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THE
FEDERAL REPORTER.

VOLUME 139.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 139.

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¹ Resigned July 26, 1905.² Appointed December 5, 1905.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

UNITED STATES v. GODILLOT & CO.

(Circuit Court of Appeals, Second Circuit. April 4, 1905.)

No. 151.

CUSTOMS DUTIES—MARKET VALUE—REMISSION OF TAXES—SPECIAL LOCAL TAXES.

The provision in section 10, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1922], that appraisers shall ascertain "the actual market value and wholesale price of merchandise * * * in the principal markets of the country whence the same has been exported," contemplates some value prevailing generally in the foreign country, and not some varying local value, and does not require that there should be included in the market value of goods imported from France certain special taxes, known as "droit de ville" and "octroi," which are remitted on exportation, but are not uniformly imposed throughout the country, nor uniform in amount.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 183.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York (131 Fed. 653), affirming the decision of the Board of General Appraisers, which overruled the action of the collector touching the assessment of customs duties on certain imported merchandise under the tariff act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1625]).

Charles D. Baker, for the United States.

Albert H. Washburn, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. There is no question as to the classification of the articles, which contain alcohol, and are imported from France, but only whether in determining the proper market value the appraiser was warranted in making certain additions to

the invoice value of the goods as declared by the importers upon the entry. The appraiser added certain revenue taxes levied on the goods in France, but which, under the French law, were remitted upon exportation. The theory of the government is that, in order to ascertain the actual market value and wholesale price in the country from which it is imported, there should be included the tax which is imposed upon the article when it is consumed there. It was held in *U. S. v. Passavant*, 169 U. S. 16, 18 Sup. Ct. 219, 42 L. Ed. 644, with regard to a German duty on cotton velvet, which is imposed on the merchandise when it is sold by the manufacturers for consumption or sale in the markets of Germany, and is collected when the finished product goes into consumption in Germany, that, "as the tax accrues when the manufacturer sells, his wholesale price includes it, and the purchaser who buys these cotton velvets in wholesale quantities in the German markets pays a price covering the tax, and that is the price for the merchandise when bought and sold in those markets." It was therefore held that it might be added, although the duty was remitted as a "bonification of tax" when the velvets were exported; the court saying:

"The laws of this country in the assessment of duties proceed upon the market value in the exporting country, and not upon that market value less such remission or amelioration as that country chooses to allow in accordance with its own views of public policy."

In the case at bar the revenue taxes imposed under the French law are (1) a general tax on alcohol consumed in France, which is the same throughout the entire country; (2) at Bordeaux (from which city came the importations in this case) a special tax for the benefit of the city of Bordeaux; (3) the "octroi" duty on alcohol sold or consumed in the city of Bordeaux. The first of these taxes is not collected in case of exportation, but is uniform throughout France, in whatever part of that country the alcohol is consumed. The importer concedes that under the *Passavant* Case, *supra*, this tax may be added to make market value. The other two taxes, "droit de ville" and "octroi," are not collected in case of importation. Moreover, whenever the alcohol is removed from the city of Bordeaux to any other part of France, the "droit de ville" and "octroi" of that city are remitted, since they are purely local taxes imposed for the benefit of the particular town or city, which has in some way obtained the right to tax articles consumed within its boundaries for its own individual benefit. If articles which have been withdrawn from Bordeaux come into the jurisdiction of some other city or town, which has itself the right to levy "octroi" or "droit de ville," they become subject thereto if they be consumed there, but if they are again removed these taxes are remitted. If they come into some part of France which has no right to impose these local taxes, and are there consumed, no tax other than the general one is imposed upon them. It appears also from the findings of the Board of General Appraisers, which are printed in *Rheinstrom v. U. S.* (C. C.) 118 Fed. 303, that these local taxes vary with the locality, the percentage of octroi in some places (as Paris) being as low as 4.76 francs for every hundred inhabitants,

and in some others as high as 13.55 (Amiens), 14.15 (Rouen), 14.98 (Bordeaux) and 15.56 (Versailles). The tax is fixed by a decision of the municipal council, subject to the sanction of the legislative chambers. As many as 1,510 towns levy octroi.

The function of the appraiser is to ascertain "the actual market value and wholesale price of the merchandise, * * * in the principal markets of the country from which the same has been imported." Act June 10, 1890, c. 407, § 10, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1922]. Some value prevailing generally in the foreign country—not some varying local value prevailing in some of its individual cities—seems to have been contemplated by the statute. We concur with the board in the conclusion that these special taxes, being purely local, and lacking uniformity throughout the foreign country from which they come, cannot be properly considered as a certain or fixed element of market value in the markets of that country, especially since it appears that there are markets in that country where neither octroi nor droit de ville is levied.

The decision of the Circuit Court is affirmed.

UNITED STATES v. R. F. DOWNING & CO.

(Circuit Court of Appeals, Second Circuit. April 4, 1905.)

No. 176.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 131 Fed. 653.

Charles D. Baker, for the United States.

W. Wickham Smith, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The question involved in this cause is the same as that decided in *U. S. v. Godillot* (opinion in which is filed herewith) 139 Fed. 1.

Decision of Circuit Court affirmed.

UNITED STATES v. B. ULMANN & CO.

SAME v. J. R. SIMON & CO.

(Circuit Court of Appeals, Second Circuit. April 4, 1905.)

Nos. 177, 230.

1. CUSTOMS DUTIES—CLASSIFICATION—FLAX DRAWNWORK—IMITATION LACE.

Held, that certain woven flax articles, in portions of which ornamental effects have been produced by drawing out certain of the threads and interjecting different, independent threads, producing openwork effects, are not "articles * * * in imitation of lace," as enumerated in paragraph 339, Tariff Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662].

2. SAME—COUNTABLE FLAX FABRICS—VARIATION IN THREAD COUNT.

In construing paragraph 346, Tariff Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1663], providing for flax fabrics and articles at rates varying according to the count of threads per square inch, *held*, that it is not necessary, in order to be brought within this provision, that goods should be homogeneous, and that certain fabrics in which various ornamental effects have been produced by withdrawing a portion of the threads and adding others are not excluded from that paragraph by reason of such treatment.

Appeals from the Circuit Court of the United States for the Southern District of New York.

These causes come here upon appeals from decisions of the Circuit Court, Southern District of New York (131 Fed. 649), reversing decisions of the Board of General Appraisers (G. A. 5,329, T. D. 24,373), which affirmed the collector of the port of New York in his assessment for duty of certain merchandise under the tariff act of 1897.

Charles Duane Baker, Asst. U. S. Atty.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for B. Ulmann & Co.

Howard T. Walden, for J. R. Simon & Co.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The importations consist of certain manufactures of flax, which were in the form of cloth squares of various sizes, known as doilies, bureau covers, table squares, and articles of a similar character, some of which were hemstitched, and contained certain ornamental effects in various portions of the squares, produced by drawing out certain of the warp or filling threads, and by the interjection of different and independent threads, producing openwork effects. The importers claimed that they were dutiable under paragraph 346 (Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1663]), which imposes rates of duty, varying according to weight and count of threads, upon "woven fabrics of flax * * * or of which [flax] is the component material of chief value." The Circuit Court so classified them. The government contends that this is error, because, by reason of the drawing out of some of the warp and filling threads, the count of threads remaining would not be uniform throughout the fabric. This contention is disposed of by the decision of the Supreme Court in *Hedden v. Robertson*, 151 U. S. 520, 14 Sup. Ct. 434, 38 L. Ed. 257, where threads had been added to make a figured pattern. The court held that it was not necessary that the cloth should be homogeneous, and that the circumstance that the number of threads to the square inch was greater where the figures were, than in the original groundwork of the fabric, was immaterial. We see no reason why the same principle should not apply when the number of threads where the figures are is less than in the original groundwork.

The collector classified the goods under paragraph 339 (30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]) which imposes duty on "laces,

lace window curtains * * * and other lace articles; handkerchiefs, napkins * * * and other articles, made wholly or in part of lace, or in imitation of lace," etc. The Board of General Appraisers found as a fact that the goods in question are ornamented by withdrawing, etc, "so as to produce lace or effects in imitation of lace." We concur with the Circuit Court in the conclusion that this finding cannot be sustained upon the record. The testimony is undisputed that they are not lace. No witness testified that the effect of the ornamentation was in imitation of lace, while, on the contrary, witnesses who said they dealt largely in laces, and were familiar with all sorts and kinds of lace, testified that the "effects" are not in imitation of any kind of lace known to them. Moreover, Congress in this very act seems to have understood that ornamentation by drawn threads was distinct from imitations of lace. As has been pointed out, paragraph 339 provides for "handkerchiefs * * * made wholly or in part * * * in imitation of lace," while paragraph 388 (Schedule L, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1670]) provides for "handkerchiefs * * * [which] have drawn threads or are embroidered in any manner."

The decision of the Circuit Court is affirmed.

INTERNATIONAL TRUST CO. v. WEEKS.

(Circuit Court of Appeals, First Circuit. May 10, 1905.)

No. 572.

1. LANDLORD AND TENANT—LEASE—COVENANTS—BREACH—ACTIONS—INSTRUCTIONS—REQUEST.

Where, in an action for breach of a covenant in a lease of property occupied by a bank, the court charged that the lessor, on the insolvency of the bank, might have terminated the entire contract, or, under a covenant in the lease, might have relet the premises at the risk of the lessee, in which case the lessee or its agent was responsible for whatever amounts the lessor should not receive from tenants to whom the premises were let from time to time, but that the lessor was bound to manifest such election within a reasonable time, and exercise reasonable care to relet, it was not error for the court to refuse a request to charge that on the insolvency of the bank the lessor was entitled to enter the premises as of its former estate, and, at its discretion, to relet at the risk of the lessee bank, in which case the bank would remain liable for the residue of the term for the rent stipulated, less such amounts as should be collected by plaintiff for the rent or use and occupation of the premises, or any part thereof.

2. SAME—NOTICE.

It was not error for the court to refuse to charge that, in order to hold the lessee bank liable for the amount of the rent for the residue of the term, it was not obligatory on plaintiff to notify the bank of its election to do so.

In Error to the Circuit Court of the United States for the District of Massachusetts.

The International Trust Company brought action against John W. Weeks, shareholders' agent of the Broadway National Bank, on a covenant in a lease of a part of a building previously occupied by the bank before insolvency.

August 11, 1898, Henry Parkman and others, predecessors in title of the plaintiff, executed a written lease of the premises to the bank for a term of 10 years from April 1, 1899, at an annual rental of \$6,000; the lease containing the following clause:

"Provided, always, and these presents are upon this condition, that if the said lessee or its successors or assigns do or shall neglect or fail to perform and observe any or either of the covenants contained in this instrument, which on its or their part are to be performed, or if the said lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of its property for the benefit of creditors, then and in either of the said cases the lessors, or those having their estate in the said premises, lawfully may, immediately or at any time thereafter, and whilst such neglect or default continues, and without further notice or demand, enter into and upon the said premises or any part thereof, in the name of the whole, and repossess the same as of their former estate, and expel the said lessee and those claiming under it, and remove its effects (forcibly, if necessary), without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant; and thereupon the lessors may, at their discretion, relet the premises at the risk of the lessee, who shall remain for the residue of said term responsible for the rent, herein reserved and shall be credited with such amounts only as shall be by the lessors actually realized."

On March 29, 1899, Henry Parkman and others sold the building to the plaintiff trust company, and on December 16, 1899, the lessee bank became insolvent, and the Comptroller of the Currency was appointed a receiver. On February 15, 1900, the Comptroller released the estate of the bank to the defendant, as the stockholders' agent, and between December 16, 1899, and February 5, 1900, plaintiff entered upon the premises, and repossessed itself of the same as of its former estate. The demised premises were occupied by the receiver, and afterwards by the stockholders' agent, from the time of the failure of the bank up to and including May 18, 1900, and full compensation therefor to the amount of the rent referred to in the lease was paid to the plaintiff. This occupancy and payment under an agreement between the parties was not to affect or prejudice their respective legal rights.

Pursuant to the direction of the Court of Appeals, the court, among other things, charged the jury that the owner of the property, having entered into possession, might then decide to terminate the contract, not merely the lease, but the mutual obligations of the parties, so far as the future was concerned, for all purposes whatsoever (in other words, it might have terminated the lease in the usual sense in which it is understood a lease is terminated), or it might, as said in the lease, relet the premises at the risk of the lessee, holding the lessor (that is, the stockholders' agent) responsible for whatever amounts they should not receive from the tenants to whom the premises were let from time to time. The plaintiff also had a right to elect which of those things it would do, but, in order to make defendant liable under such provision of the lease, plaintiff, must, within a reasonable time after entering into possession, have made its election to relet, and manifested that election by a reasonable attempt to do so. But defendant was not bound to tender plaintiff a certain trust company as a tenant, unless plaintiff had elected to let the property at the risk of the bank. Assuming that plaintiff had taken possession of the premises under such circumstances that, in accordance with the terms of the lease, it had a right to sublet at the risk of the bank or its agent, then the jury must find, in order to find for plaintiff, that it made honest and reasonable efforts to relet; that its efforts in that direction were those which a reasonable landowner, under the circumstances, would exercise. "You see that these two questions are: First, has the defendant proved by reasonable preponderance of the evidence that it elected to relet the premises, and seasonably manifested that election? And, secondly, has it used reasonable care in subletting or reletting the property? Upon either of these topics, if the plaintiff has not satisfied you by the fair preponderance of the evidence in the case, as I have explained to you, your verdict must be for the defendant; otherwise your verdict will be for the plaintiff."

Plaintiff requested the court to charge: (1) That, upon the insolvency of the lessee bank, plaintiff was entitled to enter upon the premises and to repossess the same as of its former estate, and, at its discretion, to relet the premises at the risk of the lessee bank, in which case the bank would remain liable under its covenant to that effect for the residue of the term for the amount stipulated as rent in the lease, less such amounts as shall be collected by the plaintiff for the rent or use and occupation of the premises, or any part thereof. (2) That, in order to hold the lessee bank liable for the amount of the rent for the residue of the term under such covenant, it was not obligatory upon plaintiff to notify the bank of its election so to do. (3) That, in order to hold the lessee bank liable for the amount of the rent for the residue of the term under such covenant, it was not obligatory on plaintiff to relet the premises, or to attempt to relet them.

The requests being refused, and the verdict being for defendant, plaintiff severally assigned as errors the court's refusals so to rule.

Robert M. Morse (William M. Richardson, on the brief), for plaintiff in error.

Eugene P. Carver and Edward E. Blodgett (G. Philip Wardner, on the brief), for defendant in error.

Before COLT and LOWELL, Circuit Judges, and BROWN, District Judge.

PER CURIAM. We find no substantial question presented by the record in this case which was not disposed of by our opinion passed down October 6, 1903, in *Weeks v. International Trust Company*, 125 Fed. 370, 60 C. C. A. 236. The third assignment of error raises again the question there decided. No error is shown by the first and second assignments, as the law bearing on the subject was sufficiently and correctly stated by the learned judge in his charge.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

ROGERS SAND CO. v. PITTSBURGH, FT. W. & C. RY. CO.

(Circuit Court of Appeals, Third Circuit. June 23, 1905.)

No. 15.

1. NAVIGABLE WATERS—BRIDGES—LAWFULNESS OF STRUCTURE.

A bridge across a navigable stream built under authority given by the state prior to the enactment of any federal legislation on the subject is a lawful structure.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 74.]

2. SAME—RIGHT TO REBUILD LAWFUL BRIDGE—TEMPORARY STRUCTURES.

The right to maintain a railroad bridge lawfully built across a navigable stream carries the right to rebuild the same in whole or in part when required for the safety of travel and transportation, and also the right to build such temporary structures in the stream as may be necessary to prevent the interruption of the operation of the railroad, and to maintain the same for a reasonable length of time.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 99.]

3. SAME—NECESSITY OF CONSENT OF CONGRESS.

Neither the provision of section 9 of the river and harbor act of March 3, 1899, as amended in 1900 (30 Stat. 1150 [U. S. Comp. St. 1901

p. 3540)), that "it shall not be lawful to construct or commence the construction of any bridge * * * until the consent of Congress to the building of such structures shall have been obtained," nor of section 10, prohibiting "the creation of any obstruction not affirmatively authorized by Congress," applies to the rebuilding of a bridge which was lawfully in existence when the act was passed.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

J. S. Ferguson, for appellant.

W. S. Dalzell, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a decree in admiralty dismissing the libel of the appellant, by which a recovery was sought for injuries sustained by the steamboat Margaret in consequence of her collision upon December 24, 1902, with a construction which the appellee had placed in the Allegheny river at a point between the cities of Pittsburgh and Allegheny. The contention of the appellant is that:

"The bridge in question—at least that portion of it which caused the injury—was an illegal structure and a public nuisance, because, first, inasmuch as the Allegheny river was a navigable stream, the navigable portion of which did not lie wholly within the limits of a single state, no bridge could be built across it without the authority of Congress; second, that, if this position was not tenable, the bridge was an illegal structure, because it was not built according to the plans approved by the Chief of Engineers and Secretary of War."

This contention was properly rejected by the court below. The bridge as originally built was unquestionably a lawful structure. It was authorized by the General Assembly of Pennsylvania prior to the enactment of any federal legislation upon the subject, and, "until Congress intervenes in such cases and exercises its authority, the power of the state is plenary." It was used for years without complaint from any one, so far as the record discloses; and the particular constructions which are alleged to have caused the accident, constituted a part of the work of its rebuilding about 50 feet further down the river. The right to do this work resulted from the right to maintain the bridge, and from the duty imposed by law upon every railroad company to keep its bridges at all times safe, and to adequately provide for the convenience of the public. The learned proctors for the appellant insist that their position is supported by sections 7 and 10 of the river and harbor act of 1899 (Act March 3, 1899, c. 425, 30 Stat. 1150, 1151 [U. S. Comp. St. 1901, pp. 3527, 3541]); but, in our opinion, neither the provision of section 9, "that it shall not be lawful to construct or commence the construction of any bridge, * * * until the consent of Congress to the building of such structures shall have been obtained," nor the prohibition by section 10 of "the creation of any obstruction not affirmatively authorized by Congress," is applicable to the rebuilding of a bridge which, as in this instance, was lawfully in existence when the act was passed. *Hamilton v. Vicksburg, etc., Railroad Co.*, 119 U. S. 281, 7 Sup. Ct. 206, 30 L. Ed. 393. Whether the application which

was made by the appellee to the Secretary of War for approval of its plans was or was not required by any part of this statute need not be decided. The fact is that a permit was obtained, and its conditions complied with, but with certain necessary modifications which were accepted by the War Department "as a virtual compliance with the permit already issued."

The right to reconstruct the bridge was coupled with the duty to exercise due care not to interfere unnecessarily with the navigation of the stream, but we think that the finding of the learned judge that this duty had not been violated by the appellee was correct. In *Hamilton v. Vicksburg Railroad Co.*, supra, it was held that a railroad company, in rebuilding a bridge which is a connecting link of its road, may construct a temporary structure and maintain it for a reasonable time, so that the operation of the road shall not be interrupted; and the rule thus established seems to us to be plainly applicable to the facts of this case.

After attentive consideration of the record, we concur in the views expressed by the learned judge below, and for the reasons we have indicated, but which are more fully presented in his opinion, the judgment of the District Court is affirmed.

NOTE.—The following is the opinion of Buffington, District Judge, in the District Court:

BUFFINGTON, District Judge. This is a libel in admiralty filed by the Rogers Sand Company against the Pittsburgh, Ft. Wayne & Chicago Railway Company to recover damages sustained by the libellant by the sinking of its steamboat *Margaret* on December 24, 1902. At about eleven o'clock on the morning of that day the vessel, while passing under the Ft. Wayne Bridge spanning the Allegheny river between Pittsburgh and Allegheny City, struck some piling, and sank one of the barges it was towing. It was alleged that as a result of this accident the *Margaret*, before she could right herself, was carried by the heavy current against the pier of the bridge immediately below the one in question and broken in two. After an examination of the law and facts, we have reached the following conclusions:

The state of Pennsylvania, by its act of 21st March, 1789, L. B. P. 245, and the state of New York by chapter 78 of the act of March 31, 1807, recognized the Allegheny river as a navigable stream. Across the same, as stated in libellant's brief, "the railroad bridge was built many years ago under authority of the Legislature of the state of Pennsylvania." This legislative sanction and the building of the bridge antedated the passage of the river and harbor bill cited below, and, in the absence of federal legislation on the subject, the consent of Congress to such bridge is to be implied. A right to build and maintain a bridge necessarily implies a right to reconstruct. *Central Trust Company v. Wabash, etc.* (C. C.) 32 Fed 568. Consequently, when the railroad company had to reconstruct the bridge, no empowering act of Congress was necessary, for, having already the implied "consent of Congress to the building of such structure," upon the rebuilding thereof the approvals of the chief of engineers and the Secretary of War alone were sufficient, as provided by section 9 of the river and harbor act of March 3, 1899, as amended. After submission of plans by the railroad to the War Department, a permit was issued September 1, 1900, which, inter alia, provided: "(1) That said Railroad Company shall, in the reconstruction of the bridge, remove one of the piers in the channel on the south side of the river so as to give a clear span of three hundred and twenty feet (320 feet). * * * (3) That the engineer officer of the United States army, in charge of the locality in which the bridge is to be rebuilt, may supervise its reconstruction, in order that said plans as herein modified, shall be complied with." As the work proceeded, certain changes, which are noted in the correspondence below, were

deemed desirable, and were made without express permission of the Washington officials, though the proofs show the work was under the supervision of the local federal engineer. These changes, so far as contact with the river was concerned, only reduced the length of the piers. On January 8, 1902, the railroad company wrote the Secretary of War as follows: "The original plans provided for a new double track structure above the old double track bridge, making a width of four tracks in all. These plans were approved by the department with the modification requiring the length of the channel span to be three hundred and twenty feet. In preparing the plans to comply with the requirements of the permit, the old piers, which it had been the original intention to use, were found to be too weak to bear a structure of the very great additional weight consequent upon the increased length of the span, and new piers on each side of the channel were made necessary. The location of these piers it was found necessary to change to accommodate the addition in length to three hundred and twenty feet and their angle to the bridge had to be changed to make them parallel with the current; this latter being required in the permit when the new structure was put up. These two changes made necessary the building of not only one span to take the place of the two short ones over the channel, but of the rebuilding, as well, of two spans; one north and one south of the channel. The increased size of the members of the lengthened channel span made it impossible to space the tracks the same distance as the spacing in the old bridge, and, therefore, the tracks could not be passed from the new to the old spans, and it became necessary to rebuild the whole bridge." And to this reply was made February 5, 1902, as follows: "Replying to your letter of the 8th ultimo in relation to the bridge of the Pittsburgh, Fort Wayne and Chicago over the Allegheny river, I have the honor to advise you that after thorough consideration of the entire subject, the Department concurs with the chief of engineers in his recommendations that it is not deemed expedient to issue a new permit, but that the War Department will accept the construction proposed as a virtual compliance with the permit already issued and interpose no objections to the work." In carrying out the work, while the angle of the new piers was changed so as to conform to the course of the current, and their length to accommodate the tracks used, yet as finally completed the alignment of the new bridge was the same as the old, and the changes were accepted by the War Department as a compliance with its permit. This was all prior to the accident here involved.

The railroad company being duly vested, as we have seen, with the right to rebuild, the next inquiry is whether it properly and skillfully did the work, for the measure of its duty in that regard was to reconstruct the bridge in a careful and skillful manner, having due regard to the rights of the public and to those affected by the exercise of the franchise. *Hodge v. Lehigh Valley (C. C.)* 39 Fed. 449. In reconstructing the bridge the railroad maintained track communications across the stream. We are of opinion they were justified in doing so. The bridge was a connecting link in a great artery of trade and travel, and, if the maintenance of that connection necessitated a temporary interference with the right of navigation, it would seem that such temporary interference was lawful. Indeed, in the case of *Hamilton v. Vicksburg*, 119 U. S. 280, 7 Sup. Ct. 206, 30 L. Ed. 393, where the rebuilding of a bridge completely blocked navigation, it was held lawful, and that complete temporary stoppage of navigation subjected the company rebuilding to no legal liability therefor. This principle is in accord with that governing the use of highways generally, for, while they are designed for travel, and must therefore be kept clear of obstructions, the law justifies the latter from the necessity of the case, when they are of a temporary character. 15 Ency. of Law, p. 491. In carrying out the present work the railroad drove piling below the old piers, and extending forty feet down the stream, to which the old bridge was moved. It was kept in this position while the new piers and superstructure were being built. Furthermore, in order to strengthen the old bridge in its new alignment, a group of piling was driven in the channel span. It was against this piling the Margaret struck on the rebound after striking the piling at one of the old piers.

It is contended by the libellant that there was no permit by the Secretary

of War and chief of engineers to place a bridge on this particular alignment, forty feet down stream, and that it was therefore an unauthorized structure, and the piling to support it was an illegal obstruction. We cannot accede to this view. We think the right to rebuild necessarily carried with it the right to use means which skillful engineering practice and expert bridge construction deemed safe and necessary to replace the bridge. Now, the proofs are that the rebuilding could be done in two ways: One was to maintain the old bridge, and construct the new simultaneously on the old alignment; the other was to follow the practice here employed. In view, however, of the fact that the old piers had to be replaced by new ones, the first method would have necessitated placing falsework substantially across the river, and wholly stopped navigation between spans. The proofs are express, and indeed there is no proof by engineers to the contrary, that the moving of the old bridge to the new alignment was good engineering practice, and was the most desirable and practical method for this work. Moreover, in the case already referred to (*Hamilton v. Vicksburg*, supra), such side alignment was followed, and seems to have been approved as a proper practice, although the piling there driven on the side alignment was continuous and completely blocked the passage of boats. Moreover, the permit in the case in hand left the supervision of reconstruction to the local federal engineer, and it is proved he was consulted in reference to the work as it progressed. Whether the old bridge should be moved to the new alignment during the work was, in our opinion, an engineering detail which under the permit fell under the supervision of that officer. Its temporary location on a side alignment was not one to which, by the terms of the act, resort must be had to the War Department for approval. That act contemplated that the location and plan of the permanent structure should be determined by the Secretary of War and the chief engineer, but did not contemplate that location of temporary structures to aid in reconstruction and maintaining communication should be exclusively the subject of such permit, and, unless so warranted, illegal. Such holding is not within the language of the act, and the action of the War Department officials in leaving supervision to the local federal officer is in accord with this view. Holding as we do that the bridge on the side alignment was lawful, and finding as we do that the placing of this supporting piling in the channel was proper engineering practice, and the piling was not kept in place an unreasonable length of time, it is clear that the injury that resulted to the libelant's boat therefrom cannot be charged to the respondent. The obstruction was lawfully placed in the channel to support the bridge. The libelant, with full knowledge of its existence, saw fit to attempt to pass it at a high stage of water. Unfortunate as were the consequences, they cannot be visited upon the respondent.

A decree will therefore be entered dismissing the libel.

WESSEL et al. v. UNITED MATTRESS MACH. CO.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1905.)

No. 1,397.

1. PATENTS—INFRINGEMENT—IMPROVERS.

It is the well-settled rule that, where two inventors improve an old machine, each is entitled to the benefit of his own improvement, so long as it differs from that of the other, and does not include his.

2. SAME—MATTRESS—STUFFING MACHINE.

The Stephenson patent, No. 399,093, for improvements in mattress-stuffing machines, with respect to the means employed for adjusting vertically the cover of the press box and spout, in adapting them to different sizes of mattresses, must be limited to the means specified, or its equivalent, and cannot be broadly construed to cover any means for accomplishing the same result. As so construed, held not infringed.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

A. L. Jackson, for appellants.

Russell Wiles, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and WANNY, District Judge.

SEVERENS, Circuit Judge. This is a suit in equity brought by the appellee, wherein it complains of the infringement by appellants of rights secured by letters patent Nos. 376,399 and 399,093, granted to Stephenson—the former bearing date January 10, 1888, and the latter, March 5, 1889—which the appellee claims to own. Both patents relate to mattress-stuffing machines. Patent No. 376,399 was held void by the court below, and that decision is not brought up by this appeal. Claims 1, 3, and 7 of No. 399,093 were held valid, and an interlocutory decree was entered in favor of the appellee for profits and damages, and for an injunction. The defendants below have appealed from that decree. Wessel alone was made defendant by the bill as filed. Woolery was let in to be joined as defendant upon his intervening petition, showing that he sold to Wessel the machine which the bill alleges to be an infringement of the appellee's patents. The defendants answered severally, but their answers are substantially alike; and they deny that Stephenson was the original inventor of the devices which are the subjects of the patents, or that they were patentable inventions; allege anticipation, and that the devices had been in prior use more than two years before application for the patents; and deny infringement.

The mattress-stuffing machine to which the patent No. 399,093 relates consists of a bed or floor laid on cross-timbers supported by posts, vertical sides to the bed, and a cover or lid; all being arranged like a box, to conform in a general way, in length, width, and depth, to the shape of the mattress to be stuffed. The lid is thrown up on a hinge at the rear end, while the stuffing is put into the box, and then brought down so as to be nearly parallel with the floor and secured. The open end of the sack or mattress cover is brought over and secured upon a spout arranged upon the forward end of the box. Thereupon a "follower," having a face about the size of the cross-section of the box, is advanced from the rear, and presses the stuffing into the sack. The mattress is filled in this way. The foregoing is an outline of the construction and operation of such machines. For greater perspicuity, we shall refer only to such details as are involved in the present controversy.

Two former patents are shown by the record exhibiting the characteristics of these machines—one, No. 125,233, described as an "improvement in mattress stuffers," granted to Watson April 2, 1872; the other, No. 376,399, also described as an "improvement," granted to Stephenson January 10, 1888. In his application for the patent now to be considered, he states that his invention is of improvements in the mechanism of machines "of the type shown in

letters patent granted to me the 10th day of January, 1888," which is the patent next before mentioned. He says:

"It is the purpose of my present invention to provide simple means whereby the dimensions of the packing-box, as well as the spout, may be readily increased or diminished, either vertically or laterally, to enable the operator to stuff mattresses of varying sizes, whereby the dimensions of the packing-box and spout shall be at all times varied in the same relative proportions."

He also states an incidental purpose, which is not material now. After describing the devices he proposes for such purpose, he states his claims, 1, 3, and 7 of which are as follows:

"(1) In a mattress-stuffing machine, the combination of a laterally expandible press-box, a vertically adjustable and laterally expandible box-cover, a spout connected with the discharge-mouth of the press-box, composed of two upper sections movable vertically and laterally adjustable, and two lower sections laterally adjustable and loosely connected with the upper sections, substantially as described."

"(3) In a mattress-stuffing machine, the combination, with a press-box expandible laterally, and a vertically adjustable box-cover, of a four-part spout located at the end of said press-box, and composed of two upper and two lower sections lapped upon each other, the two upper sections being movable vertically, and one upper and one lower section being movable laterally in unison with the laterally adjustable side of the press-box, and means for so adjusting the spout-sections, substantially as described."

"(7) In a mattress-stuffing machine, the combination, with a press-box having one side wall adjustable laterally, and a vertically movable box cover comprising removable and replaceable sections to vary its width, of a spout located at the discharge-mouth of the press-box and comprising two upper sections movable vertically and laterally adjustable, and two lower sections laterally adjustable and loosely connected with the upper sections, substantially as described."

From what has now been stated, it appears that he intended to provide means for expanding the stuffing box, and correspondingly the spout, both laterally and vertically, or to diminish them, to suit the different widths and thicknesses of the mattresses proposed to be stuffed. To provide for lateral extension of the box, he made one side movable, so that it could be set off or brought nearer the stationary side. The cover was made of slats running lengthwise of the cover, and severally removable. And he divided the spout into four parts, so that they would overlap in the bottom, top, and each side. Some of these parts were stationary, the others sliding on them. Thus the spout could be arranged to conform to the mouth of the box as the latter should be arranged. Then, to provide means for vertical adjustment, he fastened, by brackets on the posts extending upwards from the bed, mitre gears actuated by a shaft and crank with handle—the lower gear having a horizontal position—and centrally secured in it a screw descending into corresponding meshes in the rear bar of the frame of the lid. By operating the miter gears, the screw turns into or out of its meshes in the bar of the lid, and thus raises or lets down the latter as may be desired. This apparatus is duplicated at the other end of the bar. We presume the friction in the apparatus is sufficient to hold the bar of the lid stationary when the gears cease to be operated. Doubtless this is an old device in mechanics for effecting changes in the distance at which one object is brought and held in relation

to another. An instance of such a use is shown in a recent case which we had before us (*Rich v. Baldwin* [C. C. A.] 133 Fed. 920), where its utility in a combination for effecting a rapid and variable relation of parts was clearly demonstrated. It is, however, a matter of doubt whether in the present instance it has any peculiar adaptation to the purpose which relieves its appropriation from that process of selection which a common mechanic would make in exercising the ordinary skill of his art to accomplish such an object, if it seemed desirable. The court below, however, in its opinion, after canvassing the other features of the patent, and without finding other ground for supporting it, said:

"The vertically adjustable box-cover and spout of the complainant's second patent are not found in the Watson device, but are found and employed in the device of the defendants."

The implication is that the employment by Stephenson of the means for making the cover of the box and spout vertically adjustable in his combinations was regarded as a patentable invention. The court found, as it could hardly help doing, that the means employed by Watson, and by Stephenson in his former patent, for making the box and spout laterally adjustable, were substantially the same in their mode of construction as Stephenson had employed in his later patent. The bottom and lid of the box in Watson's patent were made adjustable laterally by dividing them lengthwise and overlapping the parts, thus permitting the parts to slide upon each other. And he made his spout adjustable laterally in the same way. In Stephenson's first patent he made his spout adjustable laterally in the same way, but made his lid in slats running lengthwise, and held in place near the fore end by a bar running across them. These slats were pivoted at the rear on a rod extending through them. By removing these slats, or inserting others, the cover was narrowed or widened, as might be desired, to suit the width of the mattress. In his later patent he uses the same cover as in his former patent, and uses the same device for making his spout vertically adjustable as Watson and himself had done for making the spout adjustable laterally; that is, he made the parts of the sides to slide upon each other, up and down, precisely as he had before made the top and bottom for the purpose of lateral expansion or contraction. It is manifest that a mechanic intent on finding means for vertical adjustment would see in the machine before him a ready way of effecting it.

For this reason, as we must think, the counsel for the appellee prudently laid stress on the novelty of the means employed in the later patent for effecting the vertical adjustment of the cover already explained, by which we mean lifting and lowering the bar in the rear of the cover to which it was hinged. Granting for the present purpose that the patent sued on may be supported upon the ground of novelty in respect to the particular means employed for vertically adjusting the cover, and granting further that the other parts of the appellants' machine are equivalents of the other elements in the combinations claimed in the later Stephenson pat-

ent, which latter concession could not, we think, justly be made, it is impossible to hold that the machine of the appellants contains the equivalent of the new element of Stephenson's combination. Counsel for the appellee, to meet the requirements of the situation, insists that the invention of Stephenson is wholly new, and includes all means for effecting the vertical adjustment of the cover of box and spout. But this proposition is quite inadmissible. It is not given to any person to preclude all others from providing means for accomplishing any beneficial result. If the means are different—are not substantially the same—there is no infringement; there is not the use of the means contrived by the inventor; his idea is not appropriated, except the idea of the result to be accomplished, and in that there is no quality of invention. These claims, if unrestricted, are in effect, so far as this element is concerned, statements of the functions performed by the means described in the specifications.

The appellants' structure reaches a similar general result, but not by the same mechanical means. The means employed are these: The horizontal support on which the cover is hinged is made vertically adjustable by putting a vertical bracket at the end of the horizontal support, which bracket is parallel and in close contact with the side of a post rising upward from the bottom of the box which it supports. A vertical slot is made in the shank of the bracket, and a hole bored through the post. A bolt is put through the slot in the shank of the bracket and the post. By turning a nut on the end of the bolt, the post and the flange are drawn tightly together, and the position of the support of the cover is secured. The slot affords the opportunity for the vertical adjustment, and the bolt holds the parts in place. The lid and its support must be lifted, and the parts and holes brought in coaptation. Apparently this is not so good a way as Stephenson's. In Stephenson's the adjustable bar is raised or lowered by simply turning the crank. In the appellants' the bar is adjusted by hand, and held in position while it is bolted in place. There are other simple ways of doing the same thing, as by boring a series of holes in the post, and another in the flange, or vice versa, or by supporting the frame of the cover by a belt or rope running over a pulley, and wound on a shaft or drum turned by a crank and handle with a ratchet wheel and pawl, such as is shown in the case of *Rich v. Baldwin* (C. C. A.) 133 Fed. 920, above referred to. We may say, by the way, that much of what was said in that case is strictly applicable here. It would be a singular result if all other methods for adjusting the cover vertically were suppressed by the invention of the method of the patent in suit. It is a well-settled rule, often repeated in varying forms of expression, that where two inventors improve an old machine, each is entitled to the benefit of his own improvement, so long as it differs from that of the other, and does not include his. In the present case the improvements differ completely. Only in the result accomplished is there any similarity. The means employed by the appellants are not equivalents of those proposed by the appellee to effect the vertical adjustment of the cover, which, as a congeries,

constitutes the novel feature of the patent in suit. And as this element in the combination is essentially different in the machines of the respective parties, the combinations are not the same, and there is no infringement.

Our conclusions, shortly stated, are that it is not necessary to determine whether these claims in the patent in suit are valid or not; that, without limitation by the specification, they are too broad; that they may be thus limited and construed to intend the specific devices described, and when so limited they are not infringed by the appellants. We give no opinion upon the question whether there was such prior public use of the supposed invention as would invalidate the patent. Upon the ground before stated, we think the bill should be dismissed.

Counsel for the appellee urge that the assignment of errors does not present this ground of objection to the decree. The first assignment is that "the court erred in not dismissing the bill of complaint," and it is said it is too general. But if this be so, we think the error is plain, and that we may, in the exercise of our discretion, and ought to, notice it. This defense was distinctly raised by the answer, the issue is vital to the merits of the controversy, and the case cannot be rightly decided without adverting to it. See rule 11 of the rules of this court (31 C. C. A. cxlvii, 90 Fed. cxlvii), and *Andrews v. National Foundry & Pipeworks*, 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153; *National Accident Society v. Spiro*, 78 Fed. 774, 24 C. C. A. 334, where Judge Lurton, in delivering the opinion of this court, said at page 779 of 78 Fed., page 339 of 24 C. C. A.:

"If this assignment had been in compliance with the plain rule of the court, we should feel constrained to reverse the judgment and remand for a new trial. So, if the error had any sound merit in it, and we could be satisfied from the whole record that a probable injustice had been done, we should be disposed, under the discretion reserved in the rule, to notice a plain and meritorious error, though not assigned."

The decree of the Circuit Court will be reversed, and the bill dismissed, with costs in both courts.

DUFF v. GILLILAND et al.

(Circuit Court of Appeals, Third Circuit. June 23, 1905.)

No. 25.

1. PATENTS—CONTRACT OF ASSIGNMENT—GROUNDS FOR CANCELLATION.

A contract assigned the legal title to a patent for a gas producer to a trustee for the benefit of a company, in consideration of the payment by the assignee of one-third of all royalties received from licensees. The company subsequently engaged in the building of the producers itself, granting licenses to those to whom they were sold. The contract contained no provision respecting such building operations, which were not at that time contemplated, but the patentee was fully advised of the company's action, and from time to time expressed his approval thereof. *Held* that, while such operations were outside of the contract, he was estopped by his acquiescence from claiming that they were in violation of

it and entitled him to its cancellation, or from claiming a share of the profits of such business.

2. SAME—TRUST—EQUITY JURISDICTION.

Such contract required the company to keep accounts showing the licenses granted, which should be subject to the inspection of the patentee, and to account at stated periods for his share of the license fees received. *Held*, that the conveyance of the legal title to the patent on such conditions created a trust in both the trustee and the company in favor of the patentee in respect to one-third of the license fees collected, which a court of equity had jurisdiction to enforce, and that a bill alleging fraud in failing to account for fees, and in failing to charge the same to the company on sales made to customers which included licenses, and that the company refused to allow an inspection of its books, stated a cause of action for equitable relief.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 135 Fed. 581.

Robert T. Totten and James I. Kay, for appellant.

George B. Gordon, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the Circuit Court of the United States for the Western District of Pennsylvania. The case in the court below was made by a bill in equity, brought by Edward J. Duff against Alexander Gilliland, trustee, and against him and the other defendants Bradley, his partners doing business under the firm name of Duff Patents Company.

The complainant, who is a citizen and resident of England, was the inventor and patentee of a gas producer, patented in England and afterwards in the United States. In 1893 he had a brother, Alfred B. Duff, residing in Allegheny City, and he was related to James A. Bradley and William H. Bradley, who also resided there. The complainant had made an invention for a certain type of boiler grate, which was covered by letters patent of the United States issued in 1890. In order to introduce that patent into the United States, he made a contract, March 1, 1893, with the Bradleys, authorizing them to sell the whole of the patent, or grant licenses under the same. Nothing resulted from this agreement. The complainant, however, came to America during the summer of 1893, and while here disclosed to his brother and to the Bradleys, the fact that he had made an invention with reference to gas producers. There was an informal understanding that the complainant's brother, Alfred B. Duff, and the three Bradleys, James A., William H. and William C., should take charge of the American rights for the plaintiff's invention, which had not yet been patented in the United States. Accordingly, the plaintiff's brother and the three Bradleys, for that purpose, organized a partnership, called the Duff Patents Company, which was to handle the Duff Gas Producer in this country. The complainant, E. J. Duff, returned to England in the summer of 1893, and did not again come to America until 1899. The Duff Patents Company endeavored to introduce the Duff gas producer, the complainant having sent them from England, from time

to time, sketches and drawings of his ideas, and explanations as to how the producers should be built. The company tried to get some producers built in America, so as to demonstrate the utility of the invention. The American patent was issued on the 27th day of March, 1894. During that spring, the Duff Patents Company arranged with one Swindell, who was a builder of furnaces, to take a license on a royalty basis for the construction of the Duff gas producer. They also agreed to license some other people, and were desirous of making a written agreement with Duff. As the complainant had returned to England, matters between the patents company and him were necessarily arranged by correspondence.

In the spring of 1894, A. B. Duff went to England, and while there made an arrangement with his brother, on behalf of himself and the Bradleys, that an agreement should be executed between them, which would authorize the Duff Patents Company to manage the business of disposing of licenses for the gas producer, for the benefit of complainant as well as of themselves. A. B. Duff took over with him for execution a form of agreement, written out by one of the Bradleys, the original draft of which appears to have been copied from the boiler grate agreement. It was a license arrangement, and stated that "the second party are prepared to undertake the sale of rights of manufacture," and "shall have full and sole right and authority to effect such sales." It provided that the Duff Patents Company "shall retain two-thirds of the gross payments received by them for such sales or licenses, out of which moiety (sic) of proceeds they shall defray all costs incurred by them in working the business; the other moiety (sic) of the proceeds shall be remitted to the first party in full." Pending the execution of this agreement by E. J. Duff, who seems to have been reluctant to make any written agreement, the Duff Patents Company, on June 14, 1894, wrote to him, pressing him to send on an agreement. A. B. Duff wrote to his partners from England, on the 29th of June, 1894, and, after saying that his brother had forwarded him their letter of the 14th, says:

"In regard to the agreement, I hope to send it along in a few days. It has not reached me yet, but Ned says he will send it in a few days, but is very busy. I have been after it ever since I came here, but since you have written on the matter, I guess he will get it done, though he says he does not see why it is necessary."

This agreement was finally sent over by complainant. It was submitted by the Duff Patents Company to the above-mentioned Swindell, who desired to become a builder of these gas producers, but he doubted their authority under it to grant the licenses. Upon submission to Swindell's counsel these doubts were confirmed. The Duff Patents Company then had their attorneys prepare an assignment and agreement, of the form here in suit, making W. H. Bradley trustee. They sent it to complainant, explaining the reason in a letter dated July 22, 1894, of which the following is an abstract:

"When your agreement came to hand, we called upon Swindell & Bro. to make our contract, and they referred us to their patent attorney, who exam-

ined our license and said he would not advise his clients to enter into an agreement with us, from the fact that we simply had a power of an attorney and not a transfer of your patent to us, and we got advice from our patent attorney, and he drew up proper papers, which we enclose for your signature, and have it witnessed. Both attorneys said when any individual license was to be granted, would require all signatures. According to your agreement, hence, W. H. B., as trustee. You need not go before American consul. Simply witness and forward to us as soon as possible. Our prospects are exceedingly bright. W. H. B. went up to Belleverson Glassworks and is certain of landing ten alterations and two new ones, and several others on the string. Don't fail to return these papers at once. Date paper when signed. *This agreement does not take away any of your rights, simply facilitates our business.* We intend to push along pending these papers."

The complainant did not assent to W. H. Bradley being named trustee in said agreement, but substituted his brother, A. B. Duff, as trustee, and then signed it as of August 6, 1894. This agreement contains (1) a formal and absolute assignment of complainant's entire right, title and interest in and to the letters patent No. 517,271, for his gas producer, to his brother, Alfred B. Duff, party of the second part, "in trust and for the use of James Anderson Bradley, William Henry Bradley, Alfred Barker Duff and William Chapman Bradley, their legal representatives and assigns, all of Allegheny aforesaid, partners doing business under the firm name of the Duff Patents Company, to the full end of the term for which said letters patent are granted." Then follows a declaration of certain conditions and covenants, in consideration of which, and for the performance of which, the foregoing grant was made. These covenants, duties and reservations are all for the benefit of the party of the first part, complainant, and are set out with fullness and particularity in five paragraphs. They are briefly:

First. That party of the second part shall not sell or transfer the right, title and interest of said letters patent, or any part thereof, without the written consent of the party of the second part, excepting the power given to the said party of the second part to grant licenses for single states or territories, at his discretion;

Second. That the said party of the second part shall pay to the said party of the first part one-third of the gross amounts received by said party of the second part for and under each of said licenses;

Third. That the said party of the second part "shall keep proper books of accounts, in which shall be clearly recorded all their transactions under this agreement and in regard to the grant of licenses under said letters patent, which accounts shall be audited every six months, and a copy of certified balance sheets, together with full statements of all licenses and sales effected, shall immediately afterward be sent to said party of the first part";

Fourth. That said party of the first part shall have the right, either personally or by his attorney, to make examinations of all books, accounts and documents relating to the business transactions of the said party of the second part, his legal representatives and assigns, relating to the sale of rights and licenses under said letters patent;

Fifth. "That in case the amount paid by the said party of the second part, his legal representatives and assigns, to the said party

of the first part, under this agreement, shall not, at the end of two years from the date hereof, amount to the sum of at least 350 pounds sterling, or should the said party of the second part, his legal representatives or assigns, fail to comply with the conditions and agreements herein contained, or any of them, then the said party of the first part, his legal representatives and assigns shall have the right to recover all the right, title and interest in said letters patent, and the same shall revert to him, his legal representatives and assigns, upon notice in writing to that effect being served upon said party of the second part, his legal representatives and assigns."

Under this agreement, and according to its terms, the Duff Patents Company conducted the business, for more than a year, devoting itself to the sale of licenses to manufacturers and users, and to widening and increasing the use of the patented invention. They then commenced themselves manufacturing the gas producers, for the reason, as they allege, that their customers preferred to buy producers already manufactured, with the license cost included in the price of the producer. The business was so conducted until 1899, when A. B. Duff, owing to ill health, retired from the business, and assigned his interest to the defendant, Gilliland, who, with complainant's consent, became trustee under the agreement.

During the period up to 1899, and afterwards, there was voluminous correspondence between the complainant in England and the Duff Patents Company. In this correspondence, are letters in which complainant objects to the patents company engaging in the manufacturing business, charging that by so doing they decreased the sale of licenses, and restricted the general use of the patented invention. The improvement in the general business of the country, however, had conduced to the prosperity of the patents company, as is evidenced by letters from the complainant, congratulating the company on the returns made to him and the increasing success of their undertaking. After 1900, however, dissatisfaction was evinced by complainant, and disagreement between the parties finally culminated in complainant coming to this country in 1903. Claim was made by him that he was entitled, as his proportionate share, to one-third of the profits of the manufacturing business carried on by the company; that the agreement between them did not contemplate or authorize the patents company entering into the manufacturing of the gas producers, and that engaging in such business made it to the interest of the patents company, his trustee, to curtail the sale of licenses and to confine the use of the patent to the business transacted by said company; that such a course tended to increase the profits of the company at the expense of the complainant, and that as these profits were made outside of the scope of the agreement, and in violation of the true meaning and purpose thereof, these profits, or a due proportion of them, should be accounted for to the complainant. A bill was filed upon this theory, in which it was alleged, in addition, that the defendants had refused to allow the complainant an inspection of their books and accounts, showing all their transactions in relation to the licenses of his patent, and prayed (1) that an account might be taken, and

the defendants decreed to pay to complainant one-third of all the profits and benefits of the entire revenue made by defendants in the granting of licenses and the manufacture and sale of the patented gas producers; (2) that Gilliland, one of the defendants, as trustee of the legal title, be ordered to reassign unto complainant the entire right, title and interest in and to said letters patent, and that said agreement may be canceled and declared null and void.

In the testimony, there was evidence tending to show that license fees had been collected and not accounted for in full to complainant, and that the licenses for gas producers manufactured and sold by the patents company were charged to it at a less rate than those charged to outside parties, and that this practice, which resulted in the loss to complainant of a large sum, to wit, of \$8,000 or thereabouts, had been concealed from the complainant, or at least that no knowledge of the same had come to him until the taking of the testimony. Leave to file an amendment to the bill, setting forth these alleged fraudulent practices, was thereupon asked for and allowed, and the trial proceeded upon the original bill so amended, and the answers thereto.

Although the contention of complainant, that the business of manufacturing gas producers, as engaged in by the patents company, was outside the scope of its agreement with the plaintiff, and unauthorized thereby, and that there was, on that account, an equity in the plaintiff to have an accounting of the profits arising from such business, and a decree for the payment of a due and proportionate share thereof, is not without merit, we incline to agree with the court below that the correspondence between complainant and the patents company shows a sufficient acquiescence on the part of the complainant, in this mode of conducting business under the agreement, to estop him from now objecting thereto.

The bill, as amended, distinctly, and with the requisite specification, charges fraud. Sufficient evidence has been adduced, as to suppression of facts in regard to the amount of license fees collected and not accounted for, and undercharges in license fees due for producers made by the defendants, accompanied by a refusal to make full disclosure of the books and accounts of the said company, to clothe the complainant with a right to pursue defendants for redress in some form of action. Indeed defendants do not deny that this constitutes sufficient ground for a suit for damages at law. They deny, however, that any ground for equitable relief is furnished thereby. In this, we cannot agree.

Apart from the question of fraud, as a ground of equitable jurisdiction, the difficulty is in the view taken by the defendant and sustained by the court below, that the relation existing between the complainant and the Duff Patents Company was simply and solely the legal relation arising from the transfer, absolute in its terms, of complainant's patented right to A. B. Duff, ignoring the trust which we think attached to the legal title. Of course there was an absolute conveyance and transfer of all the right, title and interest of the complainant, in and to the patent in question. Nothing less than this would have served the purpose of a trust, however ex-

pressly created. That the whole legal title to a particular property should be in one person, with a special confidence reposed in him to apply the property faithfully and according to such confidence, for the benefit of another, amounts to the definition of a trust. The agreement of August 6, 1894, in terms constituted A. B. Duff trustee for the members of the Duff Patents Company, including himself. It is argued by defendants' counsel, that this is the only trust created by that instrument. It will be observed, however, that it is a passive and naked trust, and the clear purpose and intent gathered from the instrument itself, is that the Duff Patents Company, as well as A. B. Duff, the nominal trustee, were to administer the business in connection with the patent assigned, and consequently were affected by the trust and confidence expressed in the later paragraphs of the writing, to which we have already referred. The express trust thus created would, under the strictest construction, constitute the defendant company, as well as Gilliland, the successor of A. B. Duff, trustees at least for the one-third of the license fees collected by them, or which they were in duty bound to collect. But the scope of a trust as to property whose title has been absolutely conveyed, may be defined by writings and correspondence between the parties with reference to the subject-matter of the trust. Writings of this character are found in the correspondence set out in the record; and we especially note the letter of July 22, 1894, written by the Duff Patents Company to the complainant, with reference to this very agreement. It seems to us to throw a flood of light upon the real purpose of the conveyance of the title to the patent, and show that it was not intended to enlarge the rights of the defendants, or diminish those of the complainant as they existed under the agreement first drawn and submitted to the counsel of Swindell & Bro., as referred to in said letter.

The administration of such a trust is, of course, a primary head of equity jurisdiction, and an accounting an ordinary mode of equitable procedure. We agree with the court below in thinking, that the cancellation of the agreement and the reconveyance of the patent, as prayed for, should not in this case be granted, but we do think there should be an accounting for the licenses that have been granted by the defendants, and the fees collected therefor, including those collected from infringers, with or without suit, and those charged by the defendants against themselves for gas producers manufactured under the patent by the defendants. Equity and good conscience clearly require that these defendants, as trustees of these license fees, should be charged with the highest rate ever collected from outsiders for similar articles.

The decree of the Circuit Court is reversed, and the case will be remanded for further proceedings in accordance with the views expressed in our opinion.

SLOAN FILTER CO. v. PORTLAND GOLD MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. June 22, 1905.)

No. 2,008.

1. PATENTS--PATENTABLE INVENTION--EMPLOYMENT OF MECHANICAL SKILL.

The result of the application of the common skill and experience of a mechanic, which comes from the habitual and intelligent practice of his calling, to the correction of some slight defect in a machine or combination, or to a new arrangement or grouping of its parts, tending to make it more effective for the accomplishment of the object for which it was designed, not involving a substantial discovery, nor constituting an addition to our knowledge of the art, is not within the protection of the patent laws.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Patents, § 17.]

2. SAME--IMPROVEMENTS NOT PATENTABLE.

The mere use of known equivalents for some of the elements of prior structures, the substitution for one material of another known to possess the same qualities, though not in the same degree, and the mere carrying forward or more extended application of the original idea, involving a change only in form, proportions, or degree, and resulting in the doing of the same work in the same way and by substantially the same means, are not patentable, even though better results are secured; and this is the case, although what preceded rests alone in public knowledge, and not upon patent.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Patents, § 23.]

3. SAME--EQUIVALENT PARTS--COMBINATION PATENT.

The doctrine of equivalents applies to patents for a combination, although the measure of its effect in the particular case depends upon the position of the patent in the art to which it relates.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Patents, § 28.]

4. SAME--INVENTION--BARREL FILTER.

The Sloan patent, No. 587,874, for a barrel filter for use in the filtration of precious metal solutions, as in the chlorination process, is void for lack of patentable invention; the elements of the combination being old, and the device of the patent differing from those of the prior art only in the substitution of equivalent parts or materials, or in improvements requiring only the exercise of mechanical skill.

Appeal from the Circuit Court of the United States for the District of Colorado.

This is an appeal from a decree dismissing the bill of complaint in a suit to restrain the infringement of a patent. The appellant, the Sloan Filter Company, sued as the successor in title to Edward D. Sloan, patentee in letters patent No. 587,874, issued August 10, 1897, for improvements in barrel filters for use in the filtration of precious metal solutions, as in the chlorination process.

The claims of the patent are:

"(1) In a barrel filter, the combination with a suitable barrel or cylinder, of a flat perforated floor, a sheeted filtering medium flatly laid thereon, a wooden framing for said floor, composed of lateral and longitudinal parts spaced and united by appropriate mortising, a grating overlying the filtering medium, a series of lateral tie bars on said grating, abutments at the sides of the interior of the barrel overlying the ends of the tie bars, and wedges which are tightly interposed between said abutments and tie bars, and firmly lock all of the parts of the filter and its framing in position with relation to each other and to the barrel, substantially as described.

"(2) In combination with a suitable barrel or cylinder, a flat perforated lead floor, a framing beneath said floor affording a firm support, as well as suitable space below for the passage of filtered liquid, a suitable sheeted filtering medium flatly laid on said floor and beyond its sides and ends, and a grating

adapted to be firmly clamped for confining the filtering medium upon the floor, and binding its edges against the interior sides of the barrel, and lateral wedge bars, which are actuated by the pressure of the grating and bind the ends of said filtering medium against the interior ends of the barrel, substantially as described.

"(3) In a barrel filter, the combination with a suitable bed or support and a perforated lead floor, of a filtering medium composed of lead in sheeted form, open to the filtering passage of liquid, substantially as described."

A barrel filter, as used in the chlorination of gold ore, and possessing the elements claimed by Sloan to be novel, may be briefly described as follows: A lead-lined steel barrel or cylinder, with cast iron heads, is arranged horizontally, and equipped at each end with trunnions resting upon bearings, so that it may be revolved upon its horizontal axis. Wooden segments or horses, with lower edges conforming to the curvature of the barrel, are placed at intervals along the bottom as a primary support for a floor. The lower edges of the segments are notched to permit of the free flow of liquid along the bottom, and the upper edges are also notched to receive longitudinal stringers, which are correspondingly notched so as to form a mortise. Across the stringers and into notches on the upper side thereof are placed transverse rifles. This arrangement, being entirely composed of wood, constitutes the support for a flat, perforated lead sheet, which is the floor of the filtering medium. The perforations in the lead sheet are approximately five-sixteenths of an inch in diameter and about one-half of an inch between centers. Upon this floor is placed a filtering medium, consisting of sheeted lead with much smaller and more numerous perforations. On top of this are placed wooden gratings or racks, constituting a holding down arrangement, and also designed to prevent the abrasion of the filtering medium beneath. These in turn are held down by transverse wooden binders, extending from side to side of the interior of the barrel; the ends of the binders extending underneath longitudinal beams, which are securely fastened to the sides of the barrel by bolts extending through the shell to the exterior thereof. Between the ends of the binders and the under side of the longitudinal beams are driven wooden wedges, for the purpose of holding the structure more securely in place. For the reception and discharge of the materials and the various parts of the filtering apparatus, the barrel is equipped with suitable openings, which are so arranged as to permit of hermetic sealing.

The operation of the filter in the treatment of gold ore is substantially as follows: The ore being crushed, and generally roasted, is mixed with water, thus constituting a pulp of the proper consistency, and is placed in the barrel upon the structure which has been described. Chlorine gas is then either injected into the barrel or is generated therein by the admixture of sulphuric acid and chloride of lime. The apertures are sealed, and the action of the gas upon the gold-bearing pulp is accelerated by the rotation of the barrel. In due course the gold values in the form of gold chloride are extracted from the pulp, pass through the perforations in the filtering sheet and the lead floor to the space beneath, and are thence drawn off for further treatment. The worthless residuum is then discharged by opening and reversing the barrel.

By the old method, which preceded the placing of the filter within the barrel, the filtering was generally done in a separate stationary open tank. This method was neither economical nor healthful, so about six years before Sloan's invention there was successfully used a barrel filter, which possessed almost all of the features of the one described in the patent in suit, and in which the chlorination and the filtering were combined in a single operation. In fact, Sloan first received his instruction in the art from the man who designed and successfully operated a barrel filter in 1890. An important consideration in the making of every filter used in that process was the selection of materials that would resist the corrosive action of chlorine gas. Iron was quickly eaten away. Hardwood was also subject to it, but its reasonable duration of life and its abundance rendered its use economical, and, besides, it was best adapted for the supporting and binding framework of the filter. The effect of the gas upon lead was slight. Upon pure asbestos there was practically none. It was also necessary that the parts of the filter be so arranged as to be readily separated and detached, in order that they might be passed out of the manhole when the necessity for repairs or replacement arose.

The only features of the patented combination which require attention on account of the claim of novelty are: (1) The mortising of the timbers of the supporting framework; (2) the use of wooden wedges between the ends of the transverse binders and the horizontal rails bolted to the shell of the barrel; (3) the floor of perforated lead; and (4) the filtering medium of lead in sheeted form open to the filtering passage of liquid. Aside from these matters there is no substantial controversy requiring consideration. In all other material respects the arrangement and elements of the filter were old in the art. The defenses which need be considered were prior use and description in printed publications and lack of invention. The mortising of the timbers and the use of the wedges was to give rigidity and stability to the framework. It was found in practice that the underlying segments would become bunched together during the revolution of the barrel, thereby tending to cause a collapse of the structure, and that sometimes the framework would break up, because not properly tightened at the top. There was evidence, however, that prior to Sloan's invention wedges had been used for the same purpose, and also to some extent a mortising of the timbers. Prior to Sloan's invention the arrangement most generally employed as a floor for the filtering medium consisted of hardwood boards laid upon the segments, the upper sides of the boards being corrugated and perforated; and the filtering medium laid thereon was generally asbestos cloth held down by the wooden racks, and those in turn by transverse binders, the ends of which, being beveled, were driven under the horizontal rails at the sides of the barrel. In this way the ends of the binders acted as wedges.

There was an earnest contention, supported by substantial testimony, that Sloan had nothing more to do with devising the arrangement of the framework of the filter than to follow the suggestions of his superiors, who superintended and directed the construction during the time he says he conceived his invention; but this feature of the case need not be considered. The use of lead and knowledge of its value in the chlorination process was old. For many years prior to Sloan's invention it had been used for lining chlorine barrels and other receptacles. Sloan's application was filed November 7, 1896, and his patent was dated August 10, 1897. In 1890 and continuously thereafter lead was in general use for lining barrel filters and protecting the exposed portions of iron bolts and rods in the interior. Indeed, it may be said to have been exclusively used for those purposes. Prior to Sloan's invention it had also been used as a coating, by being burned on perforated sheet-steel plates used as the supporting floors of barrel filters and upon iron grating used as holding-down racks. Perforated sheets of lead had been placed upon corrugated and perforated hardwood planks, also used as floors in barrel filters. Perforated sheets of lead had been placed over asbestos cloth as a filtering and retarding medium. As a filtering medium lead had been used in the form of a composite lead wire and asbestos cloth, and also alone in sheeted form with slotted apertures, instead of perforations. Sheets of lead had also been used for floor purposes by Sloan himself more than two years before the date of his application, though not advantageously, because they were not of sufficient weight. Years before lead had been used as a filtering medium in a stationary tank in Canada. An iron grating, covered with lead and used as a floor, was described in the publication "Metallurgy of Gold," published in London in 1894; but it was not durable, because of imperfections in the lead coating. Perforated lead, covered with asbestos, was used as a separating medium between the generating and chlorinating chambers in the Sutton patent, No. 527,899, dated October 23, 1894; and its use in other ways, though perhaps not so pertinent to this case, was described in other patents for improvements in filters.

Leonard E. Curtis and K. R. Babbitt (Rufus C. Thayer, on the brief), for appellant.

C. S. Thomas and Alfred J. O'Brien (A. T. Gunnell, H. N. Hawkins, J. A. Chinn, W. H. Bryant, H. H. Lee, and Ed. F. Richardson, on the brief), for appellee.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The result of the application of the common skill and experience of a mechanic, which comes from the habitual and intelligent practice of his calling, to the correction of some slight defect in a machine or combination, or to a new arrangement or grouping of its parts, tending to make it more effective for the accomplishment of the object for which it was designed, not involving a substantial discovery, nor constituting an addition to our knowledge of the art, is not within the protection of the patent laws. *Gates Iron Works v. Fraser*, 153 U. S. 332, 14 Sup. Ct. 883, 38 L. Ed. 734; *Florsheim v. Schilling*, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574; *Hollister v. Benedict Mfg. Co.*, 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901; *Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438; *Dunbar v. Meyers*, 94 U. S. 187, 24 L. Ed. 34; *Hotchkiss v. Greenwood*, 11 How. 267, 13 L. Ed. 683; *Adams Electric Ry. Co. v. Lindell Ry. Co.*, 77 Fed. 432, 23 C. C. A. 223; *Tiemann v. Kraatz*, 85 Fed. 437, 29 C. C. A. 257.

The mere use of known equivalents for some of the elements of prior structures; the substitution for one material of another known to possess the same qualities, though not to the same degree; the mere carrying forward or more extended application of the original idea, involving a change only in form, proportions, or degree, and resulting in the doing of the same work in the same way and by substantially the same means—is not patentable, even though better results are secured; and this is the case, although what preceded rests alone in public knowledge and use, and not upon patent. *Market Street Cable Ry. Co. v. Rowley*, 155 U. S. 621, 15 Sup. Ct. 224, 39 L. Ed. 284; *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1, 39 L. Ed. 64; *Adams v. Stamping Co.*, 141 U. S. 539, 12 Sup. Ct. 66, 35 L. Ed. 849; *Burt v. Ivory*, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; *Brown v. District of Columbia*, 130 U. S. 87, 9 Sup. Ct. 437, 32 L. Ed. 863; *Crouch v. Roemer*, 103 U. S. 797, 26 L. Ed. 426; *Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267; *Smith v. Nichols*, 21 Wall. 115, 22 L. Ed. 566; *Hicks v. Kelsey*, 18 Wall. 670, 21 L. Ed. 852; *National Hollow Brake-Beam Co. v. Interchangeable, etc., Co.*, 106 Fed. 693, 45 C. C. A. 544; *National Folding Box & Paper Co. v. Lithographic Co.*, 81 Fed. 395, 26 C. C. A. 448.

The doctrine of equivalents applies to patents for a combination, although the measure of its effect in the particular case depends upon the position of the patent in the art to which it relates. *National Hollow Brake-Beam Co. v. Interchangeable, etc., Co.*, *supra*.

The mortising of timbers to prevent them from shifting and sliding, and thereby to secure rigidity and stability of the framework, and the use of wooden wedges for a similar purpose, was nothing more than would naturally occur to any carpenter who understood his business. Mortising and the use of wedges are as old as carpentry itself; and, when the contemplated use of the structure precluded the employment of nails or other metallic fastenings, the method adopted by Sloan was but a simple and obvious expedient. It was not invention.

In the use of sheets of perforated lead as a flooring and as a filtering medium in a barrel filter there was on the part of Sloan neither discovery nor such ingenuity of adaptation as entitled him to a patent. No new function was performed by those elements of his filter, acting either singly or in co-operation with the others; nor was there a new method of performing an old one. The use of lead, and its especial value in the interior of barrel filters, were old in the art. In the floor of Sloan's filter the perforated sheets of lead performed in the same way the precise function theretofore performed by the lead-covered steel sheets, and by the perforated hardwood boards, either with or without the superimposed lead sheets; and as a filtering medium their precise function was theretofore performed by asbestos cloth, slotted sheet lead, and woven lead in combination with asbestos. They were, respectively, substitutes for each other, being well known to possess like qualities and to operate in the same way to produce the same results. The sheets of lead, in their relation to the other elements of the combination and their co-operative action, were the mere equivalents of those in prior use. There was no change of function, operation, or result. This seems to have been recognized, in part at least, by Sloan himself. He says in his specifications:

"A woven lead fabric is believed to be a novel filtering medium in this connection, and, while the best results will accrue from its use, the asbestos cloth is a valuable substitute therefor; but quite desirable results will accrue from the use of properly perforated sheet lead."

In fact, Sloan never used a woven lead fabric as a filtering medium, but in practice confined himself to the perforated sheets, while the use of asbestos cloth was common and extensive before he had any knowledge whatever of barrel filters.

In the briefs of both parties it is said that the real operation of the sheeted lead filtering medium was to support the coarser particles of ore above it, and to cause them to act as the true filtering medium. In other words, the pulp resting upon the diaphragm was the real filtering medium, and the operation of the perforated lead was merely to retard or prevent its passage during the process of filtration. If this view be correct, and there is support for it in the testimony, it would occur to any one that the office of a retarding medium could clearly be as well performed by any durable material susceptible of stable perforation and capable of resistance to the action of chlorine gas.

Were we to exclude from consideration the lead-covered steel plates, the slotted sheets of lead, and the woven lead in combination with asbestos, upon the ground, as claimed, that they were experiments and had been discarded for better devices, there would still remain the flooring of corrugated and perforated hardwood, with and without the cover of lead sheets, and the filtering medium of asbestos, both in combination with perforated sheets of lead and without it, all of which appear in the prior art, and to have been operated successfully before Sloan's invention. We would, therefore, be brought to no different conclusion.

The decree of the Circuit Court is affirmed.

STANDARD ELEVATOR INTERLOCK CO. v. RAMSAY et al.

(Circuit Court, E. D. Pennsylvania. June 28, 1905.)

No. 22.

PATENTS—PRIOR USE—LOCKING DEVICE FOR ELEVATORS.

The Muckle & Teamer patent, No. 555,825, for a locking device for passenger elevators, claims 1 and 2, are void, being so broad as to include a device previously in use by others, and on which that of the patent is an improvement.

In Equity. On final hearing.

See 130 Fed. 151.

Howson & Howson, for complainant.

Horace Pettit, for respondent.

J. B. McPHERSON, District Judge. This suit charges the defendants with infringing the first and second claims of letters patent No. 555,825, which were issued to John S. Muckle and William H. B. Teamer in March, 1896, and are now the property of the complainant. The end sought to be attained is thus stated in the specification:

"The object of our invention is to prevent accidents on passenger-elevators due to the carelessness of the operator in starting the car while the door is open after the car has passed the floor. This object we attain by positively locking the car on the opening of the door, and locking the door on the movement of the mechanism to start the car."

The claims are as follows:

"(1) The combination of an elevator-car, the motor controlling mechanism, a movable well-door at the landing, a latch adapted to lock the door in the closed position, with mechanism on the car adapted to release the door from the latch when the mechanism is operated to stop the car so that the door can be opened, and connections on the car between the last-named mechanism and said motor controlling mechanism, substantially as described.

"(2) The combination of an elevator-car, motor controlling mechanism, a sliding door, a latch adapted to engage with the door when closed, a device secured to the wall of the elevator-well, mechanism on the car connected to the motor-controlling mechanism, said mechanism operating to release the door from the latch, and in turn to be locked by the device secured to the wall of the elevator-well so as to prevent the car from moving when the door is opened, the said device being held clear of the mechanism on the car by the door when it is closed, substantially as described."

The case has come into my hands at a time of the year when I cannot possibly give it the detailed discussion to which the careful and elaborate briefs of counsel are an invitation. I must content myself, therefore, with merely deciding the case, in order that there may be ample time for review, if this should be desired, and a final decision, at the next term of the Court of Appeals. In my opinion, the claims sued upon cannot be sustained, in view of the prior use at the Bingham House, in the city of Philadelphia, during a part of the year 1895, of a device that accomplished the same result. The testimony upon this subject seems to me to be clear and satisfactory, meeting the stringent requirements of the law, and I accept it as establishing the defendants' position on this branch of the de-

fense. The patentees knew of this device, and their own invention was an improvement thereon, which is amply protected by the more specific claims of the patent; but the first and second claims are too broad, as I think, and cannot be construed so narrowly as to save them.

A decree may be entered dismissing the bill at the costs of the complainant.

BOSTON PNEUMATIC POWER CO. V. EUREKA PATENTS CO. et al.

(Circuit Court, D. Massachusetts. July 6, 1905.)

No. 2,022.

PATENTS—INTERFERENCE—SUIT FOR ANNULMENT.

Rev. St. § 4918 [U. S. Comp. St. 1901, p. 3394], providing for suits to annul interfering patents, gives the court jurisdiction only to adjudicate between patents, the claims of which are substantially identical, and, where such identity is not shown, it cannot declare a later patent invalid for want of patentability.

In Equity. Suit to annul patent.

Chas. F. A. Smith and Aldrich & Shurtleff, for complainant.

George N. Goddard, for defendants.

LOWELL, Circuit Judge. This was a bill in equity, brought under Rev. St. § 4918 [U. S. Comp. St. 1901, p. 3394], to annul claims 1, 2, 3, and 4 of letters patent No. 710,291, issued to Moran, as being in interference with claim 1 of Letters patent No. 673,922, to Nolan. The claims are as follows:

Nolan: "(1) In a pumping system for beer or other liquids, a plurality of barrels or receptacles, a source of pneumatic pressure, a main-pressure pipe leading from said source and communicating with all the receptacles in use, an outlet-pipe leading from each receptacle, a supplemental-pressure pipe leading from said source and communicating with each of said outlet-pipes, and a check-valve to control each of such points of communication, whereby the contents of the several receptacles are prevented from entering the supplemental-pressure pipe, substantially as described."

Moran: "(1) In a dispensing apparatus for liquids, a receptacle containing the liquid, a source of pneumatic pressure, a main pressure-pipe from said source of pressure, communicating with said receptacle above the liquid therein, a discharge-pipe from said receptacle, a discharge-faucet on said discharge-pipe, a supplemental pressure-pipe under uniform pressure with that in the main pressure-pipe, said supplemental pressure-pipe located in part above the discharge-pipe, near the discharge-faucet thereon and connected to the discharge-pipe at that place from above said discharge-pipe, and a stopcock above the discharge-pipe and within the supplemental pipe near its connection with the discharge-pipe, whereby the liquid in the discharge-pipe may be allowed to return by gravity to said receptacle by the operating of said stopcock and the liquid be prevented from leaking into the supplemental pressure-pipe from the discharge-pipe.

"(2) In a dispensing apparatus for liquids, a receptacle containing the liquid, a source of pneumatic pressure, a main pressure-pipe from said source of pressure communicating with said receptacle above the liquid therein, a discharge-pipe from said receptacle, a discharge-faucet on said discharge-pipe, a supplemental pressure-pipe under uniform pressure at all times with that in the main pressure-pipe, said supplemental pressure-pipe located in part above the discharge-pipe near the discharge-faucet thereon and connected

to the discharge-pipe at that place from above said discharge-pipe, a stopcock within the supplemental pressure-pipe near its connection with the discharge-pipe leaving a vertically-arranged passage between said stopcock and discharge-pipe, whereby the liquid in the discharge-pipe may be allowed to return by gravity alone to the receptacle by opening said stopcock, and whereby a cushion of air will remain within said vertically-arranged passage and prevent the liquid from the discharge-pipe from connecting with said stopcock when the stopcock is closed.

"(3) In a dispensing apparatus for liquids, a receptacle containing the liquid, a source of pneumatic pressure, a main pressure-pipe from said source of pressure communicating with said receptacle above the liquid therein, a discharge-pipe from said receptacle, a discharge-faucet on said discharge-pipe, a supplemental pipe under uniform pressure at all times with that in the main pressure-pipe and connected to the discharge-pipe near the discharge-faucet thereon, and a stopcock having a contracted passage through it when opened located within the supplemental pressure-pipe near its connection with the discharge-pipe, whereby the liquid in the discharge-pipe may be allowed to return by gravity alone to said receptacle when said stopcock is opened and its returning movement be retarded as desired by the contracted passage through said stopcock.

"(4) In a dispensing apparatus for liquids, a plurality of receptacles, each containing a liquid, a source of pneumatic pressure, a main pressure-pipe from said source of pressure communicating with each of said receptacles above the liquid therein, discharge-pipes from receptacles, a discharge-faucet on each discharge-pipe, a supplemental pressure-pipe under uniform pressure with that in the main pressure-pipe connected to each discharge-pipe near the discharge-faucet thereon from above the highest part of said discharge-pipe, and a stopcock in each connection between the supplemental pressure-pipe, and the discharge-pipes, whereby the liquid in each of the discharge-pipes may be allowed to return by gravity alone to its respective receptacle, independent of the liquids in the other discharge-pipes when its respective stopcock is opened."

Rev. St. § 4918 [U. S. Comp. St. 1901, p. 3394], reads as follows:

"Whenever there are interfering patents, any person interested in any one of them or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment."

The defendant pleaded that the invention set forth in the claim of the Moran patent was different from that set forth in the claim of the Nolan patent, and that the two patents did not interfere with each other.

Generally it has been held that section 4918 gives the court jurisdiction only to determine the question of priority between interfering claims; that is to say, between claims substantially identical. As was said by Judge Colt in *Nathan Manufacturing Company v. Craig* (C. C.) 49 Fed. 370:

"The invention which a man patents is that which he claims, and patents do not interfere unless they claim the same invention in whole or in part. Upon suits brought under this section, it has, therefore, been repeatedly held, until it has become well-settled law, that two patents interfere, within the meaning of this section, only when they claim, in whole or in part, the same invention."

"The complainants' position seems to be that in a bill of this character the court may go outside and beyond the claims of the interfering patents, and consider generally the two inventions or structures, taken as a whole; and complainants cite as an authority upon this point the case of *Garrett v. Seibert*, 98 U. S. 75, 25 L. Ed. 84. In that case, however, the answer did not deny, but rather admitted, an interference of the patents, and it is therefore not an authority against the general doctrine which the courts have laid down upon this point." *Gold & Silver Ore Company v. U. S. Ore Company*, Fed. Cas. No. 5,508.

See *Pentlarge v. Pentlarge* (C. C.) 19 Fed. 817; *Lockwood v. Cleveland* (C. C.) 20 Fed. 164; *Sawyer v. Massey* (C. C.) 25 Fed. 144; *Am. Clay Bird Company v. Ligowski Clay Pigeon Company* (C. C.) 31 Fed. 466; *Elec. Accum. Company v. Brush El. Company* (C. C.) 44 Fed. 602; *Stonemetz Printers' Company v. Brown Folding Company* (C. C.) 57 Fed. 601, *Dederick v. Fox* (C. C.) 56 Fed. 714.

In *Palmer Pneumatic Tire Company v. Lozier*, 90 Fed. 732, 33 C. C. A. 255, the Circuit Court of Appeals for the Sixth Circuit discussed most of these cases, and sought to overrule many of them by holding that the court has jurisdiction to examine the validity of the patents in question apart from priority of invention. But even that court did not extend the jurisdiction given by section 4918 beyond controversies between identical claims. To permit a complainant having a patent for one invention to annul, by virtue of this section, a patent for a different invention, on the ground of want of patentability in the latter, would transgress the limitations declared in *Mowry v. Whitney*, 14 Wall. 434, 440, 20 L. Ed. 858. Therefore the court must first determine if the claims here alleged to be in interference are substantially identical.

It is manifest that the claims of the Moran patent, above quoted, differ from the first claim of the Nolan patent, in that they are more specific and contain additional elements. Thus the claims are not substantially identical, and the court is not called upon in this proceeding to determine if one shows patentable invention above another.

The plea is therefore good, and the bill is dismissed, with costs.

MARLIN FIREARMS CO. V. KELLOGG.

(Circuit Court, D. Connecticut. July 7, 1905.)

No. 1,138.

PATENTS—INFRINGEMENT—BREECH-LOADING GUNS.

The Hepburn patents, Nos. 400,679 and 434,062, each for a breech-loading gun, construed, and held not infringed as to claims 1 and 5 of the former, and 10, 11, 12, and 21 of the latter, and infringed as to claim 27 of the latter.

In Equity. On final hearing.

Robert C. Mitchell, for complainant.

Louis C. Raegener and Milton E. Robinson, for defendant.

PLATT, District Judge. This is a suit in equity, brought on two United States letters patent to Hepburn—one, No. 400,679, dated April 2, 1889, for a magazine gun; the other, No. 434,062, dated August 12, 1890, for a breech-loading gun. Infringement is alleged upon claims 1 and 5 of the first patent, and upon claims 10, 11, 12, 21, and 27 of the latter patent. The defenses are that said claims are not infringed, and, if broadly considered, are anticipated. For convenience, the claims are set forth en masse:

Patent No. 400,679.

"(1) The combination, in a gun, of the receiver, A, having a solid or unbroken wall at its top, with the longitudinal opening, I, in its side, and the reciprocating breechblock, B, of the proper form transversely to fill the cavity between the walls of the receiver and the opening, I, in its side, substantially as shown and described."

"(5) The flat-spring ejector, f, provided with the projection, i, said projection being provided with a right-angled face at its front and an inclined or beveled face at its rear side, the same being secured in a recess formed in the inner wall of the receiver, substantially as shown and described."

Patent No. 434,062.

"(10) The combination of the frame, A, containing the breech mechanism, the reciprocating breechblock moving therein on guide or raceways, and the removable side plate, B, having a portion of it forming one of said raceways supporting the breechblock, substantially as described.

"(11) The combination of frame, A, containing the breech mechanism, and provided with shoulders, s¹, s², projecting laterally therefrom, the reciprocating breechblock moving therein on guide or raceways, and the removable side plate, B, having a portion of it opposite the said shoulders when it is attached to the frame forming one of said raceways supporting the breechblock, substantially as described.

"(12) The combination of frame, A, containing the breech mechanism, and provided with shoulders, s¹, s², s³, s⁴, projecting laterally therefrom, the reciprocating breechblock moving in the frame on guide or raceways, and the removable side plate, B, fitting between and sustained by said projections, and having a portion of it forming one of said raceways, substantially as described."

"(21) The spring-ejector provided with the projection, i², having a right-angled face at its front end and an inclined or beveled face at its rear, and also provided with the curved nose, i³, projecting in front of shoulder, i², and adapted to strike the body part of the cartridge-shell as its head is caught against shoulder, i², and project it sidewise out of the gun, substantially as described."

"(27) In combination with a reciprocating breech-bolt for a gun, the spring-hook extractor, t, set in a longitudinal recess or groove cut in said bolt in position to hold the shank of the extractor against the strain of its elastic-hook end (in the act of engaging the cartridge) by the opposite solid walls of said groove, the said extractor being held against longitudinal movement in said groove by an enlargement arranged to fit in a corresponding recess in the bolt, substantially as described."

We will first examine claim 1 of the earlier patent. It relates to such an arrangement of the breech-bolt in the frame, as that the cartridge-handling mechanism will be protected from the elements, and the user from injury by a bursting shell. One question only arises, what is meant by having a breechblock of such form as "transversely to fill the cavity between the walls of the receiver and the opening, I, in its side"? Is closing the opening the same thing as filling the cavity? If it is, then defendant infringes.

Let us turn to the specifications. It appears that the patentee says he has improved on the gun which he patented on October 11, 1887, No. 371,455. In that case he made the slot or opening on top of the receiver, "as is customary in this class of guns," but now he puts the opening on the side; the breechblock being so formed "as to completely close this opening, i. its outer surface coming flush with the side or face of the receiver, the same as in the former case it was made to come flush with the top of the receiver." Plaintiff argues: That in one respect the gist of the invention was to provide a firearm of the laterally ejecting type, with a reciprocating breechblock, which is so shaped transversely as to itself close the discharge opening in the side wall of the receiver. That a separate side plate, carried by the breechblock, had been used before Hepburn, for a like purpose, but that he knew this and disclaimed it. Such side plate, for divers reasons, is less reliable than a solid block of metal. Hepburn made such a block of proper shape to fill the cavity between the walls, so that when it slid forward it would itself effectively close said opening. It was also held firmly by the angles of the walls, so that it could not rotate, and so become liable to displace the extractor. That the defendant's construction infringes, because the opening is just as effectively closed when the breechblock lies flush with the inner walls of the receiver as it is when said block lies flush with the outer walls. Defendant takes issue on these propositions, and says further: That Mullins' patent, 349,282, dated September 14, 1886, discloses substantially this portion of the inventive thought attributed to the patent in suit. That in the Mullins patent the empty shells are ejected laterally. It has a reciprocating bolt or breechblock, which, when brought forward into operative position for firing, completely closes the opening from which the empty shells are laterally ejected. The bolt or breechblock, when the gun is ready for firing, also abuts at its rear end against a depending shoulder within the chamber of the gun, so that the recoil of the breechblock after firing is taken by that shoulder, which is on the main frame of the gun. That the Burgess patent, No. 251,694, dated January 3, 1882, also shows a side opening, and a bolt or breechblock which moves past and closes it. That the Mullins or Burgess constructions would infringe plaintiff's patent if the latter shall be construed as broadly as is desired, and therefore, being earlier, must anticipate the claim so construed.

Plaintiff's counsel was understood at the hearing to admit that one of these bolts or breechblocks does completely close the side opening when the gun is in operative position for firing; and, this being so, of course, claim 1, construed as it must be, is not infringed.

Claim 5 of the first patent and claim 21 of the second patent may well be considered together, because they relate particularly to the "ejector," which is the means used to expel the empty shells. In claim 5 it is essential to read in a nose forward of the stop shoulder, which latter is the "projection, i." This is asked for because the

specification places the "projection, i," near the front end of the extractor. That is true, but the nose, with the functions claimed for it, cannot be found either in specification or in drawings. It is not perceived that there is any possibility of the part of the extractor forward of "projection, i," bearing against the side of the shell at any stage of the operation.

We must journey along to claim 21 of the second patent to find the nose, and the trouble which the nose provokes. We find here a feature additional to claim 5, just discussed, viz., "and also provided with the curved nose, i³, projecting in front of shoulder, i², and adapted to strike the body part of the cartridge-shell as its head is caught against the shoulder, i², and project it sidewise out of the gun." Before we reach this feature, it is well to note that there is no projection in defendant's construction "which has a right-angled face at its front, and an inclined or beveled face at its rear." A spring is used to actuate the pivoted ejector, but springs for that purpose were old. See Berdan, 108,869, and Tiesing, 206,367. The inclined faces of the ejectors in both patents are to enable the breechblock to pass over it in its forward movement, and the right-angled faces are to serve as stops; both functions appearing in the Hepburn patent.

Going back to the nose, we find that the claim says that it is adapted to strike the body part of the cartridge shell as the head is caught against the shoulder. The shoulder is on the free end of a spring, and, as the blow of the retreating shell is applied, that spring must inevitably bend from the strain. It is likely that this bending permits the nose to come over and strike upon the body part of the shell, and may aid in the rotary motion which enables the shell to become free of the extractor hook, and in projecting the shell sidewise out of the gun. The form of the nose would certainly greatly increase the chances that it will do such things. Defendant's construction does not appear to me to be a spring ejector, in the sense of the patent in suit. It is a rigid block pivoted in one end of the frame. It is actuated by a spring, and that makes it incumbent upon us to study its mode of action. It has a nose, and the crucial question is whether that nose acts in the same way that the nose of the patent acts. As the shell is withdrawn it strikes against what may fairly be called a shoulder. Up to that time the nose cannot have delivered any blow to the side of the shell. From this instant, the extractor hook pulling to the rear, and the shoulder resisting, the shell must turn on the extractor hook as a pivot. As it does so, the short leverage on the head must act in such a way that the shell will rapidly retreat from the nose, and, by its sidewise momentum, tumble out, end over end, after freeing itself from the extractor hook. Common sense, plus personal examination of the exhibits, satisfies me that these are facts, and settles beyond cavil the proposition that the nose on defendant's structure is not "adapted to strike the body part of the cartridge shell as its head is caught against the shoulder," or at any other time, and does not assist in the lateral expulsion of the cartridge shell by adding any direct force to the projection. The Patent Office must have thrown the

functional purposes and limitations of the claim and specification around the nose of the patent in suit, in order to cipher out novelty therein, and it is not the province of the courts to go beyond the grant, or to aid in any manner in enlarging the contract which the letters patent import. As the claim must be construed, it will suffer the same fate as claim 5 of the earlier patent, because concededly there is no infringement. Complainant's actual construction appears to be as well outside of this patented feature as is the defendant's.

Claims 10, 11 and 12 of No. 434,062: Claim 10 calls for a combination of the frame containing the breech mechanism with a reciprocating breechblock moving therein on guide or raceways, and a removable side plate having a portion of it forming one of said raceways supporting the breechblock, substantially as described. The specifications tell us that the frame is formed of a solid block of metal, with a recess chambered into one side, and that the breech is solidly attached to the front end, so as to open into the upper part of that recess. The magazine also opens into it below the barrel, and the stock is attached to the rear of the frame. The side plate closes the recess, and forms the guideway on which the breechblock rests and slides. Complainant looks for a broad construction of this claim, because he insists that the gist of the invention is to remove the side plate, so as to be able to easily clean, repair, or replace the various parts of the working mechanism; and, if that plate also serves to guide the breechblock in its movements to and fro, the claim is in that respect infringed. Removable side plates for guns, which will afford ready access to the mechanism within the frame, were, however, by no means new with Hepburn. Swingle and Huntington, 150,102, shows such a plate in figure 5; Holmes, 273,684, in figure 7. See, also, Bull. No. 209,010. The inventive thought would appear to be the making such a use of the removable side plate that a portion of it shall form one of the "raceways supporting the breechblock," or a "guideway on which the breechblock rests and slides." In defendant's gun there are no guides or raceways to be found for the breechblock, which is entirely supported and handled by the action-bar, and the frame merely offers a side wall which prevents lateral dislocation. Claim 10 is not infringed, and this conclusion disposes of claims 11 and 12, which are manifestly narrower.

But claim 27 of No. 434,062 is another story. In the specifications we find a detailed description of the way in which the extractor is set in a longitudinal recess formed in the bolt, so as to hold the extractor against the strain of its elastic-hook end. Thereby the solid walls of the breech-bolt take all the strain brought upon the shank of the extractor, and holding-screws, which may loosen or wear out, are avoided. It is then shown that by making an enlargement, w, as in figure 6, fitting into a corresponding recess formed in the side wall of the long recess, the extractor will be locked in place, and cannot be pulled endwise out of its seat when extracting the shell. Its situation naturally leaves it free to be taken out by hand when the bolt is detached. The substance of

this feature of the invention clearly seems to lie in the earlier part of the description. The proceedings in the Patent Office emphasize the correctness of this conclusion. Burton, original 81,059 and reissue 3,699, were cited as anticipatory of this claim. Hepburn, in reply, said, among other things:

"This claim is for a combination of the extractor with the reciprocating breech-bolt, so set in a groove in the bolt that the walls of the groove in the solid metal shall hold the extractor and resist the strain of the elastic-hook end."

In this respect he distinguished his idea from the disclosure in Burton, and claim 27 was thereupon allowed. The defendant has copied precisely this manner of mounting the ejector in the breech-block, and gets, as Hepburn does, the benefit of the walls of the groove in the breechblock. To prevent longitudinal movement, instead of using the enlargement and corresponding recess, he drives a pin through the shank of the extractor, so that it is friction-tight, and obtains the same result. This makes the removal of the extractor more difficult, but, as I understand the law, it is well settled that a deliberate impairment of the utility of the patented construction, leaving its essential function in full operation, will not avoid infringement.

It is unnecessary to cumber this opinion with a statement of the reasons for concurring with the Patent Office in the conclusion that the Burton patent in no sense anticipates claim 27. The Burton extractor is a different device, mounted differently and operating differently.

Our labors are ended. Much that defendant suggests meets with cordial approval. This is not a case in which the complainant is entitled to claim dominion of the entire shore by reason of his additions to the general stock of knowledge. On the other hand, he has added one pebble, at least, in claim 27, and defendant ought not to step on that pebble.

Let the bill be dismissed upon the first patent, and upon all claims in the second patent except 27. Upon claim 27 of patent 434,062 let there be an injunction and accounting.

EASTMAN KODAK CO. v. ANTHONY & SCOVILL CO.

(Circuit Court, S. D. New York. June 30, 1905.)

PATENTS—INVENTION—PHOTOGRAPHIC FILM ROLL.

The Turner patent, No. 539,713, claims 1, 2, and 3, for a photographic film roll for daylight loading of a camera, consisting of a sensitized film mounted on a strip of opaque material, having markings on the back which can be seen through a peep hole in the camera to indicate when the film is in proper position for an exposure, and also to show where the film is to be cut to separate the exposures, the whole wound upon a reel with lateral flanges, from which it is unwound in the camera as the exposures are successively made, and rewound on a receiving reel, are void for lack of patentable invention in view of the prior art, merely ordinary mechanical skill being employed to adapt well-known devices and means to the

accomplishment of a desired result, which had before been accomplished in substantially the same manner by substantially the same means, although not in precisely the same combination.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Patents, § 17.]

Suit in equity for alleged infringement of United States letters patent No. 539,713, dated May 21, 1895, application filed April 21, 1892, granted to Samuel N. Turner for "photographic film roll." Defenses: Turner not inventor; in view of prior art no patentable invention; and aggregation. Also that third claim is void for want of definiteness, and because of contradictions between it and drawings, etc. No infringement when claims construed, as they must be, in view of claims, specifications, and drawings taken together.

Philipp, Sawyer, Rice & Kennedy, for complainant.

Edward C. Davidson (Edmund Wetmore, of counsel), for defendant.

RAY, District Judge. The patent in suit contains three claims, viz.:

"(1) The herein described new article of manufacture consisting of a strip of opaque material and a continuous strip of sensitized material of a length for a series or number of photographic exposures, superimposed upon said strip of opaque material, a series of marks upon the strip of opaque material on the side opposite the sensitized strip to indicate where the strip is to be stopped for exposure and cut after exposure, said strips of sensitized material and opaque material being adapted to move in unison past an opening in a photographic camera and expose the indicating marks on the strip of opaque material, substantially as described.

"(2) The combination, with a continuous strip of photographic sensitized material of a length for a series or number of photographic plates, of a strip of opaque material superimposed thereon and having on its side opposite the sensitized strip a series of marks to indicate where the strip is to be stopped for exposure and another series of marks to indicate where the strip is to be cut after exposure, said strips of sensitized material and opaque material being adapted to move in unison past an opening in a photographic camera to expose the indicating marks on the strip of opaque material, substantially as described.

"(3) The herein described new article of manufacture consisting of a roll having at its ends laterally extending flanges, a strip of opaque material having superimposed thereon, and supported thereby, a continuous strip of sensitized material, the strip of opaque material being of greater length, and having its ends extending beyond the ends of the strip of sensitized material, said strips of opaque material and superimposed sensitized material being wound upon the roll, the strip of opaque material outermost, whereby the entrance of light to the sensitized material is effectually excluded by the opaque material and the flanged ends of the roll, substantially as described."

I am asked to find and hold that Turner, the patentee, was not the inventor. There is a mass of evidence on this subject. The complainant's brief contains 215 pages of printed matter, and defendant's 296. To give the reasons for my decision, arrived at after a perusal of the evidence and these briefs, would require an opinion, possibly, of equal length, and one which might be more confusing than satisfactory. The court, not without some hesitation, holds that Turner was the inventor. As to claims 1 and 2, the

court holds that there is no patentable invention disclosed in view of the prior art. In the specifications we find:

"The object of the present invention is to provide means in a photographic camera, in which a continuous strip of sensitized sheet material is used for the negative, so that it can be moved the right distance for the exposure of a fresh portion of its surface conveniently and to a certainty for the taking of another picture, and so on for each successive picture, and the invention consists in the combination with a strip of sensitized paper or other flexible sheet material, of a strip of flexible sheet material of an opaque nature superimposed thereon, so opaque that light practically cannot penetrate through it, having certain indicating marks on its outer side in relation to the sensitized sheet, and a camera in which the two sheets are rolled up for use, having an opening through which the marks on the opaque sheet can be seen from the outside, to indicate the movement or location of certain portions of the sensitized sheet in relation to the lens of the camera, as hereinafter described and claimed.

"My invention also has for its object the provision of a holder for a strip of sensitized material which, together with the strip of opaque material upon which the sensitized strip is superimposed serves effectually to exclude the entrance of light to said sensitized strip so that the roll can be freely carried about in any light without injury to the sensitized strip, and can at any time be placed in the camera, in the field or wherever pictures are being taken, without the necessity of using a dark room for the purpose, as in present cameras. * * * The sensitized strip is a little shorter than the opaque strip, and is placed on the opaque strip or superimposed thereon, so that its film side will be outside, and so that the opaque strip will extend some distance at each end beyond the sensitized strip, one end of the film strip being secured to the opaque strip near one end, by a piece, d, of sheet material by paste or any suitable adhesive material, or secured thereto in any suitable manner, the sensitized strip being of a length that will take the necessary number of pictures, which is regulated by the amount that can be wound upon the roll, K, when in the box. After the strips are secured together, one end of the opaque sheet which is the end to which the sensitized sheet is secured, is secured in any suitable manner to the roll, K, and wound thereon, and the roll placed in its place in the box. The ends of the two sheets are then passed between the guide boards, e, f, toward and over the end of the framework of the chamber, E, and circular opening, F, and back again to the other roll, L, to which the end of the opaque sheet is secured, as shown in Fig. 1. * * * In using the camera with the sensitized and opaque strips, the two strips are placed together and wound upon the roll, K, so that as they travel over the circular opening, F, the film side of the sensitized strip will face the lens and the marked side of the opaque sheet will be face to the opening, P. The sheets are first moved so that the figure 1 can be seen through the opening, P, as shown in Fig. 2. Then the picture is taken as usual. * * * The improved roll, as K, is constructed at each end with a laterally extending flange, R, said flange preventing the entrance of light to the sensitized strip at the edges, whereby, when the strip with the opaque strip on which it is superimposed, and which is of greater length than the sensitized strip, is wound upon the roll, the sensitized strip is effectually excluded from the effect of light. By the use of this invention the strips can be wound upon a roll preparatory to inserting it in the box, and freely carried about in any light without injury to the film strip, so that they can be placed in the camera at any time, in the field or wherever pictures are being taken, without the necessity of doing so, as at present, in a dark room."

Claim 1 of the patent in suit is for a new article of manufacture. This manufacture consists of (1) a strip of opaque material; (2) a continuous strip of sensitized material of sufficient length for a series or number of photographic exposures; (3) this strip of sensitized material is superimposed upon the strip of opaque material. This means that the sensitized material is laid upon the opaque ma-

terial, and in some manner attached thereto. So far as the claim is concerned, this sensitized material may be pasted or glued to the opaque material or sewn or pinned thereto. Any opaque material may be used. Any sensitized material suitable for taking photographs may be used. Clearly, there is no invention in superimposing the one of these materials upon the other. Proceeding with the claim, we find (4) that we are to have a series of marks upon the strip of opaque material, and on the side thereof not adjacent to the sensitized material. These marks indicate where the strip is to be stopped for exposure and where the strip is to be cut after exposure when removed from the camera and the picture is to be developed. As I understand the specifications, there are two series of numbers upon the opaque material. One set of marks comes opposite the peep hole, and when this mark is opposite the peep hole the movement of the strips of opaque and sensitized material stops until the exposure is made. The other marks indicate where the cutting is to be done as these fix the boundaries of the exposure. The claim then says (5) that these strips of sensitized material and opaque material are adapted to move in unison past the opening in a photographic camera, and expose the indicating marks above mentioned. This means, taken in connection with the drawings and specifications, that the strip of sensitized material and opaque material attached together are wound upon something, placed in the camera and unwound in such a manner that the opaque material with the marks will pass in front of the peep hole through which the operator is looking, and as one of these marks comes opposite the peep hole the operator stops the movement until the exposure is made. As the opaque material and the sensitized material are attached together either by pasting, sewing, or pinning, and are both wound upon a roll or spool of some description, and the free end, when it is desired to take a picture, is attached to another roll or spool, which being turned by means of a crank or thumb piece, not only winds the material, after the exposure, upon the new spool, but unwinds it before exposure from the spool upon which it was wound before being placed in the camera, they necessarily pass in unison before the opening of the camera known as the "peep hole," through which the operator is looking for the purpose of stopping the material at the proper point. The spool upon which the material is wound before being placed in the camera must be so placed in the camera that when the unwinding occurs the opaque material will come next the peep hole, and, the sensitized material, being on the opposite side, will come next the lens, and so take the impression. The two materials upon being attached together necessarily move in unison. The placing of the two rolls or spools, the one being the supply spool and the other the receiving spool, is a mere matter of mechanical skill. If the one is below the other must be above the peep hole. If the one is to the right the other must be to the left of the peep hole. The claim of the patent has nothing to do with the arrangement or construction of the camera. The claim relates simply to the putting or placing of a strip of opaque material upon a strip of sensitized material, or of

a strip of sensitized material upon a strip of opaque material, and this is the equivalent in every respect of pasting or stitching or pinning one piece of cloth upon another, a process of manufacture known to our great-grandmothers a hundred years ago. The making of a figure or mark upon the strip coming next the peep hole to indicate to the eye when the movement of the material should stop for the taking of an impression would occur to any one desiring some mark to indicate when the material had moved a sufficient distance for the purpose desired. I can discover no patentable invention in attaching these two strips of material together, or in attaching the two and marking the one.

Claim 2 is not for a new article of manufacture, but for the combination with a continuous strip of photographic sensitized material of sufficient length for a number of photographic plates of a strip of opaque material superimposed thereon, and having the marks mentioned in claim 1 for the purposes mentioned in claim 1. The one is superimposed upon the other, and they are attached together so that when unwound from the roll or spool they necessarily move in unison, and if the rolls or spools are properly arranged in the camera they will move in unison past the opening or peep hole, and the observer or operator will know the marks, and be able to stop the movement at the right point. Claim 1 seems to be for a new article of manufacture, while claim 2 is for a combination of elements, viz.: (1) A continuous strip of sensitized material of the length mentioned; (2) a strip of opaque material superimposed upon the sensitized material, and having marks, or a series of marks, on the outer side thereof, or the side opposite the sensitized strip. In short, the elements of claim 2 are a strip of sensitized material laid upon and attaching to a strip of opaque material and the marks upon the opaque material. Any sensitized material may be used that will take a photographic impression. Any opaque material sufficient to exclude the light may be used. Any figures or numbers or letters may be used. These indicating marks are to be placed, of course, at regular intervals. The sensitized material must be excluded from the light, and hence the necessity for the opaque material between it and the peep hole when in the camera and being unwound from the supply spool and wound upon the receiving spool. The side of the sensitized material next the lens takes care of itself, as light is excluded at all times except when the impression is to be taken.

Claim 3 goes further than claim 1 or claim 2. Claim 3 is for a new article of manufacture, which consists of (1) a roll having at its ends laterally extending flanges; (2) a strip of opaque material having superimposed thereon and supported thereby a continuous strip of sensitized material, the strip of opaque material being of greater length, and having its ends extending beyond the ends of the strip of sensitized material; (3) these strips of opaque material and superimposed sensitized material are wound upon the roll with flanges above mentioned. The claim states that by this arrangement the entrance of light to the sensitized material

is effectively excluded by the opaque material and the flanged ends of the roll. It is evident that the sensitized material must be attached to and superimposed upon the opaque material in the so-called dark room. It is also evident that when the two are joined together—that is, when the one is superimposed upon the other—they must be wound upon the spool in the so-called dark room. The opaque material is longer than the sensitized material, and hence, the two being attached together, when the sensitized material is all wound upon the spool there is still quite a length of the opaque material to be wound, and this, of course, being wound outside the sensitized material, will effectively exclude the light. It is necessary also to exclude the light from the edges of the sensitized material, and so the spool is made with flanges at each end; and, of course, it is understood that the width of the sensitized material will be such as to fill the space between the two flanges of the spool. When wound upon the spool, the sensitized material is now protected from the light at the edges by the flanges of the spool, and on the outside by the wrapping of opaque material. The sensitized material is superimposed upon or attached to the opaque material; or, in other words, the sensitized material has a backing of opaque material for use in the camera, and not as a protection from the light when not in the camera. The roll may be carried about in the light with impunity because protected at the ends by the flanges and on the surface by the wrapping of opaque material. When in the camera and passing behind the peep hole the marked strip of opaque material comes into play and serves a double purpose, viz., (1) the opaque material protects the sensitized material from the light entering the camera through the peep hole, and (2) the marks on the opaque material are plainly seen through the peep hole by the operator, and he is enabled to stop the movement of the sensitized material at proper points for making the exposures. I can discover nothing new in the flanged spool, for these spools were in use a century since. There is nothing new in winding this material upon the one spool and unwinding it when in use from the one spool to another; that is, from the supply spool to the receiving spool. It seems to me clear that, if this movement of the sensitized material superimposed upon the opaque material is to be in front of a peep hole, it would occur to any one to place a mark upon it at intervals showing when its movement was to be stopped for the purpose of making an exposure. It may be that this precise combination is not found in the prior art, but in the prior art we do find the opaque material coextensive with the sensitized material and backing the sensitized material, whereby the latter is protected while in the camera; and this is shown in an article on Capt. Barr's Dark Slide, published in *Notes and Queries*, April 21, 1855, at pages 311, 312. In that article we find a description of the use of a long strip of black calico as the opaque material, upon which strip of black calico there is placed a series of sheets of sensitized film, each sheet a short distance from the one next to it, and these sheets of film superimposed on the black calico are then drawn

from the supply roller upon which they are wound across the focal plane to another roll or receiving roller. In that article we read:

"To use this dark slide, prepare your sensitive paper, say ten or twelve sheets. Have a piece of thin black calico a little longer, say twelve inches longer than your twelve sheets of paper; and upon this band of black calico place your sheets of prepared paper, leaving intervals of about two inches between each two papers, and attach the papers in any convenient manner by their upper and lower edges to the calico. Now attach the one end of the calico to the lower roller of the slide and roll it up, leaving just sufficient of it unrolled to reach the upper roller. Pass this unrolled end over the glass plate I have referred to, and then attach it to the upper roller."

It is evident that this black calico backing the sensitized paper or sheets would serve to protect it from the light coming in through the peep hole or getting to it in any way except through the lens.

In the description of Capt. Barr's Dark Slide we also read:

"As a farther precaution against light, and to guard against the evil effects of air upon the prepared paper, I leave the black calico band a foot larger than is necessary to carry all the papers, so that when all are wound round the roller the last five or six plies are plain calico, thus excluding light."

In defendant's exhibit Marey Translation, being the translation of an article written by E. J. Marey, of the French Institute, published in *La Nature*, No. 911, 1890, at pages 375 to 378, we find the cut or representation of a photochronographic apparatus with film ribbon. This film ribbon is wound upon a roll or spool having flanges, and the film ribbon is represented in figure 6 as having two opaque covers—that is, at each end of the film is an opaque extension of some dark material, black calico—and when wound upon the spool the black calico or opaque cover extension at the free end covers and protects the film from the light. The edges of the film are protected from the light by the flanges of the spool. Further on in this description it is stated:

"The most important part to describe is that relating to the pellicle, to its introduction into the apparatus, and to the manner in which it is moved. Each analysis of a movement by photochronography gives rise to a long series of pictures and uses up a strip of film. It is therefore necessary for each new trial to take out the impressed strip and replace it by another. This substitution may be made in broad daylight by means of the covered spools, the description of which is as follows: To the ends of each strip of film are pasted strips of paper of the same width. One of these extensions is red, the other black. Each is about fifty centimeters in length. In the red light laboratory the ribbon thus formed is wound up on a metal spool, which it fills completely from rim to rim. After winding, the spool shows on the outside superposed layers of black paper, the opacity of which protects the sensitive film from all impression by light. Thus prepared, the supply spool may be handled in broad daylight. In order to introduce it into the apparatus, a few turns of the black cover is unwound, and the end thereof is attached to an empty spool, which is called the 'receiver,' upon which will be made a new winding of the strip as fast as it shall have passed in front of the focus of the objective lens. Pressing rollers assure the accurate winding of the successive turns of the ribbon upon the spool. When a trial is finished, the entire ribbon has passed from the supply spool, M, to the receiving spool, and the latter then shows on its exterior the red color of the covering, which in its turn will preserve the film from the action of light, and permits its removal from the apparatus without danger. Thanks to

these two different colors, it is not possible to mistake a spool which has been impressed from the one that has not."

Going again to the prior art, we find in a British patent, No. 17,522, applied for November 4, 1889, and accepted March 29, 1890, granted to one Damoiseau for "improvements in photographic apparatus," the following:

"Two rollers or bobbins, K, K', are arranged in the back of the camera, one being the roller carrying the sensitive material or film and the other receiving the film after exposure. * * * The two rollers can hold about ten metres of paper, or enough for forty exposures or ordinary negatives, or from 8 to 10 complete panoramas. With gelatine from 25 to 30 metres and upwards can be stored up, being sufficient for from 100 to 120 ordinary negatives or about 20 complete panoramas, all in a most compact space, and not weighing more than about 300 grammes. The number of proofs which can be taken with the lengths above indicated evidently depends on the focal length or distance of the lenses employed. The ends of the sensitive material are attached to the rollers in a simple and effective manner hereinafter described facilitating this operation, which has to be performed in the dark room. * * * A case of the size of an ordinary military knapsack holds the whole apparatus, which may be carried in the hand, or by a strap over the shoulders, or on to the back. With the apparatus above described an arrangement may be provided whereby the rolls of sensitive material may be changed in full daylight. This is an important consideration, since it greatly increases the stock of sensitive film or sensitive material that can be carried, and renders it unnecessary to take the apparatus to a dark room in order to replenish the magazine. With this object, the construction of the rollers or bobbins, K, K', remains the same, but the film undergoes a slight modification, a sheet of black paper being pasted to each of its ends, of a length (say 50 centimetres) sufficient to envelope the roll of film about three times. To place a roller in position in full daylight, the camera is opened and the roller put in its usual position, a sufficient length of black paper is unrolled to allow its end to be attached to the roller on which the sensitive material is rolled after exposure. The apparatus is then closed, and the black paper is unwound until the sensitive material reaches the center of the camera which can be ascertained by looking through a small opening in the back, provided with a shutter. After the shutter has been closed, the apparatus is ready for working until the roll on the bobbin is exhausted. As the sensitive part of the roll terminates in a sheet of black paper, the sensitive part is automatically wrapped up in the black paper by the action of the apparatus after the final exposure, and thus it is possible to withdraw the roll from the inside of the camera in daylight in the same way as it was placed in position. With this arrangement, care must be taken to set the counter so that it indicates correctly the amount of sensitive material actually used, in order to avoid risk of opening the apparatus before the roll is properly covered by the black paper at the end. The above arrangement is equally applied to all photographic apparatus which employs sensitive material wound on rollers or bobbins."

As to the indicating marks upon the back of the strip of opaque material used for the purpose of showing where the sensitized material is to be stopped for exposure, and also to indicate where it is to be cut after exposure, we find this device shown in the Whitney patent, No. 446,369, dated February 10, 1891. In the specifications of that patent we find:

"J is a short strip of the perforated negative-ribbon as it may be numbered and perforated ready for use. The ribbon may be of any suitable material, however. I use and prefer transparent celluloid, and the perforations and numbers are made for ease in separating the plate when ready for developing."

In the sixth claim of that patent we find:

"(6) In a camera, the combination of case, A, colored-glass peep-hole, I, the consecutively-numbered plates, J, and the revolving cylinders, D, and D', substantially as described."

In principle there is no distinction or difference between marking the back of the film and marking the back of the opaque material upon which the film is superimposed. In any event, whether shown in the prior art or not, I can find no invention in placing marks or numbers upon the back or front of this opaque material carrying the film, and which is intended to move inside the camera in front of the peep hole, to indicate the point at which it should be stopped for the purpose of taking the impression or picture. Such a device would occur to any person possessed of ordinary intelligence. Ordinary mechanical and mathematical skill would enable a person to locate these marks. But it is apparent on inspection of the prior art that equivalent devices had been used for this very purpose. After going over the prior art with great care, I am constrained to hold that, in view of such prior art, no invention is disclosed either in claims 1, 2, or 3 of the patent.

In the third claim nothing is said of the markings, but we have added the feature of the opaque material extending beyond the film and the whole wound upon the spool. The features for excluding the light when the loaded spool is outside the camera make it a "daylight loader," so called. Wound upon the spool in this manner, it may be carried about in the light freely. I find nothing new in this; nothing new in the spool with flanges; nothing new in the numbers; nothing new in superimposing the one material upon the other; and I can find no inventive skill in the combination as shown in the patent in suit in view of the prior art. It may be true that the prior art does not show a continuous strip of sensitized material or film superimposed upon a continuous strip of opaque material, but it does show this strip of opaque material with separate pieces of sensitized plate or film superimposed thereon; and to my mind the one so readily and necessarily suggests the other that no invention can be found in the substitution of a continuous strip of sensitized material. In my view, this controversy is reduced to this: the novelty, if novelty there be, consists in the backing of a series of united plates forming a continuous film upon a continuous strip of black paper or opaque material in place of a series of slightly separated plates superimposed upon such a backing of opaque material. I find no new results from the combination amounting to invention.

The alleged invention has two objects: (1) To provide means for correctly and accurately moving and stopping a continuous strip of sensitized material so as to take successive pictures upon the same strip, and enable the operator to cut such strips after removal from the camera so as to have each picture by itself uninjured, and without mutilation; and (2) to provide a holder for the above-mentioned strip of sensitized material, which, with a strip of opaque material upon which the sensitized strip is superimposed, will

serve effectually to exclude the entrance of light to the sensitized strip both on the outside and at the ends thereof, so that the roll of sensitized material when wound upon the holder can be freely carried about in any light without injury to the sensitized strip, and be placed in the camera in the field, or wherever pictures are to be taken, without the necessity of using the dark room when the roll of sensitized material is to be placed in or taken from the camera. These objects are not new. They have been in the mind of other inventors. The means employed are not new. The same idea of means is old. Improvement has been made from time to time in the sensitized material used for taking pictures. The sensitized material now used is superior to that formerly in use. The patent is not for the improved sensitized material. The success attending the use of the spool and strips of material mentioned in the patent is due more to improved construction and the improved sensitized material used than to anything else. It is quite clear that in the claims and specifications of the patent in suit we have a more extended application of the original thought which brought into use plates of sensitized material superimposed on strips of opaque material with extended ends, so that, when rolled upon a spool with flanges, the sensitized material would be excluded from the light, making a daylight loader. But the processes described in the patent in suit show a change in the prior art in degree mainly and almost entirely, and the same thing substantially is done in substantially the same way by substantially the same means. The results are the same in substance, but perhaps better.

In the patent in suit the sensitized material is protected from the light by the same means employed in the prior art for the same purpose. I think it is true that the patent in suit shows an increased protection in the combination, but in a sense this is the result of a mere aggregation of devices well known in the prior art for accomplishing the same result. The patent in suit is the employment merely of ordinary mechanical skill to adapt well-known devices and means to the accomplishment of a desired result, which had before been accomplished in substantially the same manner by substantially the same means, although in not precisely the same combination. A combination of old elements in a new way to produce a new and beneficial result or a markedly improved result may show invention. It is difficult many times to draw the line between invention and a display of mechanical skill applied in the art, but the line must be drawn somewhere, for it is not every improved mode of doing a thing by the use of well-known means that constitutes invention. I cannot do better than to call attention to the language of the court in *Hill v. Wooster*, 132 U. S. 693, at page 700, 10 Sup. Ct. 228, at page 230, 33 L. Ed. 502, and to the cases there cited at page 701 of 132 U. S., page 231 of 10 Sup. Ct. (33 L. Ed. 502). In *Klein v. City of Seattle*, 77 Fed. 200, 23 C. C. A. 114, it was held that:

"The fact that a device has gone into general use, and displaced other devices, while in some cases high evidence of invention, is not conclusive of

patentability, and is not sufficient to support a patent, where the changes made from the prior art are mere changes of mechanical construction, or of form, size, or materials."

The result is that the defendant is entitled to a decree dismissing the bill of complaint, with costs.

WILCOX & WHITE CO. v. FARRAND ORGAN CO.

(Circuit Court, E. D. Pennsylvania. July 12, 1905.)

No. 30.

PATENTS—SUIT FOR INFRINGEMENT—LACHES.

A device relating to automatic music-playing instruments was used generally by manufacturers of such instruments for more than 12 years after the issuance of a patent therefor without notice or objection from the owners of the patent, and in many cases without knowledge of it on the part of the users, and during such time large capital was invested in the business, and instruments embodying the device aggregating several millions of dollars in value were sold. Complainant, which was one of the manufacturers so using the device without right under the patent, became the owner of the patent some five years after it was issued, and continued the use of the device without marking the same patented or giving any notice of its alleged exclusive right to its competitors in business. *Held*, that it was estopped by its laches from maintaining a suit for infringement against another, who, in the meantime, had established the manufacture of instruments in which the device was used without knowledge of the patent.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Patents, §§ 468, 469.]

In Equity. Suit for infringement of patent. Argument on plea.

Harold Binney and Bartlett, Brownell & Mitchell, for complainant.

A. B. Stoughton, James Whittemore, Edward Rector, and Frank P. Prichard, for respondent.

HOLLAND, District Judge. The bill filed in this case alleges an infringement of a patent issued on the 19th day of April, 1892 (No. 473,338), for a useful improvement in automatic music-playing instruments, entitled "Automatic Governor for Pneumatic Motors." This patent was assigned to the complainant on the 24th day of November, 1897. Suit was brought against the defendant company on December 5, 1904, to which a plea was filed, and complainant set it down for argument. In doing so the complainant admits the truth of the facts well pleaded, and denies their sufficiency.

On the pleadings, as they now stand, the facts are these: Patent No. 473,338 was issued to William D. Parker, who assigned the same to Edward H. White, the assignor of the complainant, who acquired the same on the 24th day of November, 1897. The complainant, however, prior to the assignment of this patent to it or its predecessors in business, in common with other manufacturers, made and sold machines embodying this alleged invention in defiance of said patent, and without any license or right there-

under. That from and after November 24, 1897, for some years, and after the defendant began to use the instrument claimed to have been patented, the complainant herein manufactured and sold mechanical musical instruments embodying said alleged invention without marking them as patented under the said patent, and without at any time notice to others (many of whom were using said alleged invention openly, publicly, and in large numbers) of the existence of the said letters patent or the complainant's alleged rights thereunder, until August 15, A. D. 1904. That for many years prior to the filing of the bill of complaint in this cause the alleged invention of the patent in suit was in general use by manufacturers of musical instruments throughout the United States, who were either in ignorance of or who manufactured in defiance of said letters patent, and without any right or license thereunder. That the complainant and its predecessors in the ownership of the said letters patent had full knowledge of the said alleged infringement by other manufacturers for many years, but allowed said use to continue without any notice or protest whatsoever, and without any effort or attempt of any kind to assert their alleged rights under the said letters patent prior to the filing of the bill of complaint in this cause. That 21 different firms had used this alleged invention, some of them beginning with the date or issuance of said patent, and continuing down to the time of suit being instituted against this defendant, during which time much capital has been invested upon the faith of a right to use this mechanism, and that instruments had been sold by manufacturers using said alleged invention amounting in value from ten to twenty million dollars. That the defendant commenced manufacturing and selling piano players embodying the structure now alleged to infringe said letters patent No. 473,338 in the year 1900, and has continued to make such instruments to the present time, and has made and sold several thousand of said instruments, and has advertised them in all the principle magazines and in the musical papers; and that the defendant has been in direct and open competition with the complainant from the day the defendant commenced business, and the complainant has known and been familiar with defendant's machine embodying said structure at all times since the year 1900. That at the time this defendant entered upon the manufacture of piano players, it was aware of the general use of the device now alleged to be patented in the patent in suit by manufacturers of piano players and other self-playing instruments, and was not advised that any one claimed a patent thereon, but relied upon such general use, and entered upon the manufacture of such players in good faith, and without any knowledge of the existence of the patent, and received no notice of the existence of a patent until the 15th day of August, 1904, at which time a letter was received, signed by the complainant company and another, notifying the defendant that a patent was claimed, and threatening them with a suit for infringement. Upon these facts the defendant alleges that the complainant has been guilty of laches, for which reason the bill should be dismissed.

Upon these facts it appears that from April 19, 1892, to August 15, 1904, a period of more than 12 years, this patent was innocently infringed by various concerns engaged in the manufacture of musical instruments, without any action on the part of the complainant or its predecessors in ownership, and no automatic music-playing instruments manufactured by the owners of the patent were ever marked, so as to notify the public of the existence of a patent, prior to the time the defendant received notice of the complainant's claim, while at the same time there was a general use of this device by manufacturers of musical instruments, who placed the same upon the market in competition with the owners of the patent, and this complainant permitted them to do so, and remained silent until vast sums of money were expended in plants, and many million dollars' worth of these instruments were sold, and now, within four years of the expiration of this patent, it is sought to restrain this defendant from its use. It is true that mere delay in bringing suit for an infringement of a patent will not prevent the owner thereof from obtaining relief in a court of equity when the infringement has been persisted in with knowledge of the existence of the patent, and no acts of commission or omission on the part of the patentee to encourage its use; yet where the complainant itself has infringed the patent prior to acquiring ownership therein, and for 12 years the general public used it in competition with the owners, who failed to mark the device as required by law, or to give notice of the patent, thereby permitting and encouraging the investment of vast sums of money and the sale of many millions of dollars' worth of instruments, it seems to me it would be inequitable to restrain the use of this device at this late day. *Saxlehner v. Eisner*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60; *McLaughlin v. Railway Co.* (C. C.) 21 Fed. 574; *Woodmanse & Hewitt v. Williams*, 68 Fed. 489, 15 C. C. A. 520; *Meyrowitz v. Eccleston* (C. C.) 98 Fed. 437; *Edison E. L. Co. v. Ass. Soc.* (C. C.) 55 Fed. 478; *Starrett v. Athol Co.* (C. C.) 96 Fed. 244.

What has been said applies to this case as it is presented on the issue joined on the plea to the bill, but as the complainant is entitled to reply or amend its bill (*U. S. v. Dalles*, 140 U. S. 599, 11 Sup. Ct. 988, 35 L. Ed. 560) the question as to whether the allegations contained in the plea can be sustained must, of course, be left to future developments.

The order of the court is that the complainant be permitted to reply or amend its bill on or before August 1, 1905; otherwise the plea will be sustained.

POPE MFG. CO. v. H. P. SNYDER MFG. CO. et al.

(Circuit Court, N. D. New York. July 12, 1905.)

No. 6,830.

PATENTS—INVENTION AND INFRINGEMENT—BICYCLES.

The Smith patent, No. 392,973, claims 1 and 6, for an improvement in bicycles, which consists in building the transverse tube for receiving the pedal shaft rigidly into the frame, so as to form an integral part thereof, embody an invention of the patentee, and disclose patentable invention, in view of the prior art. Also *held* infringed.

In Equity.

Suit in equity to enjoin alleged infringement of claims 1 and 6 of United States letters patent No. 392,973, dated November 13, 1888, and issued to the Smith National Cycle Manufacturing Company as assignee of William E. Smith, the patentee, for bicycle (application filed February 16, 1888), and for an accounting. The suit was originally brought by the American Bicycle Company, but the present complainant, above named, by various assignments, has become the owner of the patent and of all rights of action. Some of the original defendants are out of the litigation, and others have come in, but these changes do not affect the questions now before the court. The defenses urged are: William E. Smith was not the inventor; anticipation by the prior art; the claims in controversy (1 and 6) show no patentable invention, in view of the prior art.

Redding, Kiddle & Greeley (William A. Redding, Edmund Wetmore, and Frederic H. Betts, of counsel), for complainant.

James Harold Warner (Philip C. Dyrenforth, William H. Dyrenforth, and Alfred C. Wilkinson, of counsel), for defendants.

RAY, District Judge. The claims in controversy (1 and 6) read as follows:

"(1) In a rear-driving front-steering bicycle, the frame or reach provided with the rigid transverse tube, c, built rigidly into and forming an integral part of said frame, and adapted, substantially as described, to receive the pedal-shaft."

"(6) In a frame for bicycles and kindred machines, a transverse shaft-receiving tube, c, provided with necks, c⁸ and c⁹, to receive the front and rear ends of the frame or reach."

This patent is not for a "bicycle," but for "certain improvements in bicycles." The specifications say:

"The invention consists in various details of construction, hereinafter described, relating more particularly to the main frame, to the several bearings for the shafts, and to means for adjusting the tension of the driving-chain and securing alignment of the wheels."

It relates mainly to the so-called "safety bicycles"—those with two large wheels, one directly in front of the other, and of about the same diameter. The rear wheel is the driving wheel; the front one, the steering wheel. There is a frame or reach connecting the two. The rear end of this reach is supported by the driving wheel, while the forward end is pivotally supported by the steering wheel. This frame or reach has a pedal shaft, which is supported between the two wheels; also a saddle, on which is seated the rider, supported between the two wheels, and, of course, indirectly by the two wheels. This frame or reach has a driving mech-

anism between the pedal shaft and the hub of the driving wheel, and connected therewith, for transmitting the power from the pedals to the driving wheel. An upward extension of the reach or frame supports the saddle, and, of course, the rider, while an upward extension further to the front supports the steering handles and apparatus.

Counting from the rigid transverse tube mentioned in claim 1, adapted to receive the pedal shaft, the frame or reach there referred to has a forward part extending from such transverse tube to the steering head (connected with and supported by the steering wheel), and a rearward part extending from the transverse tube to the hub of the driving wheel and its axle. This rearward part is forked. As I understand the claims, these forward and rearward parts may be constructed as one, integral; but at the point where they join we have the transverse pedal shaft tube, for receiving the pedal shafts, built in rigidly in such a way, anyway, so as to make the whole combination rigid and substantially integral. It would seem permissible in claim 1 to construct the rigid transverse tube for receiving the pedal shaft of one piece, the forward part of the reach or frame of another, and the rearward part thereof of still another; but when completed, they are to be made one whole, integral, by welding or screwing together so as to form a substantial, rigid reach or frame, provided with the rigid transverse tube built therein. In claim 2 we have, not the frame or reach, provided with the transverse tube built into and forming a part thereof, but the "transverse shaft-receiving tube," provided with necks "to receive" the before-mentioned forward and rearward parts of the frame or reach. I do not see how this "transverse shaft-receiving tube" is a part of the reach or frame until the "front and rear ends of the frame or reach" are inserted into it, or until it has received such front and rear ends of the frame or reach. In short, claim 1 is for the frame or reach provided with the rigid transverse tube built rigidly into and forming a part thereof, while claim 2 is for the transverse shaft-receiving tube provided with necks adapted to connect it with the frame or reach, which, until the connection is made, must necessarily be in two parts, the front end and the rear end, spoken of in claim 2 as "the front and rear ends of the frame or reach." In both claims, when the structure is complete, the transverse tube is between the wheels, and at the junction of the front and rear ends, respectively, of the reach or frame, and "built rigidly into and forming an integral part of said frame" or reach, but in such a manner as to be adapted to receive the pedal shaft. The particular manner of building the "transverse tube" into the frame or reach is not specified in claim 1. It is in claim 2. It is evident that both require a construction where the parts are integral, and where the transverse tube for receiving the pedal shaft is not attached to, or built and attached outside of, or made dependent from, or an exterior attachment of, the reach or frame. The idea is to make it integral with the reach or frame; to make it solid with and to have it built into the reach or frame at a certain point, and in such a way as to add

strength to the structure. It is true, however, that in the specifications of the patent we find this:

"When the frame is made in the particular form herein shown, the bearing-tube, c, will also have two horizontal necks, extending, respectively, forward and rearward, as shown at c⁸ and c⁹ in Fig. 14, to enter the front and rear portions of the frame. When thus constructed, the bearing-tube and its necks serve as a means for uniting the two parts of the main frame or reach. When, however, the frame is of the usual shape, it may be made continuous from end to end, and the tube applied transversely to its upper or its under side."

This does not limit claims 1 or 6 of the patent. It is merely a permissible form of construction, a form of construction permitted by other claims of the patent—claim 3, for instance, where it is said, "In a bicycle or kindred machine, the reach having the transverse tube, c, rigidly combined therewith," etc. The words "rigidly combined" do not necessarily mean "built rigidly into and forming an integral part of said frame," which is the language of claim 1.

The prior art and experience, and even observation alone, afford proof that in a bicycle the frame or reach and the support of the pedal shaft, which sustains, in part, at least, the weight of the rider and the force applied to the pedals, are subjected to great strain. This demands a structure of great strength, but it must not be heavy. We must provide great strength with the least possible weight. The location of the pedal shaft support and the manner of its attachment in or to the machine is of prime importance. The parts must maintain their alignment and proper relations, or there will be excessive wear and friction, and the machine will become useless, or in need of constant repair and replacement of its parts. The necessity of a wholly tubular pedal shaft, the exclusion of dust, etc., has not been lost sight of. Prior to Smith's patent inventors and users of bicycles had these facts and others of a kindred nature in mind, and attempts were made to overcome these objections and defects. The art had not reached perfection, nor did it attain perfection when the improvements of the Smith patent came into use, but with his invention it made a vast stride. The evidence and exhibits in this case are voluminous, and have demanded and received careful study and consideration. The defense of prior use by James and Stanley, by Robert S. Crawford, and by Alfred J. Gould is not made out to my satisfaction. There is considerable evidence, but it is not sufficiently convincing to come within the adjudicated cases.

In view of the prior art, to which I have given careful attention, I must find patentable invention. The experts differ; the evidence conflicts; some of the patents and illustrations in the prior art throw doubt on the question, does not the prior art disclose the same construction shown in claims 1 and 6? But it is not sufficient to satisfy the mind. The evidence is too misty and uncertain, and the presumption of validity is not overcome. The device of Smith, who I find was the inventor, went into general and extensive use, and superseded the older devices. That defendants infringe is beyond any question whatever.

The complainants are entitled to a decree adjudging the validity of the claims in question, infringement, and for an accounting, with

costs. But care must be taken in preparing the decree not to include any defendant who has arranged a settlement. Let notice of the settlement of the decree be given to all concerned.

In re TICE.

(District Court, M. D. Pennsylvania. June 29, 1905.)

No. 582.

1. BANKRUPTCY—CONDITIONAL SALE—VALIDITY AND EFFECT.

The validity of a contract reserving title in the seller to property in possession of a bankrupt is to be determined by the local law.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1323.]

2. SAME—LAW OF PENNSYLVANIA.

Under the law of Pennsylvania a reservation of title in a contract under which goods are delivered to another until the purchase price shall have been paid is void as against creditors of the person in possession, whatever may be the form of the contract, if it is essentially one of conditional sale, and not of bailment.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 444; vol. 43, Cent. Dig. Sales, §§ 1391-1402.]

3. SAME—CONSTRUCTION OF CONTRACT—SALE OR LEASE.

Machinery was delivered to a bankrupt under a contract which provided that he should pay certain varying sums at irregular intervals as rent for the same, and that on a final small payment he should be entitled to a bill of sale. There was no provision for the return of the machinery aside from one giving the privilege of retaking it on default in making any of the payments. *Held*, that under the law of Pennsylvania such contract was one of conditional sale, and not of bailment, and that the property was assets of the bankrupt estate.

In Bankruptcy. On exceptions to decision of John M. Wilson, referee, sur petition of Good Roads Machinery Company, for the reclamation of property.

Addison Candor, for claimant.

Howard T. Janney, for trustee.

ARCHBALD, District Judge. It is admitted that the property in question was delivered to the bankrupt under the following agreement, and that the right of the claimant depends upon the construction to be given thereto.

Howard, Pa., June 1, 1904.

Good Roads Machinery Co.
Kennett Square, Pa.

C. M. Tice,

Oak Grove, Clinton Co., Pa.

Care N. Y. C. R. R.

About June 10.

Rent Contract.

1. No. 4 Champion Rock Crusher, one set Mountings and Brake, one 16 ft. Elevator, one Twelve Ton Bin, one 32"x7 ft. Revolving Screen. C. M. Tice to pay freight on above machinery and to pay rent for use of same as follows: \$200 in cash, the receipt of which the Good Roads Machinery Co. hereby acknowledges for rent from receipt of machinery till May 1, 1905; on May 1, 1905, * * * to pay \$100 for rent till July 1, 1905; on July 1, 1905, to pay \$100 for rent till Aug. 1, 1905; on August 1 to pay \$100 for rent till

Sept. 1, 1905; on September 1 to pay \$100 for rent till Oct. 1, 1905; on October 1, 1905, to pay \$50 for rent till May 1, 1906; on May 1, 1906, to pay \$100 rent for mach. till June 1, 1906; on June 1, 1906, to pay \$200 for rent till July 1, 1906; on July 1, 1906, to pay \$100 for rent till September 1, 1906; on Sept. 1, 1906, upon further payment of \$100 Good Roads Machinery Co. agree to give C. M. Tice bill of sale of above machinery, Good Roads Machinery Co. to have privilege of taking machinery if rent is not paid within 60 days from times due.

J. C. Lawrence, Agt. for Good Roads Machinery Co.
C. M. Tice.

The character of this instrument is to be determined by the local law. *Hewitt v. Berlin Iron Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; *In re Butterwick* (D. C.) 131 Fed. 371. By a long line of decisions the courts of Pennsylvania are committed to the general doctrine that the delivery of goods with a provision that the title shall not pass until the purchase price has been paid is void as to creditors of the party to whom they are delivered. *Martin v. Mathiot*, 14 Serg. & R. 214, 16 Am. Dec. 491; *Chamberlain v. Smith*, 44 Pa. 431; *Brunswick v. Hoover*, 95 Pa. 508, 40 Am. Rep. 674; *Farquhar v. McAlevy*, 142 Pa. 233, 21 Atl. 811, 24 Am. St. Rep. 497; *Ott v. Sweatman*, 166 Pa. 217, 31 Atl. 102; *Morgan Electric Co. v. Brown*, 193 Pa. 351, 44 Atl. 459. And it is also declared that the essential character of the transaction will be regarded, rather than the particular form which it assumes. *Brunswick v. Hoover*, 95 Pa. 508, 40 Am. Rep. 674; *Ott v. Sweatman*, 166 Pa. 217, 31 Atl. 102; *Hervey v. Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003. Notwithstanding this, however, there have been so many refinements and distinctions, as well as conflicting, if not contradictory, deliverances, that it is not always easy to determine whether any given transaction is, on the one hand, a conditional sale, or, on the other, a bailment. It has been held, for instance, to be of the essence of a bailment that there shall be a return of the property. *Stephens v. Gifford*, 137 Pa. 219, 20 Atl. 542, 21 Am. St. Rep. 868. And that this must therefore be stipulated for. *Farquhar v. McAlevy*, 142 Pa. 233, 21 Atl. 811, 24 Am. St. Rep. 497; *Morgan Electric Co. v. Brown*, 193 Pa. 351, 44 Atl. 459. But the necessity for such a stipulation is denied in *Enlow v. Klein*, 79 Pa. 488, and *Edwards' Appeal*, 105 Pa. 103; stress being laid in the latter case, however, on provision for a definite term; while in *Stiles v. Seaton*, 200 Pa. 114, 49 Atl. 774, it is declared that neither a stipulation for the return of the property, nor a definite term, is necessary, although both are admitted to be important, and the absence of them sometimes controlling.

Disposing, then, of the case in hand as best we may, the question is as to the character of the writing under which the property was delivered to the bankrupt. It is to be observed that, although it is called a "rent contract," and the party to whom the possession was given is "to pay rent for the use of the same" in certain installments, covering specified periods, there is no actual hiring or leasing in so many words, nor anything beyond what has been mentioned, to make that out of it. If it is a contract of bailment, in other words, it is such not by direct provision, but by implication only. In view of this, the failure to provide for a return of the property, and the

absence of a definite term, even under the authority of *Stiles v. Seaton*, *supra*, are significant. It is true that rent, so called, is to be paid up to a certain time, which may thus be said to determine the life of the contract. But the question is, what is to happen after that, and why, if a return was contemplated, was it not provided for? On the basis that the payments to be made are rent—up to the last one, which is not so denominated—it is somewhat peculiar that no rate per month or year is given by which to continue the arrangement in force; and it is thus brought to an end without any provision for its extension, or for a return of the property, other than the general right which the owner would have to get it back. No doubt, under the contract, if the installments of rent which are there spoken of remain unpaid for 60 days after they severally become due, the machinery company may take the property. But, as was said in *Morgan Electric Co. v. Brown*, 193 Pa. 351, 44 Atl. 459, this is evidently for the purpose of enforcing payment, rather than securing the property at the end, and is entirely consistent with the idea of a conditional sale. The case, as it seems to me, comes as near as any to that of *Farquhar v. McAlevy*, 142 Pa. 233, 21 Atl. 811, 24 Am. St. Rep. 497, where the contract was declared to be of that character. There is no delivery here of the goods in trust for a certain purpose, upon the accomplishment of which they are to be returned again, which is of the essence of a bailment. On the contrary, they are turned over indefinitely, for no apparent purpose, the only thing stipulated for being the payment of certain sums at certain times. It is true that these are declared to be for the use of the property; but so they were in *Farquhar v. McAlevy*, 142 Pa. 233, 21 Atl. 811, 24 Am. St. Rep. 497, and yet that was not enough to save it. In the final analysis, and looking to the substance of the agreement, it amounts to nothing more than this: that upon the payment of the installments which are there provided for, by the party to whom the property is delivered, he is to become absolutely entitled to it. This is not an option, superadded upon an intermediate bailment, to come into effect upon certain conditions at its close, as in *Myers v. Harvey*, 2 Pen. & W. 478, 23 Am. Dec. 60, but it is an essential and controlling feature of the transaction from the outstart, upon which the possession of the property was parted with. If this be so, it is difficult to see how we can escape the conclusion that it was a sale, and not a bailment, subjecting the property to the claims of creditors. If it was not so intended, it would have been easy to have provided otherwise, and the parties have only themselves to blame. The burden in every such case is upon the one who asserts the contrary, and the contract is to be construed most strongly against him, which in case of doubt would be sufficient to turn the scale.

The exceptions are overruled, and the report of the referee recommending the dismissal of the petition is confirmed.

UNITED STATES v. JOHNSON & FAULKNER.

(Circuit Court, S. D. New York. February 15, 1905.)

No. 3,466.

CUSTOMS DUTIES—CLASSIFICATION—JACQUARD FIGURED GOODS.

Held, that silk goods woven on Jacquard looms, with broad and narrow stripes, the body between having a watered effect, are within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 391. 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], for "Jacquard figured goods" of silk.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,507, T. D. 24,831, which reversed the assessment of duty by the collector of customs at the port of New York on goods imported by Johnson & Faulkner. The opinion filed by the board reads as follows:

DE VRIES, General Appraiser. The merchandise the subject of these protests consists of figured upholstery and drapery fabrics, returned for duty under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 387, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1669], at the rates of 90 cents and \$1.30 per pound, as woven fabrics of silk in the piece, not specially provided for, according to weight, etc. They are claimed by the protestants to be properly dutiable, under the provisions of paragraph 391 of said act (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]), at 50 per cent. ad valorem, as Jacquard figured goods in the piece, silk the component material of chief value, which paragraph, in so far as pertinent, provides:

"391. * * * And all Jacquard figured goods in the piece, made on looms, of which silk is the component material of chief value, dyed in the yarn, and containing two or more colors in the filling, fifty per centum ad valorem."

These goods are woven with broad and narrow silk stripes of a satin appearance, between which stripes appears the plain body of the fabric, having a watered effect, and being a grosgrain stripe. Upon the theory that goods woven with this striped and watered design were not "figured," within the provisions of paragraph 391, quoted, return was made that these goods were woven on the Jacquard loom, having two colors in the filling, but not figured. In our opinion, the word "figured" in this connection is used in contradistinction from the word "plain." Goods having a design of any character whatsoever would be figured as opposed to plain.

In view of the fact that the statute suggests no intermediate effects between plain and figured goods, we are of the opinion that it must be assumed that Congress contemplated none such. All goods not plain must be within the description of figured, and these clearly could not be appropriately characterized as plain. Moreover, the paragraph (391) speaks of "Jacquard figured" goods. While all figures are not produced by the Jacquard machine, the converse is true, that it is used solely to produce figures and figured effects, and its employment ex necessitate results in a Jacquard figure, within the meaning of paragraph 391, wherever and whenever employed.

It is admitted by the appraiser in his return that these goods have been manipulated by the Jacquard loom, and for that reason it would seem to follow that the effect produced is a figured effect.

We find from the record in these cases and samples produced that this merchandise consists of upholstery and drapery materials composed in chief value of silk, dyed in the yarn and containing two or more colors in the filling and having figured effects produced by the Jacquard process.

We hold that they are properly dutiable as claimed. The protests are sustained, and the decision of the collector in each case is reversed, with instructions to reliquidate the entries accordingly. G. A. 5,000, T. D. 23,309.

Charles Duane Baker, Asst. U. S. Atty.
W. Wickham Smith, for importers.

WHEELER, District Judge (after stating the facts). These goods fall within paragraph 391 of the act of July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], if they are "Jacquard figured." They appear to have been woven on Jacquard looms, with broad and narrow silk stripes, and with body between having a watered effect. The description is not of figures of any particular style, form, location, or separation. The stripes appear to be separate figures of that form, and with them the goods are not plain, but figured, and, being done on a Jacquard loom, are Jacquard figured.

Decision affirmed

UNITED STATES v. SEID BOW.

(District Court, D. Vermont. June 9, 1905.)

CHINESE EXCLUSION—PERSONS SUBJECT TO DEPORTATION—MERCHANT BECOMING LABORER.

A Chinese person who before, during, and for a long time after the time when Chinese laborers were required by the exclusion acts to register was lawfully domiciled in the United States as a merchant is not subject to deportation thereunder on subsequently becoming a laborer.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Aliens, § 77.]

Appeal from Commissioner's Order of Deportation.

Peter F. McManus, for appellant.
James L. Martin, U. S. Atty.

WHEELER, District Judge. The appellant is of the Chinese race, born in China. From 1892 to 1898 he appears to have been a partner in the firm of Quong Ying Lung, doing Chinese grocery business, in the capital stock of which his share was \$500. Thus he was a merchant, within the definition of the Chinese exclusion acts (Act Sept. 13, 1888, c. 1015, 25 Stat. 476 [U. S. Comp. St. 1901, p. 1312]), before, during, and for a long time after the time in which Chinese laborers were required to register in order to be entitled to remain in the United States. *Tom Hong v. U. S.*, 193 U. S. 517, 24 Sup. Ct. 517, 48 L. Ed. 772. After the expiration of that time there was no law requiring registration of laborers for lawfully remaining in the United States. When he ceased to be a merchant in 1898 he became a laborer, within the definition of the same acts, and, although he has remained such ever since, he has been domiciled lawfully here. Since then he has not been subject to deportation, and is now entitled to be discharged from these proceedings, according to that decision.

Appellant discharged.

FELTY v. NATIONAL ACCIDENT SOC.

(Circuit Court, E. D. Pennsylvania. June 14, 1905.)

No. 4.

PLEADING—DEFECTS IN STATEMENT OF CLAIM—WAIVER BY PLEADING TO MERITS.

Under the Pennsylvania practice the filing of an affidavit of defense to the merits is a waiver of any objection to formal defects or imperfections in the statement of claim.

At Law. On demurrer to statement of claim.

Andrew J. Maloney, for plaintiff.

A. W. Schalck, for defendant.

J. B. McPHERSON, District Judge. For present purposes it may be admitted that the statement is defective in several particulars, and that an objection thereto, if seasonably made, would have been sustained. The defects are amendable, however, for the subject-matter of the suit is within the jurisdiction of the court of common pleas of Schuylkill county, in which the action was originally brought, and of the circuit court; and, if the writ was properly served upon the defendant, both courts had jurisdiction of the parties also. If, therefore, the omissions pointed out by the defendant should be supplied, a good cause of action would be presented by the statement. But in my opinion no amendment is necessary at present, for reasons now to be stated. The suit was brought on November 10, 1894, and the statement was filed on November 19th. Its defects were immediately apparent, but, instead of demurring promptly, the defendant chose to file an affidavit of defense on the merits. This was done on December 15th, and was followed at once by an attack on the service of the writ, which was not concluded until April 9, 1897, when the court of common pleas refused to set aside the service. Application was then made to remove the cause to this court, and on April 26th the order of removal was made. On October 6, 1897, the pending demurrer was filed, nearly three years after the defects in the statement were known to the defendant, and more than seven years later the demurrer was argued. It is true that in the affidavit of defense the following sentence is to be found:

"This affidavit is filed under protest, and simply to save being defaulted for want of such affidavit of defense, the defendant reserving the right to move to quash the writ, or to set aside the service thereof, and other preliminary motions."

But this attempted reservation of right had no effect. The defendant was not bound to file an affidavit of defense to a statement that did not set forth a good cause of action. The proper course was to demur, or to move for a more specific statement, and there could have been no default if either course had been taken. But the defendant elected to proceed at once to the merits, and this was a waiver of objection to the imperfect statement. Further discussion is unnecessary, since the point has been expressly decided by

the Supreme Court of Pennsylvania in *Heller v. Ins. Co.*, 151 Pa. 101, 25 Atl. 83. Two of the common pleas courts of the state have repeated this ruling: *Wagner v. Smith*, 11 Pa. Dist. R. 662; *Pittsburg, etc., R. R. Co. v. Hayes*, 13 Pa. Dist. R. 671.

The demurrer is overruled, and the defendant is ordered to plead on or before June 26th.

SCHOELLKOPF, HARTFORD & HANNA CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 23, 1905.)

No. 3,549.

CUSTOMS DUTIES—CLASSIFICATION—PARAFFIN—PETROLEUM PRODUCTS—COUNTERVAILING DUTY.

In construing paragraphs 626, 633, § 2, Free List, Tariff Act July 24, 1897, c. 11, 30 Stat. 199, 200 [U. S. Comp. St. 1901, pp. 1685, 1686], providing, respectively, for a countervailing duty on "products of crude petroleum" and for the free entry of "paraffin," *held* that the latter is the more specific, and governs the classification of paraffin, even though it be a product of crude petroleum.

On Application for Review of Decisions of the Board of United States General Appraisers.

The decisions reviewed affirmed the assessment of duty by the collector of customs at the port of New York on importations by the Schoellkopf, Hartford & Hanna Company. Note G. A. 5,658, T. D. 25,237.

Comstock & Washburn (Albert Comstock, of counsel), for importers.

Charles Duane Baker, Asst. U. S. Atty.

WHEELER, District Judge. Paragraph 626 of the free list of the act of 1897 (Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685]), "Oils," makes a great number and variety of oils free, ending with petroleum, crude or refined, with a proviso for a countervailing duty on "crude petroleum or the products of crude petroleum." Paragraph 633, 30 Stat. 200 [U. S. Comp. St. 1901, p. 1686], puts "paraffin" on the free list. This importation is of paraffin in two forms—liquid, which is a direct product of petroleum; and malle, which is a product of petroleum and a wax. As paraffin is one of many products of petroleum, it is more specific in description than the general words covering petroleum and its products, and placing it in the free list by that specific name would seem to distinguish it from other products of that kind, and to make that distinctively free. This is not contrary to the reasoning in *Ropes & Co. v. United States* (C. C.) 123 Fed. 990, for neither paraffin nor anything specifically named in the free list was there involved. No reason is apparent why such construction as to what is most specific should not prevail as well concerning countervailing duties and the free list as elsewhere in the tariff laws.

Decision reversed.

THE KENILWORTH.

(District Court, E. D. Pennsylvania. June 20, 1905.)

No. 45.

SEAMEN—INJURY IN SERVICE—LIABILITY OF SHIP FOR MAINTENANCE.

A vessel cannot be held liable for the maintenance of an injured seaman beyond the term of the voyage, and after the ordinary medical and surgical resources for his cure have been exhausted.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, §§ 39-43, 187.]

In Admiralty. Suit by seaman against vessel. See 137 Fed. 1003.

Joseph Hill Brinton, for libelant.

Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. In accordance with the permission recently given, some further testimony has been taken by the libelant, but I do not think the situation has been materially changed thereby. It still appears that when the libelant left the hospital at Baltimore he was practically as well as he is now, or is ever likely to be; the ordinary medical and surgical means could do nothing more for him. I see no sufficient ground, therefore, upon which to rest the award for which he asks. Some of the decisions hold that the ship's liability for maintenance and wages in case of a seaman's injury or illness ceases with the voyage; others intimate that under exceptional circumstances the liability might continue, at least for a reasonable time, after the voyage had been completed. A full discussion of the subject will be found in *The City of Alexandria* (D. C.) 17 Fed. 390. Either test is a bar to the present claim against the ship. His board has been paid by the Seaman's Union, not by himself, and the same organization has also paid \$50 for a surgeon's opinion, obtained in January, 1905, to the effect that the leg could not be broken again and reset so as to make a perfect cure. Neither sum appears to be an obligation which the libelant is bound to meet. The union called in the surgeon and was obliged to pay him, and the money paid out for board is not regarded as a debt due by the libelant. The agent of the union testified:

"Q. Is the money that you have paid out for Krelly a gift?

"A. No, sir.

"Q. What is the regulation as to that?

"A. The money is advanced, with the expectation that any time he is able to he will pay it back to the organization.

"By Mr. Edmunds: Q. And if he is not able to pay it back, you don't expect him to pay it back?

"A. Oh, no; of course you can't get it.

"Q. Then you don't expect it?

"A. No."

But entirely aside from this, and without laying stress upon the charitable nature of the aid that has thus been given him, these expenditures were all made after the libelant's return to Philadelphia,

in 1904, when the ordinary medical and surgical resources had been exhausted. The equitable claim of the union for reimbursement cannot rise higher than the libellant's own right.

A decree may be entered dismissing the libel, but without costs.

MINARD v. DELAWARE, L. & W. R. CO.

(Circuit Court, D. New Jersey. June 30, 1905.)

1. DEED—CONSTRUCTION—COVENANTS—CONDITIONS.

In an action in ejectment, brought by a grantor to recover possession of land, because certain provisions in his deed, alleged to be conditions subsequent, had been violated by the grantee's assigns, *held*, that whether the provisions of the deed referred to are covenants or conditions is to be ascertained by a construction of the entire deed for the purpose of ascertaining therefrom the intention of the parties, and this regardless of the technical meaning of the terms employed; and that, if it appear doubtful whether the terms used import covenants or conditions, courts of law always incline to construe them to be covenants, in order to avoid a forfeiture of the estate.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 469, 471, 472.]

2. SAME—CLAUSE OF REVERTER.

Held, also, that where, as in this case, a clause of reverter was found in the deed, it would, in order to give it effect, control the construction of the deed to the extent of making the undertakings of the grantee, so far as the same were included in the reverter, conditions subsequent, rather than covenants.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 471.]

3. SAME—BREACH BY GRANTEE.

Held, further, that the admitted breaches of the grantee's undertakings in this case were not embraced in the reverter, and that, inasmuch as it included some of the undertakings of the grantee, such undertakings as it did not include must be construed to be covenants.

(Syllabus by the Court.)

In Ejectment. Tried before the court without a jury upon a state of facts agreed upon.

William J. Kearns, for plaintiff.

Conover English and Robert H. McCarter, for defendants.

CROSS, District Judge. The following is the state of facts agreed upon, the same being entitled in the cause and signed by the attorneys of the respective parties:

"It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the above-entitled cause shall be tried by the court without a jury, trial by jury being hereby expressly waived, and that at the trial the following state of facts shall be submitted to the court as the agreed state of facts upon which this case shall be heard:

"First. The deed dated February 6, 1871, between Dayton A. Minard and Amanda C., his wife, party of the first part, and the New Jersey West Line Railroad Company, party of the second part, is admitted to have been duly signed and executed, and the same may be offered in evidence by either party, without objection.

"Second. Dayton A. Minard was the owner and in possession of the property described in the said deed on the date of the said conveyance, to wit, February 6, 1871.

"Third. Dayton A. Minard's grantor was the owner and in possession of the property described in the deed given by Minard and wife to the New Jersey West Line Railroad Company on February 6, 1871, at the time of the conveyance of the said property to the said Dayton A. Minard.

"Fourth. The description of the property set forth in the summons and declaration served in the above-entitled cause is correct, and properly describes the premises conveyed to the New Jersey West Line Railroad Company by the plaintiff herein on February 6, 1871, and that the defendant herein is now in possession of the same.

"Fifth. On May 9, 1904, and at divers times before and after that date, certain passenger express trains operated and managed by the defendant herein did not stop at the station at Basking Ridge, New Jersey, but did stop at the Bernardsville Station, to wit, trains from Gladstone to New York, leaving Bernardsville for New York at 7:25 a. m. and 8:25 a. m. And trains leaving New York for Bernardsville at 3:50 p. m. and 4:50 p. m. did, on the date aforesaid, pass the Basking Ridge Station without stopping, and did stop at Bernardsville, and from thence on to Gladstone.

"Sixth. The station house at the defendant's station at Basking Ridge is not as large and complete as the station house of the said defendant at Bernardsville.

"Seventh. The station house at Bernardsville of the defendant herein stated is less than three miles distant from the station of the defendant at Basking Ridge.

"Eighth. That Dayton A. Minard, the plaintiff herein, on February 6, 1871, was the owner of a large farm or tract, of which the property described in the said deed and conveyed by him to the New Jersey West Line Railroad Company was a part. This farm or tract at the time of the said conveyance surrounded on every side the property described in the said deed.

"Ninth. At the time of the commencement of this suit, to wit, July 25, 1904, and for a long period prior thereto, the said Dayton A. Minard, the plaintiff herein, had conveyed away all his right, title, and interest to the property originally owned by him surrounding and abutting upon the premises described in the said deed given by him on February 6, 1871, to the New Jersey West Line Railroad Company.

"Tenth. The plaintiff herein, prior to the institution of this suit, did lay out, open, and dedicate to the public the streets and highways mentioned in the said deed, and set forth on the map thereto annexed.

"Eleventh. The printed book or pamphlet entitled 'Incorporation, Laws and Leases, Passaic and Delaware Railroad Company, 1865-1886,' contains true copies of the acts, deeds, leases, etc., by which the Delaware, Lackawanna & Western Railroad Company, the defendant herein, came into possession and control of the property described in the plaintiff's summons and declaration. The said printed book or pamphlet may be offered in evidence by either side without objection."

The declaration is in the ordinary form in ejectment, and alleges that the plaintiff's right to the possession of the premises therein described accrued May 29, 1904. The plea is not guilty.

At the trial the plaintiff offered in evidence the deed referred to in the above stipulation, being a deed made by Dayton A. Minard and wife to the New Jersey West Line Railroad Company, dated February 6, 1871, which is in form a deed of bargain and sale, containing a covenant against the grantor's acts, the habendum being to the party of the second part, their executors and assigns, forever, for railroad purposes only, and conveying a strip of land at Basking Ridge, Somerset county, N. J., 150 feet wide and 663 feet long, with parallel sides, being 100 feet in width on the easterly side of the center line of said New Jersey West Line Railroad and 50 feet in width on the westerly side of said center line, which center line is therein particularly described. The tract of land above de-

scribed is now in the possession of the defendant herein under and by virtue of certain foreclosure proceedings, deeds, and leases which appear in the book offered in evidence, pursuant to paragraph 11 of the statement of facts, but which it is unnecessary to set forth in detail. There was no pecuniary consideration expressed in the deed, but it was recited to be "in consideration of the covenants on the part of the party of the second part" therein contained.

It is claimed on the part of the plaintiff that upon a true construction of said deed it will appear that certain conditions subsequent therein contained have been broken, whereby the title to the said premises has reverted to the plaintiff. This position is denied by the defendant corporation, which insists that the clauses of the deed which the plaintiff claims have been broken are covenants, or that the only conditions contained in the deed are specified in the clause of reverter, and that these have not been broken. By referring to the stipulation it will be seen that the alleged breaches, briefly stated, consist in the fact that the station house on the land in question is not as large and complete as the station house at Bernardsville, which is less than three miles distant from the station at Basking Ridge, and that certain passenger express trains operated and managed by the defendant, which stop at Bernardsville, do not stop at the station at Basking Ridge. In order to a proper understanding of the case, it will be necessary to set forth at length the parts of the deed which show the alleged conditions or covenants claimed to have been violated. They are as follows:

"This conveyance however is made subject to the right now and hereby especially reserved by the party of the first part hereto, to lay out, open, maintain, and dedicate to the public, two public roads or highways, sixty feet in width, across the said tract of land as shown on said map, which public roads when so laid out, opened and dedicated, shall be considered in all respects, at all times, and for all purposes the same as if they had been laid out and opened as highways by the public authorities, previous to the location of said Rail Road.

"And the party of the first part covenants and agrees with the party of the second part, that he will open and dedicate to the public as highways, as well the two strips of land, as also, a strip of land on the West side of the premises hereby conveyed, of eighty feet in width and about three hundred and thirty feet in length, and one on the East side thereof, forty feet in width and six hundred and sixty feet in length.

"All of which appears on said map which is hereto annexed, and made part of this conveyance and agreement.

"And the said party of the second part for themselves, their successors and assigns, in consideration of the foregoing conveyance, covenant and agree to and with the said party of the first part, his heirs and assigns, as follows: and this conveyance is made upon the express consideration, agreement and condition, that, the said party of the second part, shall and will, as soon as their Rail Road shall be so far completed as to be in use for public purposes in the neighborhood of Basking Ridge in said County of Somerset, erect and forever thereafter maintain a first class station house for Rail Road passengers on said strip of land hereby conveyed, on the West side of the centre line aforesaid, and between the two new streets above mentioned, and will always thereafter cause to stop at said station to take up and set down passengers, all such passenger trains on its said Rail Road, as shall stop for that purpose at any other station on said Rail Road, within three miles of the station so to be erected, on the hereby granted premises, and that said station shall be erected and maintained of suitable size and with suitable conveniences, and as large and complete as any other station house on the said Rail Road.

within three miles thereof; and shall be erected and always be maintained on the West side of said centre line, and never on the East side thereof. And that said party of the second part, their successors and assigns, will at all times so arrange the running and stopping of its trains, and will at all times so arrange the same, as to afford the same accommodation and facilities to travelers and passengers at the station so to be erected and maintained on the hereby granted premises, as are afforded at any other stations on said Rail Road, within three miles thereof.

"And further, that the said party of the second part, their successors or assigns, shall never knowingly cause or permit the hereby granted premises or any part thereof, to be used for any purpose other than Rail Road purposes, such as Rail Road tracks, switches, stations, and freight houses, locomotive berths and repair shops, and shall never knowingly cause or permit any portion of the same, or of any erection thereon, to be used for the sale or other disposal of any cider, ale, beer, brandy, spirits, whiskey or other intoxicating fluid or beverage of any kind whatsoever, and shall never knowingly cause or permit any such fluid or beverage to be sold or other wise disposed of thereon, but this stipulation and condition shall not prevent the receipt and transportation of the said fluids and beverages as freight, over the said Rail Road.

"And if at any time the said party of the second part, successors or assigns, shall knowingly cause or permit the premises hereby conveyed or any erection thereon to be used for any of the purposes hereinbefore provided against, and forbidden, or shall knowingly cause or permit any such intoxicating beverages or fluids to be sold or otherwise disposed of thereon, then and in such case the right and title hereby conveyed shall cease and determine, and the said tract of land and premises, and all right and title therein shall revert and return to, and become vested in the said party of the first part, his heirs and assigns, in all respects the same as if this conveyance had not been made.

"And further that the said party of the second part, shall never cause, suffer or permit any freight house, engine house, repair shop or building, other than a passenger station house to be erected on the West side of said centre line, or use the Westerly side of said strip of land for taking up or putting down, or handling freight or any other object of Rail Road traffic, except passengers and their baggage, and express goods carried by passenger trains."

Whether the terms of the deed under consideration are conditions or covenants is to be ascertained by a construction of the entire deed for the purpose of ascertaining, if possible, the intention of the parties. Terms which, taken by themselves, import a condition, are frequently construed to be covenants, while terms which, taken by themselves, import covenants, are frequently construed to be conditions; or, stated in a different way, the intent of the parties is gathered from the construction of the whole instrument, regardless of the technical meaning of the terms used. If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law always incline against the latter construction, if they can reasonably do so, in order to avoid forfeiture. *Southard v. Central R. R. Co. of N. J.*, 26 N. J. Law, 13; *Rawson v. District No. 5*, 7 Allen, 125-127, 83 Am. Dec. 670; *Merrifield v. Cobleigh*, 4 Cush. 184; *Woodruff v. Woodruff*, 44 N. J. Eq. 349-353, 16 Atl. 4, 1 L. R. A. 380. And for the same reason words in a deed not in the form either of a covenant or condition will be construed to be a covenant, rather than a condition. *Woodruff v. Woodruff*, *Rawson v. District No. 5*. Counsel for the defendant contend that the covenants immediately following the habendum clause are mutual or reciprocal, and that by them the plaintiff on his part agreed to lay out and dedicate certain public roads surrounding the premises

conveyed, and the party of the second part on its part covenanted to erect and maintain a first-class house for passengers on the land conveyed, and to cause to stop at said station to take up and set down passengers all such passenger trains as should stop for that purpose at any other station on said railroad within three miles thereof; that said station should be of suitable size, with suitable conveniences, and as large and complete as any other station house on said railroad within three miles thereof; and that the party of the second part would so arrange the running and stopping of its trains at the station so to be erected as would afford the same accommodation to passengers and travelers as would be afforded any other station on said railroad within three miles. In the view, however, that we take of this case, it seems unnecessary to decide whether the foregoing covenants are or are not mutual or reciprocal. Undoubtedly a forcible argument could be made in the affirmative; but we think that a correct construction of the point under consideration can be more safely reached by having regard chiefly to the clause of reverter set forth in the deed. In nearly all of the cases which we have examined this clause, where it has been found, has exercised an apparently controlling influence in deciding whether specific expressions in a deed were intended to be covenants or conditions. Thus in *Woodruff v. Water Power Co.*, 10 N. J. Eq. 489, the owner of a farm conveyed the same subject, nevertheless, to the following proviso: "That if the said main raceway shall not be made on said premises in conformity to the act incorporating said company [the defendant], the said lands and premises should revert to the grantor, his heirs and assigns." The Court of Errors held that this language constituted a condition, and it plainly appears that they were influenced thereto by reason of the provision that, in case of failure to comply with the condition, the property should revert. Page 508. In *Southard v. C. R. R. Co.*, 26 N. J. Law, 13, the property was deeded to a railroad for station purposes, and certain conditions were set forth in the deed, at the foot of which appears a clause of reverter. The deed was held to be upon condition, although it was held that the condition had not been broken. To the same effect are *Cornelius v. Ivins*, 26 N. J. Law, 376, and *McKelway v. Seymour*, 29 N. J. Law, 321. In *Bouvier v. Baltimore & N. Y. R. R. Co.*, 65 N. J. Law, 313, 47 Atl. 722, the property was granted upon the condition that the grantee should forthwith begin, lay out, etc., and thereafter forever maintain, a double-track railway and build and maintain a passenger station, etc. This language was held to import a condition, since it further appeared that, if the company should refuse to construct and maintain its double track and to build and maintain a station, then and in either of such cases it should or might be lawful for the parties of the first part, their heirs, executors, administrators, or assigns, to re-enter and repossess and enjoy the lands and premises, as in their former estate. Page 324, 65 N. J. Law, page 776, 47 Atl. In *Post v. Weil*, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809, the deed conveyed a fee of certain lands with the following provision:

"Provided always that these presents are upon the express condition that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used as a tavern or public house of any kind."

In construing the deed the court said:

"Although the words of the clause in question are apt to describe a condition subsequent reserved by a grantor, we are in no wise obliged to take them literally. In the consideration of what, by the use of these words, was imported in the conveyance, we are at liberty to affix that meaning to them which the general view of the instrument and of the situation of the parties makes manifest. Whether they created a condition or a covenant must depend upon what was the intention of the parties, for covenants and conditions may be created by the same words."

The language was construed as a covenant, and it is evident from the opinion of the court that the fact that the clause gave no right to re-enter upon breach had great weight with the court in arriving at such conclusion. On this point the court said (page 371, 115 N. Y., page 147, 22 N. E., 5 L. R. A. 422, 12 Am. St. Rep. 809):

"In this connection it may be noted that there is no clause in the deed giving the right to re-enter for conditions broken. While the presence of such a clause is not essential to the creation of a condition subsequent by which an estate may be defeated at the exercise of an election by the grantor or his heirs to re-enter, yet its absence to that extent frees still more the case from the difficulty of giving a more benignant construction to the proviso clause. The presence of a re-entry clause might make certain that which, in its absence, is left open to construction. The absence of such a clause may have its significance in connection with the circumstances of the case and the intent to be fairly presumed therefrom."

There are also numerous cases in which clauses in a deed which in terms imported conditions subsequent were nevertheless construed as covenants; but in all of such cases no clause or reverter, so far as we have noticed, existed. *Skinner v. Shepard*, 130 Mass. 180; *Avery v. N. Y. C. & H. R. R. Co.*, 106 N. Y. 142, 12 N. E. 619; *Rawson v. District No. 5*, 7 Allen, 125, 83 Am. Dec. 670; *Sohier v. Trinity Church*, 109 Mass. 1; *Episcopal City Mission v. Appleton*, 117 Mass. 326. In these cases the existence of a clause of re-entry after breach would certainly have compelled the courts to arrive at different conclusions. Sufficient authorities have been cited to show that the absence or presence of a clause of reverter has a most important, although not a controlling, influence in determining whether the language in the deed shall be construed as a covenant or condition.

In the deed in evidence in this action, such a clause is found. It reads as follows:

"And if at any time the said party of the second part, successors or assigns, shall knowingly cause or permit the premises hereby conveyed or any erection thereon to be used for any of the purposes hereinbefore provided against, and forbidden, or shall knowingly cause or permit any such intoxicating beverages or fluids to be sold or otherwise disposed of thereon, then and in such case the right and title hereby conveyed shall cease and determine, and the said tract of land and premises, and all right and title therein, shall revert and return to, and become vested in the said party of the first part, his heirs and assigns, in all respects the same as if this conveyance had not been made."

In view of this clause, and in submission to the trend of the authorities above cited, we are compelled to hold that there are matters set forth in this deed, the nonobservance of which by the grantee was intended to work a forfeiture of its estate. This conclusion seems irresistible. But, granting this, defendant's counsel nevertheless maintain that the provisions of the deed admitted to have been broken are not within the terms of the reverter, and hence their breach did not work a forfeiture. It is quite apparent that the clause of re-entry is restrictive, and that it was not intended to embrace all of the preceding undertakings of the grantee; or, stated in another way, it was intended that a breach of certain of the grantee's undertakings should forfeit the estate, while a breach of certain other undertakings should not. Close observance of the paragraph immediately preceding the reverter shows that it contains prohibitions not only well within the language of the reverter, but provisions which fully meet and satisfy its requirements, and all of them. The paragraph referred to provides that the premises conveyed shall not be used for other than railroad purposes, such as railroad tracks, switches, station and freight houses, locomotive berths, and repair shops, or for the sale or other disposal of any cider, ale, beer, etc., or other intoxicating fluid or beverage whatever. We think that the contention of the defendant in respect to what is included in the clause of re-entry is correct; the language prohibiting the use of the land for other than railroad purposes, and for the sale of intoxicating beverages, are directly within its terms, and there are no other provisions which are. The language of the clause of re-entry is restricted to prohibiting the use of the land for "any of the purposes hereinbefore provided against and forbidden." The grant itself, it will be borne in mind, was made for railroad purposes only, and by the paragraph immediately preceding that providing for a re-entry it was reiterated that the premises were not to be used for any other than railroad purposes, describing such purposes, nor were they or any erections thereon to be used for the sale of intoxicating liquors. These provisions are, as above stated, within the reverter, and their reiteration makes it clear that they were considered by the parties the important matters, which, if broken, should work a forfeiture of the estate. The clauses which relate to the stoppage of all trains which are stopped at any other station, etc., and to the erection of as large and complete a station house thereon, etc., cannot, in our judgment, be called uses of the land for "purposes forbidden." To so include them would strain the meaning of the terms employed. The only circumstances apparently which would warrant their inclusion would be the presence of the reverter in the deed, without other undertakings on the part of the grantee upon which it could operate.

We have already said that courts invariably hold, if possible, that undertakings in deeds are covenants, rather than conditions, and they will not hold them to be conditions if by any proper construction such a conclusion can be avoided. Following this principle of interpretation, we conclude that the provisions of the deed under consideration, the breach of which works a forfeiture of the

title, are those forbidding the use of the land for other than railroad purposes, and the inhibition against the sale of intoxicating beverages, and that the specific mention of these provisions excludes all others not mentioned, including those admitted to have been broken.

We therefore find for the defendant.

INSURANCE CO. OF NORTH AMERICA v. FREDERICK LEYLAND & CO., Limited.

(District Court, E. D. Pennsylvania. June 16, 1905.)

No. 120.

ADMIRALTY—SERVICE OF PROCESS ON AGENT—FOLLOWING STATE STATUTE.

Service of monition in admiralty may be made on an agent of a non-resident defendant in conformity with a state statute authorizing such mode of service in actions at law or in equity.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 917.]

In Admiralty. On motion to set aside service of monition.

Francis S. Laws and John F. Lewis, for libelant.

Howard H. Yocum, N. Dubois Miller, and Biddle & Ward, for respondent.

J. B. McPHERSON, District Judge. This is an action in personam, and the motion to set aside the service of the writ is based upon the averment that there is no statute, or rule of court or practice, authorizing service upon the agent of a nonresident defendant. It seems to have been so decided some years ago in this district, but since that decision the question has been before the Supreme Court of the United States in *Re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991. In that case a Kentucky corporation filed a libel in personam against the Louisville Underwriters, an insurance company of the same state, in the district court of the United States for the Eastern District of Louisiana, and the citation was served upon an agent of the defendant, who had been appointed in obedience to a statute of Louisiana, which required foreign insurance companies to have an agent in the state upon whom process could be served. A petition to prohibit the District Court from entertaining jurisdiction of the libel was denied by the Supreme Court of the United States, and Mr. Justice Gray, delivering the opinion of the court, upheld the validity of the service, saying, *inter alia*:

"In the present case the libelee had, in compliance with the law of Louisiana, appointed an agent at New Orleans upon whom legal process might be served, and the monition was there served upon him. This would have been a good service in an action at law in any court of the state or of the United States in Louisiana (citing cases). And no reason has been or can be suggested why it should not be held equally good in admiralty."

The Circuit Court of Appeals for the Ninth Circuit, in *Doe v. Springfield Boiler Co.*, 104 Fed. 684, 44 C. C. A. 128, has made a

similar decision. The facts of that case are identical with the facts now under consideration, for the monition there was served under the section of the California Code of Civil Procedure that provides for the service of a summons upon a foreign corporation or non-resident joint-stock company or association. While the service was set aside upon the ground that the person served was not an agent of the defendant corporation, the Court of Appeals expressly declared that:

"Service of monition in admiralty may be made under the provisions of a state statute regulating the mode of service in actions at law or in equity."

In the present case the service was made in strict accordance with the provisions of the Pennsylvania statute of July 9, 1901 (P. L. 615) § 2, cls. e, g.

The motion to set aside the service is therefore refused.

Ex parte VILES.

(District Court, W. D. Washington, N. D. June 27, 1905.)

No. 3,056.

INDIANS—SELLING LIQUOR TO ALLOTTEES—EFFECT OF AGREEMENT WITH NEZ PERCES.

The provision of article 9 of the agreement made May 1, 1893, with the Nez Perce Tribe of Indians, confirmed by Act Aug. 15, 1894, 28 Stat. 330, c. 290, that allottees of such tribe, whether under the care of an Indian agent or not, shall be subject for a period of 25 years "to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians," can apply only to Indians who received their allotments and acquired their rights of citizenship pursuant to such agreement, and cannot affect the status of one who had previously acquired such rights, and had become subject to state laws, so as to give force and validity as to him, to the unconstitutional act of January 30, 1897, 29 Stat. 506, c. 109, making it a crime to sell liquor to Indian allottees.

Application for a writ of habeas corpus to discharge the petitioner from imprisonment under a sentence for selling liquor to an Indian to whom an allotment of land had been made within the Nez Perce Indian Reservation, in violation of the act of Congress of January 30, 1897 (29 Stat. 506, c. 109), which makes it a criminal offense to sell intoxicating beverages to Indian allottees. Petitioner discharged.

A. H. Denman, for petitioner.

Jesse A. Frye, U. S. Dist. Atty.

HANFORD, District Judge. The petitioner, being under sentence to serve two years in McNeil's Island Penitentiary for having sold liquor to an Indian to whom an allotment of land had been made, and relying upon the recent decision of the Supreme Court in the case of Albert Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. —, declaring the act of Congress under which he was sentenced (Act Jan. 30, 1897, 29 Stat. 506, c. 109) to be unconstitutional and

void, filed his petition in this court for a writ of habeas corpus, alleging that his incarceration in the penitentiary is unlawful. The government, by an answer to the petition, alleges that the Indian to whom the petitioner sold liquor is a Nez Perce Indian, having an allotment of land within the Nez Perce Indian Reservation, in Idaho, and sets up as ground for distinguishing this case from the Albert Heff Case article 9 of an agreement, signed by the principal men and male adults of the Nez Perce Tribe of Indians on the 1st day of May, 1893, which agreement was confirmed by an act of Congress dated August 15, 1894 (28 Stat. 330, c. 290). Article 9 of the agreement reads as follows:

"Art. 9. It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians."

The record shows that the petitioner was indicted by a grand jury in the United States District Court for the District of Idaho. The indictment contains two counts, the first of which charges him with having unlawfully introduced spirituous liquor into the Indian country, to wit, the Nez Perce Indian Reservation; and the second count charges him with having sold spirituous liquor, in violation of law, to a Nez Perce Indian to whom an allotment of land had been made. A plea of not guilty having been entered, the petitioner was tried, and the jury returned a verdict finding him "guilty as charged in the indictment," and thereupon the court rendered a final judgment in the following words:

"Now, therefore, the said defendant having been convicted of the crime of selling liquor to an Indian, it is hereby considered and adjudged that the said defendant, George Viles, do pay a fine of two hundred dollars, and that he stand committed until said fine is paid, and that he be imprisoned and kept in the U. S. Penitentiary at McNeil's Island, state of Washington, for the term of two years; and it is further ordered and adjudged that said defendant be, and is hereby, remanded to the custody of the United States marshal for Idaho, to be by him delivered into said prison, and to the proper officer or officers thereof."

The record does not show what disposition was made of the first count in the indictment, charging the petitioner with the offense of introducing liquor into the Indian country; but, from the description of the offense, there is a reasonable inference that both counts of the indictment related to one and the same transaction, and that by the judgment of the court he was sentenced to be punished only for the crime of selling liquor to an Indian who is described in the indictment as an Indian to whom an allotment of land had been made, the title to which was held in trust by the government of the United States. In a case prosecuted under section 2139, Rev. St. U. S., an indictment, to be sufficient, would have to aver that the Indian was under charge of an Indian agent or superintendent of the United States; and until the act of 1897 it was not criminal, under the national laws, to sell liquor to Indians not under the charge of such agent or superintendent. Therefore the judgment has no

foundation in law, other than the act of Congress of 1897, which the Supreme Court declared to be unconstitutional in so far as it makes criminal the act of selling liquor to an Indian who has acquired the rights of citizenship by receiving an allotment of land in severalty.

The sole question now to be decided is whether the conviction of the petitioner can be sustained, notwithstanding the decision of the Supreme Court in the Heff Case, by reason of the ninth article of the agreement made with the Nez Perce Tribe of Indians, above quoted. That agreement, having been confirmed by an act of Congress, has all the force and virtue of law, to the extent of the power of Congress to abridge the rights and privileges of Indians of the Nez Perce Tribe to whom allotments of land had been previously made. So regarding it, I am unable to make any application of its provisions to affect the validity of the sentence imposed upon the petitioner. The agreement does not define any crime, nor prescribe punishment for the act of selling liquor to a Nez Perce Indian. It was made and was confirmed by Congress long prior to the act of 1897 prohibiting the sale of intoxicating beverages to Indian allottees. The act of the petitioner specified in the indictment as constituting the offense of selling liquor to an Indian is not criminal or punishable under any law previously enacted, and the only argument to be founded upon the treaty is this: that the stipulation in article 9 fixes the status of the Nez Perce Indians as being subject to laws to be enacted in the future, and, they being subject to the power of Congress to enact laws prohibiting the sale of intoxicating beverages, the act of 1897 affects them differently from other Indians not parties to the agreement. Possibly this argument might be sustained if the Nez Perce Indians received their allotments and acquired the rights of citizenship pursuant to the agreement, and with the limitations assented to in the agreement itself, or by receiving allotments under its terms and conditions; but the agreement provides for allotments only of certain land to be selected in lieu of and in exchange for allotments previously made, and the record in this case does not show that the Indian referred to in the indictment selected or received a lieu allotment. It does not appear from the record when he did receive his allotment, and the only presumption on the subject is that his allotment had been made at a time previous to the date of the agreement, and that he was then, by virtue of the act of Congress of February 2, 1887 (24 Stat. 388, c. 119,) enfranchised as a citizen of the United States, with all the rights, privileges, and immunities of citizens, and subject to the laws of the state of Idaho. I understand the decision of the Supreme Court in the Heff Case as a broad declaration of a fundamental principle—that Congress has no power by special legislation to classify citizens, so as to create race or other distinctions, and subject one class or grade of citizens to police regulations not applicable to all citizens, and incompatible with the reserved power of the states to enact and enforce valid local laws, and that when an individual has once acquired the rights and privileges of a citizen, and become subject to state laws, his status cannot be changed by an act of Congress, without his individual consent and the concur-

rent assent of the state in which he resides. I therefore conclude that the agreement referred to is impotent to give force and validity to the act of 1897 upon which the judgment against the petitioner appears to be founded.

For the reasons stated, an order will be entered directing that the petitioner be discharged from imprisonment.

LOEWE et al. v. CALIFORNIA STATE FEDERATION OF LABOR et al.

(Circuit Court, N. D. California. July 1, 1905.)

1. CONSPIRACY—CONCERT OF ACTION TO INJURE BUSINESS OF ANOTHER—BOYCOTT.

The fact that the ultimate object of a combination is to benefit the parties thereto in their business or property, which is in itself lawful, will not prevent such combination from being an unlawful conspiracy, where its immediate object and purpose is to injure or destroy the business of another by means of a boycott; nor is such combination rendered lawful because the acts contemplated and done pursuant thereto might lawfully be done by an individual acting for himself alone.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, §§ 7, 10.]

2. SAME—RIGHT TO INJUNCTION.

The concerted action of labor organizations, state and local, in declaring a boycott against the business and goods of a manufacturer of another state, to compel him to unionize his business, as demanded by an affiliated organization, followed by the sending out of circulars and agents announcing such action, and that dealers buying or selling the goods of the manufacturer will also be treated as "unfair," and by attempts by other means to interfere with and destroy his business, constitutes an unlawful conspiracy, which the courts will enjoin.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 174, 175.]

In Equity. On motion for preliminary injunction.

Bill of complaint by D. E. Loewe & Co., of Danbury, Conn., against the California State Federation of Labor and others. On order to show cause why a temporary injunction should not issue, restraining the defendants from boycotting complainants' business.

Francis J. Heney, for complainants.

James G. Maguire and E. T. Barrett, for the California State Federation of Labor and certain other defendants.

Cleveland L. Dam and Charles S. Burnell, for the Building Trades Council of San Francisco and certain other defendants.

MORROW, Circuit Judge. This is an order to show cause why an injunction pendente lite, should not issue, restraining the defendants from in any manner conspiring together to destroy the trade and business of complainants; from boycotting the complainants' business or the product of their factory; from publishing or otherwise circulating statements or representations calling the attention of complainants' customers or of dealers or of tradesmen or of the public to any boycott or strike against the complainants; from threatening or intimidating the customers of complainants

or the public or persons buying from complainants, or persons buying the products of complainants' factory from any other person, firm, or corporation, by any means alleged in the bill of complaint. A hearing has been had upon the bill of complaint, and affidavits in support thereof, and affidavits on the part of the defendants. An answer to the bill has not yet been filed.

The bill alleges that the complainants are domiciled in, and are citizens of, the state of Connecticut, and are copartners, located and doing business as manufacturers and sellers of hats, under the firm name and style of D. E. Loewe & Co., at Danbury, Conn.; that the defendants California State Federation of Labor, San Francisco Labor Council, and Building Trades Council of San Francisco are voluntary unincorporated associations, composed of persons voluntarily combined and associated together for their common benefit, and governed by officers and agents selected by the members of said associations, and that all the defendants and all the members of said associations are citizens of the state of California; that complainants during all the times mentioned in the bill of complaint have had a factory at Danbury for the making of hats for sale by them in the various states of the Union, and have for many years employed at said factory a large number of men in the manufacture and sale of hats, and have invested in that branch of their business a large amount of capital; that complainants, in their business of selling the product of said factory and filling orders for hats, had in the year 1902 built up and established a large trade, employing more than 230 persons, making and selling annually hats of a value exceeding \$400,000, and that at the time of filing the bill of complaint complainants employed about 200 persons in the hat manufacturing business, and that said business was then of the value of about \$250,000 annually; that complainants have for many years been engaged in trade and commerce among the several states of the Union, in selling and shipping the product of their factory by common carriers from Danbury, in the state of Connecticut, to wholesale dealers doing business in each of the states of Maine, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia, Ohio, Illinois, Michigan, Wisconsin, Missouri, Nebraska, Arkansas, and other states, to the amount of many hundred thousands of dollars, and in sending agents with samples from Danbury into and through each of the said states to visit the wholesale dealers at their places of business in each of the several states, and to solicit and procure from them orders for hats to be manufactured by complainants at Danbury, Conn., and shipped by complainants by common carriers to said wholesale dealers, to be by them paid for after the delivery thereof at their several places of business; that complainants are almost wholly dependent upon the sale and shipment of hats to the dealers in states other than Connecticut to keep their factory running and dispose of its product, and to keep their capital in said business profitably employed, and the restraint, curtailment, and destruction of their trade and commerce with their customers in said states by the combination, conspiracy, and acts

of the defendants, as set forth in the bill of complaint, has been and was at the time of the filing of the bill of complaint of serious damage to the property and business of the complainants, as set forth in the bill.

It is alleged that the Building Trades Council of San Francisco, the San Francisco Labor Council, and the California State Federation of Labor, their officers and members, bind and tie together all the local unions and their members by consent and agreement for united and concerted action in all matters affecting their common interest, including the ordering, prosecution, and furtherance of strikes and boycotts, and including also the acts charged in the bill of complaint against the defendants; that these acts are enforced against their own members, and also against members of local unions, by the defendants, their officers and executive bodies, and by said local unions and their officers, by means of fines, expulsions, and other penalties, and by threats and coercion, and against tradesmen in particular, and the public generally, by means emanating from the same sources—of strikes, boycotts, threats, coercion, and intimidation. It is further alleged that there is in nearly every state of the Union, and in every state and place where complainants do business, and sell or trade in or manufacture hats, a complete organization of labor into local unions, similar to those within the state of California, which in turn are bound together by central labor bodies, and said central labor bodies in California and in each of the other states of the Union are, by their rules, customs, and regulations, bound in obedience to a great central body or chief combination, known as and called the American Federation of Labor, having jurisdiction over all classes of labor throughout the United States, and having in the neighborhood of 2,000,000 members, of which all the individual defendants in this case, and all the members of the local unions, the California State Federation of Labor, the Building Trades Council of San Francisco, the San Francisco Labor Council, and all of said local and state central bodies or combinations, are members; that this combination is subdivided into subordinate groups and combinations, comprising 110 national and international unions or combinations, of which the combination of persons styling themselves the United Hatters of North America is one, and of which others are the California State Federation of Labor, the Building Trades Council of San Francisco, and the San Francisco Labor Council and others, composed of 12,000 local unions, 28 state federations or combinations, more than 500 central labor unions or combinations, and more than 2,000 local unions or combinations. The bill alleges in detail the method adopted by the combination the United Hatters of North America, the American Federation of Labor, and the San Francisco Labor Council in the publication of newspapers and the employment of agents for the purpose of enforcing boycotts, and to force all manufacturers of fur hats in the United States, including complainants, to unionize their factories, by restraining and destroying their interstate trade and commerce. It is further alleged in the bill that said combination

owns and absolutely controls the use of a certain label or distinguishing mark which it styles the "Union Label of the United Hatters of North America," which mark, when so used by them, affords to them a ready and effective instrument and means of boycotting the hats of any manufacturer against whom they may desire to use it for that purpose. It is alleged that the defendants, together with the other persons named in the bill, and united in said combinations known as the American Federation of Labor and the United Hatters of North America, have been for many years engaged in a combined scheme and effort to force all manufacturers of fur hats in the United States, including the complainants, against their will and previous policy of carrying on their business, to organize their workmen in the departments of making and finishing in each of their factories into an organization to be part and parcel of the said combination known as the United Hatters of North America, or, as the defendants and their confederates term it, to unionize their shops, with the intent thereby to control the employment of labor in and the operation of said factories, and to subject the same to the control and direction of persons other than the owners of the same, in a manner extremely onerous and distasteful to such owners, and to carry out such schemes, effort, and purpose by restraining and destroying the business, trade, and commerce of such manufacturers by means of intimidation of and threats made to such manufacturers and their customers in the several states of boycotting them, their product and their customers, using therefor all the powerful means at their command, until such time as from the damage and loss of business resulting therefrom the said manufacturers should yield to the said demand and unionize their factories.

The bill alleges that on or about March 1, 1901, in pursuance of the general scheme and purposes set forth in the bill, the United Hatters of North America, through their agents, demanded of the complainants that they should unionize their factory in the making and finishing departments, and also thereby acquire the right to use in all hats made by them the said union label, subject to the right of said last-mentioned combination to recall the same at pleasure, and notified complainants that, if they failed to yield to said demand, they and all the members of the said combination known as the United Hatters of North America would resort to their usual and well-known methods to compel them to do so; that the complainants refused to comply with this demand, believing that they were acting for the best interests of Danbury and their employés by operating an independent, open factory, and they declined to have their shop unionized. The bill further alleges that about July 25, 1902, the individuals composing the combinations of the United Hatters of North America and the American Federation of Labor, in pursuance of the general scheme and purpose to force all manufacturers of fur hats, and particularly the complainants, to unionize their factories, wantonly, wrongfully, maliciously, unlawfully, and with intent to injure the property and business of the complainants by means of acts which were unlawful and illegal,

and also by other means and doings, entered into a combination and conspiracy to restrain the complainants and their customers in Connecticut and other states, including California, from carrying on said trade, commerce, business, and manufacture, and to wholly prevent the complainants from selling their hats to wholesale dealers and purchasers in said states, or any of them, and to prevent the said dealers and customers from buying the same, and to prevent the complainants from obtaining orders for their hats from such customers and from filling the same, and from shipping hats to said customers, and thereby to injure the complainants in their property and business, and to render unsalable the product and output of their factory, in whosoever's hands the same might be or come, and to employ as means to carry out said combination and conspiracy, and the purposes thereof, and accomplish the same, the measures and acts in the bill alleged, namely, to cause, by means of threats and coercion, the concerted and simultaneous withdrawal of all makers and finishers of hats then working for the complainants, whether members of the combination the United Hatters of North America, or not; to declare a boycott against all hats made for sale by the complainants, and the business of those who should deal in them; to intimidate wholesale dealers from purchasing or dealing in the hats of the complainants by informing them that the American Federation of Labor had declared a boycott against the product of the complainants and against any dealer who should handle it, and by distributing circulars containing notices to such dealers of the boycott; to threaten to boycott any persons who should buy any goods whatever, even if union made, of such boycotted dealers; to falsely represent to such wholesale dealers and their customers that complainants had discriminated against the union men in their employ, had thrown them out of employment because they refused to give up their union cards and teach boys who were intended to take their places after seven months' instruction, and had driven their employes to extreme measures "by their persistent, unfair, and un-American policy of antagonizing union labor, forcing wages to a starvation scale, and giving boys and cheap, unskilled foreign labor preference over experienced and capable union workmen," in order to intimidate dealers from purchasing such hats by reason of the prejudice thereby created against the complainants and the hats made by them among those who might otherwise purchase them; to use the union label of the United Hatters of North America as an instrument to aid them in carrying out such conspiracy and combination against the complainants and their customers, and for the purpose of describing and identifying the hats of the complainants, and singling them out to be boycotted; to employ a large number of agents to visit the wholesale dealers and their customers at their several places of business, and threaten them with loss of business if they should buy or handle the hats of the complainants, and thereby prevent them from buying said hats; to cause said dealers to be waited upon by committees representing large combinations of persons in their several localities to make similar threats to them; to use the public press

in the localities where such wholesale dealers reside and do business to announce and advertise the boycott against the hats of the complainants and such wholesale dealers, and thereby make the same more effective and oppressive; to use the columns of their said paper, the Journal of the United Hatters of North America, and also the other papers specifically mentioned in the bill, for that purpose, and to describe the acts of the agents in prosecuting the same.

The bill further alleges in detail the numerous acts, doings, and proceedings, of the combinations and associations mentioned in the bill, and the acts and doings of the defendants individually, as members and agents of said combinations and associations, in carrying into effect the conspiracy mentioned in the bill. It is alleged that such acts and doings of the defendants have been continuous, and are being continued by them, to the great damage and detriment of the complainants. It is alleged that, by means of each and all of such acts done by the defendants in pursuance of the conspiracy, they have greatly restrained, diminished, and in many places destroyed the trade and commerce of the complainants with the wholesale dealers and others in the state of California, and by reason of the acts of the defendants and the other conspirators the complainants have suffered great and irreparable damage, in the sum of more than \$100,000; that the natural and inevitable result will be that complainants will be unable to dispose of their goods in California, causing them great and irremediable injury and loss of business, and that said damage is irreparable, in this: that the same can never be ascertained, and for the reason that, as complainants are advised and believe, and therefore allege the fact to be, the defendants, and each and all of them, are insolvent and unable to respond in damages; that the defendant combinations in California are composed of many thousands of individuals, and that complainants do not know the names or addresses of any of them, other than those individuals named in the bill; that it would require a great number of actions at law in order to recover the damages; and that complainants have no plain, speedy, or adequate remedy at law.

The bill prays for an injunction with respect to all the acts of conspiracy and boycotting alleged in the bill.

The bill is supported by affidavits from which it appears that Triest & Co., a corporation engaged in business in San Francisco as a jobber of hats, has for many years dealt extensively in hats manufactured by D. E. Loewe & Co., of Danbury, Conn.; that these hats have given the best of satisfaction to the customers of Triest & Co.; that about two years ago the corporation was boycotted by the labor organizations of San Francisco because it dealt in the hats manufactured by Loewe & Co., and the San Francisco Labor Council has issued circulars declaring the boycott, which has been indorsed by the California State Federation of Labor and by the state federations and central labor unions and bodies throughout California, Washington, and Oregon, and has been actively enforced by local unions and their members throughout all of that

territory; that circulars have been sent broadcast throughout California, Washington, and Oregon, declaring both Loewe & Co. and Triest & Co. unfair, and that both firms will be retained on the unfair list of the San Francisco Labor Council, the California State Federation of Labor, and the state federations and central labor bodies of California, Washington, and Oregon, as long as Loewe & Co. remain unfair, and as long as Triest & Co. continue to patronize that firm; that these circulars have been distributed at various intervals since July, 1903, to all of the customers of Triest & Co. in the states of California, Washington, and Oregon; that the agents of the labor organizations have personally visited the customers of Triest & Co. in San Francisco and Oakland, and the majority of their customers throughout the states of California, Washington, and Oregon, and demanded of them that they cease to deal with Triest & Co., because Triest & Co. continued to patronize Loewe & Co., who, it was stated, were antagonistic to organized labor, and who have been declared unfair by the United Hatters of North America; that these agents have made many statements to the customers of Triest & Co. which were untrue, and used the means at their command to induce and compel such customers to stop dealing with them, including statements that the registered union labels which were in Triest & Co.'s union-made hats were counterfeit labels, in imitation of that of the United Hatters of North America. It was further represented that the union men were thrown out of the factories of Loewe & Co. in August, 1902, and are now walking the streets; that Triest & Co. promised to cease buying of Loewe & Co., but that they have broken their faith in that regard. It is stated in the affidavits that all of these statements were false. It is further stated that these agents in many cases threatened the customers of Triest & Co. that unless they ceased patronizing Triest & Co. they themselves would be considered as antagonistic to union labor, and that they would be boycotted, and that labor-union men would not trade with them; that this representation was made with the express purpose of coercing and intimidating the customers of Triest & Co. to comply with the demands of these agents not to trade with that corporation; that in many instances these agents of the labor organizations caused customers of Triest & Co. to be declared unfair by local labor organizations for not refusing to patronize Triest & Co., also for the express purpose of aiding the boycotting of Loewe & Co. by the United Hatters of North America.

It is further alleged that the defendants San Francisco Labor Council and others, through their officers and agents, have adopted and maintained in the state of California, and particularly in the cities of San Francisco and Oakland, a system of picketing and espionage upon the shipments by Triest & Co. of hats manufactured by D. E. Loewe & Co. to retail dealers, and also upon other shipments of Triest & Co., and have followed such shipments through the hands of common carriers by the aid of their employes, many of whom are also members of the labor organizations comprising the American Federation of Labor, and upon the arrival of such ship-

ments at their destination they have visited the dealers to whom such shipments were consigned, and have threatened the dealers that unless they returned such shipments, and also unless they refused to purchase hats from Triest & Co, they (the dealers) would be boycotted, and their business greatly injured, if not wholly ruined; that many of such purchasers of Loewe & Co.'s hats, through fear of the threats of these agents, acceded to their demands, and refused to trade or to deal with Triest & Co.; that an agent of the United Hatters of North America has recently come to San Francisco to enforce the boycott against Loewe & Co., and is prepared forthwith to commence with renewed vigor active measures in prosecuting the boycott against the goods of Loewe & Co. and against Triest & Co. The effect of these measures adopted by the labor organizations throughout the state of California was to frighten many of the customers of Triest & Co. into canceling orders given that corporation for hats. Many shipments which had been made to customers of Triest & Co., consisting of union-made goods, as well as goods manufactured by Loewe & Co., were returned, and some of the customers have ceased to deal with them and to purchase any of the Loewe hats, to the great damage of Loewe & Co., as well as of Triest & Co. It is alleged that one of these agents of the labor organizations declared to an officer of Triest & Co. that they (the labor organizations) were after Loewe & Co., and he wanted to know whether Triest & Co. had a contract with Loewe & Co. Upon being informed that there was no contract, the agent demanded that Triest & Co. should cancel its orders placed with Loewe & Co. and promise not to buy from Loewe & Co. as long as the United Hatters had Loewe & Co. on their unfair list. The agent stated further that Triest & Co. used three-fourths of the output of Loewe & Co.'s factory, and, if Triest & Co. would promise not to buy from Loewe & Co., they (the labor organizations) would have no trouble in unionizing Loewe & Co.'s factory. It is alleged further that one of these agents stated to an agent of Triest & Co. that they (meaning the United Hatters of North America) had \$100,000 at their disposal with which to break up Loewe & Co. and Triest & Co., even if it took them one, two, or three years to accomplish this purpose. It is further alleged that this agent said they (the labor organizations) had succeeded in breaking up harder cases than these.

At the hearing the complainants introduced the affidavit of one Herman Welisch, engaged in business in San Francisco as a dealer in clothing, hats, and furnishing goods for men. He was a customer of Triest & Co., and had been notified by the San Francisco Labor Council that Triest & Co. were on the unfair list. Welisch alleges that he was afterwards boycotted, and his place of business picketed. But it appears from the affidavit of Russell J. Wisler, secretary of the San Francisco Labor Council, that this boycotting was not done by any labor organization, but by representatives of the Retail Clerks Union, by reason of some disagreement between Welisch and his employes concerning the hours he kept his place of business open. The defendants also introduced the affidavit of

P. H. McCarthy, president of the Building Trades Council of San Francisco, one of the defendants, from which it appears that that organization is concerned only and solely with the building industry in the city and county of San Francisco, and with the trades connected therewith, and is not connected with or concerned in any other trades union or other organization concerned with persons pursuing occupations not connected with the building industry. The constitution of the Building Trades Council is set forth in the affidavit, and its organization and relation to other organizations explained. It is denied that the Building Trades Council was ever united in or connected with or concerned in any combination, combined scheme, or conspiracy, or otherwise, with any of the labor organizations mentioned in the bill of complaint, or otherwise, or at all, to force any person, firm, or corporation (either hat manufacturers or otherwise) into an organization to be a part of the United Hatters of North America, or into any organization, or at all; denies that the Building Trades Council, either separately or in combination with any of the organizations mentioned in the bill, sought, or do they now seek, to force complainants to unionize their business; denies that the council has at any time declared a boycott against complainants; denies that they have combined and conspired with any other of the defendants of this city for the purpose of injuring complainants in their business in any way whatever, or otherwise, or at all.

The defendants contend that the allegations of the bill of complaint and the supporting affidavits are insufficient to justify the court in issuing a temporary injunction; that it does not appear that any force, threat, or intimidation has been used by the defendants to enforce the alleged boycott against the product of complainants' factory; that all that has been done by the labor organizations named in the bill has been to urge upon the friends of labor to use their patronage for the benefit of labor; that they had the constitutional right to do this, either by the publication of their views upon the subject, or by communicating them orally to their friends and to the public generally. But can it be truthfully said that this is all that has been done by the defendants and those who have acted with them in enforcing the boycott described in the bill of complaint? Are they not doing something more than speak, write, and publish their sentiments? Are they not using the power of their combined numbers, acting in concert, to drive the complainants out of business and destroy their property unless they are willing to surrender the control and management of their business to a labor organization? Are they not acting in combination, not merely for the ultimate purpose of advancing their own interests as workmen, but for the direct and immediate purpose of injuring the complainants in their business and property? If these questions must be answered in the affirmative—and upon the facts before the court they cannot be answered otherwise—then what follows? The weight of authority is that these acts are unlawful, and may be restrained by injunction.

In *State v. Glidden*, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23,

the case was a criminal prosecution for a conspiracy. The substance of the charge in the indictment was a conspiracy to compel the Carrington Publishing Company, against its will, to discharge its workmen, and to employ such persons as the defendants and their associates might name. In other words, the conspiracy was to deprive the publishing company of the liberty of carrying on its business in its own way, and to compel it to "unionize its shop." This object was to be accomplished by boycotting the business of the corporation, and the threatened withdrawal of patronage. In one count of the indictment it was charged "that the defendants induced one person to discontinue his subscription to said newspaper, and attempted to induce sundry other persons from advertising therein, and that the corporation was greatly damaged." Three of the defendants were found guilty. This is what the court says concerning the offense charged:

"It seems strange that in this day and this free country—a country in which law interferes so little with the liberty of the individual—that it should be necessary to announce from the bench that every man may carry on his business as he pleases; may do what he will with his own so long as he does nothing unlawful and acts with due regard to the rights of others; and that the occasion for such an announcement should be, not an attempt by government to interfere with the rights of the citizen, nor by the rich and powerful to oppress the poor, but an attempt by a large body of workmen to control, by means little if any better than force, the action of employers."

The court states that the defendants said in effect to the publishing company:

"You shall discharge men you have in your employ, and you shall hereafter employ only such men as we shall name. It is true, we have no interest in your business; we have no capital invested therein, we are in no wise responsible for its losses or failure, we are not directly benefited by its success, and we do not participate in its profits, yet we have a right to control its management and compel you to submit to our dictation."

The court says that the bare assertion of such a right is startling; that, if such a right existed, all business enterprises would be alike subject to the dictation and control of those who might assert it, and upon the same principle, and for the same reason, the right to determine what business men shall engage in, and when and where and how it shall be carried on, will be demanded, and must be conceded to associations of workmen of the class of those whom it would be necessary to employ. And, speaking of the fact that a combination organized for a good purpose may be perverted by the power it wields to deprive others of their just rights, the court says:

"The intention by one man, so long as he does nothing, is not a crime which the law will take cognizance of; and so, too, of any number of men acting separately. But when several men form the intent, and come together and agree to carry it into execution, the case is changed. The agreement is a step in the direction of accomplishing the purpose. The combination becomes dangerous and subversive of the rights of others, and the law wisely says it is a crime. It is no answer to say that the conspiracy was for a lawful purpose—to better their own condition, to fix and advance their rate of wages, and further their own material interest. It is certainly true that they had a right to such a purpose, and to use all lawful means to carry it into effect; and so a purpose to acquire property is lawful, so far as it contemplates

lawful means only. But if it contemplates the acquisition of money by means of murder, theft, fraud, or injustice, the end does not sanctify the means. Neither will these defendants be permitted to advance their material interests or otherwise better their condition by any such reprehensible means. They had a right to request the Carrington Publishing Company to discharge its workmen and employ themselves, and to use all proper argument in support of their request. But they had not the right to say, 'You shall do this, or we will ruin your business.' Much less had they a right to proceed to ruin its business. In such a case the direct and primary object must be regarded as the destruction of the business. The fact that it is designed as a means to an end, and that end, in itself, considered a lawful one, does not divest the transaction of its criminality."

The court discusses other features of the case, and determines that the acts were in violation of law, and that the conviction was proper.

Crumph v. Commonwealth, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895, was an indictment for a conspiracy. Defendants and others, members of a typographical union, conspired to compel the proprietors of a printing office to unionize their office, and not to employ any printer who did not belong to the union. Pursuant to such conspiracy the defendants sent circulars to a large number of the customers of the printing office, informing them that they had, with the aid of other labor organizations, boycotted the printing office, and notifying the customers that the names of all who should continue to patronize the printing office after being notified of the boycott would be published in the labor paper, the organ of the union, as a black list, and they in turn would be boycotted until they agreed to withdraw their patronage from the boycotted establishment. The defendants declared it their set purpose to crush the boycotted establishment, and they used every means short of actual physical force to carry the purpose into effect. The Supreme Court of Appeals held that the acts alleged and proved in the case were unlawful and incompatible with the prosperity, peace, and civilization of the country, and if such acts could be perpetrated with impunity by combination, cabals, and cliques, there would be an end of government and of society itself. To the same effect is *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; *State v. Donaldson*, 32 N. J. Law, 151, 90 Am. Dec. 649.

In *Casey v. Cincinnati Typographical Union No. 3* (in the Circuit Court of the United States for the Southern District of Ohio), 45 Fed. 135, 12 L. R. A. 193, the action was for an injunction restraining the defendants from boycotting complainant's newspaper. The defendant, Cincinnati Typographical Union, No. 3, had demanded that complainant should unionize his office (that is to say, publish and conduct his paper according to the custom, rules, and regulations laid down and prescribed by said union), and that he should pay his employes wages at such rates as should be fixed from time to time by the Union, and should discharge from his employment all persons not members thereof. The facts of this case are in some respects similar to those of the present case. Discussing these facts, the court said:

"That the defendant, the Typographical Union, set on foot a boycott against the complainant, as stated in the bill and in the affidavit on file, is not denied.

That this boycott was to be enforced by threatening loss of business to those who, having no connection with the union, should continue to advertise with or in any way patronize the complainant, is clearly shown. True, it is claimed that no threats were used, but the language of the circulars has no doubtful meaning. The affidavits on file show that it was perfectly understood by those who received them, and the circumstances indicate that it was intended that it should be so understood. In *Brace v. Evans*, 3 Ry. & Corp. Law J. 561, it was held that the word 'boycott' is in itself a threat. 'In popular acceptance, it is an organized effort to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and thereby coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs.' But it is insisted for the defendants that every representation of fact contained in their handbills and circulars is true; that is to say, that the complainant had in 1888 broken with the typographical union, discharged all union employes, and had since that date employed only those who were not members of the union, and that, after repeatedly promising to unionize his office, he had finally, in September, 1890, refused to do so, and declared that he would not employ any person who was connected with the union. All these are conceded facts. Therefore, argue counsel for the defendants, this is only a case of lawful competition. The complainant having declared that he would not employ any member of the union, the union had a right to say that its members would not patronize the complainant. Nobody disputes that proposition. If that were all that is involved in this case, there would be nothing for the court to act upon. But it is not all by any means. Instead of 'fair, although sharp and bitter, competition,' as is contended by counsel, it was an attempt by coercion to destroy all competition affecting the union. It was an organized conspiracy to force the complainant to yield his right to select his own workmen, and submit himself to the control of the union, and allow it to regulate prices for him, and to determine whom he should employ and whom discharge. In other words, it was and is an organized effort to force printers to come into the union, or be driven from their calling for want of employment, and to make the destruction of the complainant's business the penalty for his refusing to surrender to the union."

The court reviews the authorities upon the subject, and says:

"In the light of these authorities, it is idle to talk about the defendant's acts and publications as mere incidents of a competition set on foot by complainant's declaration that he would not employ union printers, that the publications are shielded by constitutional guaranties, or that, viewed in the most unfavorable light, they are nothing more than libels, and the only remedy for any injury resulting is by an action at law."

The motion for a temporary injunction was granted.

Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 62 Fed. 803, was a proceeding upon a petition to have one Phelan adjudged guilty of contempt of court for the violation of an injunction issued out of the Circuit Court. The proceedings involved some of the facts relating to the great railroad strike in 1894, and which was mainly supported and carried on through an organization known as the American Railway Union, by Debs, Phelan, and others, for the purpose of compelling the Pullman Palace Car Company to comply with the demands of its employes. Judge Taft, Circuit Judge, heard the petition, and in his opinion discusses the various features of the case. Speaking of the combination to prevent the operation of the railroad, he says:

"It was a boycott. The employes of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use of the Pullman cars as cars. They came into no natural relation

with Pullman in handling the cars. He paid them no wages. He did not regulate their hours or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury on the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employ  s had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service. It is the motive for quitting, and the end sought thereby, that make the injury inflicted unlawful, and the combination by which it is effected an unlawful conspiracy. The distinction between an ordinary, lawful, and peaceable strike, entered upon to obtain concessions in the terms of the strikers' employment, and a boycott, is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes the one or the other as quickly as the lawyer or the judge. The combination under discussion was a boycott. It was so termed by Debs, Phelan, and all engaged in it. Boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be in Minnesota; and they are held to be unlawful in England."

The respondent was adjudged guilty of contempt of court, and sentenced to prison for a term of six months.

In *Arthur v. Oakes* (in the United States Circuit Court of Appeals for the Seventh Circuit) 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414, Mr. Justice Harlan draws the distinction between the forming of a purpose by a single individual to injure another, and the combination of many persons for a like object. He says:

"It is one thing for a single individual, or for several individuals each acting upon his own responsibility and not in co-operation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing, in the eye of the law, for many persons to combine or conspire together with the intent not simply of asserting their rights or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public. An intent upon the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal."

Barr v. The Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881, was an order to show cause why an injunction should not issue to restrain the defendants from boycotting complainant's business. The principal plaintiff was the proprietor and publisher of a daily morning newspaper called the Newark Times. He determined to use plate matter in the make-up of his paper, notwithstanding the interdictive resolution of the local typographical union, of which all his employ  s were at the time members. On this, some of them left his employment, others remained, and in consequence lost their membership. The union thereupon withdrew its indorsement of the paper, and reported the matter to the Trades Council, a representative association in which it and other trades unions were affiliated; the whole comprising a body of operatives in the county of

Essex of a purchasing capacity of \$400,000 a week. After the publication by each side of its version of the difficulty, a circular was issued by the Trades Council calling on all friends to boycott the paper and to cease buying and advertising in it. The court held that a boycott of a newspaper started under these circumstances, in pursuance of which not only the members of the various societies were by their rules, but the public was by the circular, which was widely distributed, called on to cease buying or advertising therein, and personal application was made to actual advertisers by the distribution of printed circulars and resolutions of the societies, suggesting that they discontinue their advertising therein, even if they had made contracts to so advertise, enforced by a threat in the guise of a suggestion that if they did continue to do so they would also incur the enmity and opposition of organized labor, followed by damage to the proprietor of the paper from loss in circulation and advertising, was an actionable wrong.

My Maryland Lodge, No. 186, I. A. of M., v. Adt. (Md.) 59 Atl. 721, and Beck v. Railway Teamsters' Protective Union (Mich.) 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421, are to the same effect; holding that a court of equity will interfere by injunction to restrain a combination of persons from boycotting complainant's business by intermeddling and coercing their customers to leave, and endeavoring by abusive and threatening language to drive away their employes.

The argument against the doctrine of the foregoing cases has been that it makes motive and combination elements of liability, contrary to the rule that an act which is not in itself actionable does not become so because the motive is malicious or bad, or because it is done in combination with two or more persons. This question was elaborately discussed in the House of Lords in Allen v. Flood, A. C. 1898, p. 1, and the rule of nonliability applied in that case. But in the later case of Quinn v. Leathem, A. C. 1901, p. 495, the question was further discussed, and upon a state of facts similar to that in the present case it was held that the acts in question were unjustifiable and illegal, in that they were not performed in the line of legitimate trade competition, for the purpose of advancing the interests of the workmen themselves, but for the sole purpose of injuring the plaintiff in his trade, and that where a combination of two or more persons, without justification or excuse, injured a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment, they were liable in damages.

In the Supreme Court of the United States, in the late case of Aikens v. Wisconsin, 195 U. S. 194, 25 Sup. Ct. 3, 49 L. Ed. 154, it was contended, as in the English cases, that no one could be held answerable in law for the exercise of a legal right on the ground that it was exercised with malevolent intent, and that the act of combining could never be considered a wrong or a crime when done in the exercise of a legal right which required for its exercise combination or co-operation. A statute of Wisconsin imposed imprisonment or fine on "any two or more persons who shall combine

* * * for the purpose of willfully or maliciously injuring another in his reputation, trade, business, or profession by any means whatever." An information under this statute charged certain persons with unlawfully combining together with the intent of willfully and maliciously injuring the Journal Company, a corporation, and certain persons named, stockholders and officers of the company, in their trade and business. The agreement of the combination related to rates of advertising in the Milwaukee Journal and rival newspapers, and a feature of competition was based upon circulation. The effect of the agreement was to injure the Journal. The state court adjudged the combination unlawful. The Supreme Court of the United States sustained the judgment; holding that the liberty to combine to inflict injury upon another, even upon such intangibles as business or reputation, was not among the rights which the fourteenth amendment was intended to preserve, and that the defense that motives are not actionable is true in determining what a man is bound to foresee, but not necessarily true in determining the extent to which he can justify harm which he has foreseen. In other words, if the acts were intended and the injury foreseen, it is no defense to say that motives are not actionable. "An act," says the court, "which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and, if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law." This opinion of Mr. Justice Holmes, while it was directed to the construction of a statute, appears to go to the heart of the whole question, and disposes of the argument that there can be no liability of a combination for acts unless the acts themselves are criminal.

It follows that the complainants are entitled to a temporary injunction against all the defendants except the Building Trades Council of San Francisco, which, it appears, is not concerned in any combination, scheme, or conspiracy with the other defendants to injure the complainants in their business.

Writ of Injunction.

United States of America, Northern District of California—ss.:

The President of the United States of America, to California State Federation of Labor, San Francisco Labor Council, Harry Knox, T. F. Gallagher, Nicholas Blum, Daniel D. Sullivan, J. R. Hillis, C. W. Holmquist, J. C. Templeton, John Guinne, Frank J. Bonnington, G. K. Smith, Will J. French, A. C. Rose, Russel I. Wisler, P. H. Coyle, J. A. Johnson, Richard Cornelius, Sarah Hogan, Charles T. Shuppert, J. L. Franklin, Theodore Johnson, G. M. Lipman, Wm. P. McCabe, George Metzger, A. Burton, J. E. Hooper, A. S. Howe, Joseph

Moran, Annie Mullen, O. E. Pierce, T. E. Zant, J. R. Roland, their, and each of their, attorneys, agents, employes, and all persons acting in aid of, or in conjunction with them, or any of them, greeting:

Whereas, Dietrich E. Loewe and Martin Fuchs, complainants in the above-entitled cause, and citizens of the state of Connecticut, have filed on the chancery side of the Circuit Court of the United States for the Northern District of California a bill against the above-named defendants and others, and have obtained an allowance for an injunction as prayed for in said bill:

Now, therefore, we, having regard to the matters in said bill contained, do hereby command and strictly enjoin you, the said California State Federation of Labor, San Francisco Labor Council, Harry Knox, T. F. Gallagher, Nicholas Blum, Daniel D. Sullivan, J. R. Hillis, C. W. Holmquist, J. C. Templeton, John Guinne, Frank J. Bonnington, G. K. Smith, Will J. French, A. C. Rose, Russell I. Wisler, P. H. Coyle, J. A. Johnson, Richard Cornelius, Sarah Hogan, Charles T. Shuppert, J. L. Franklin, Theodore Johnson, G. M. Lipman, Wm. P. McCabe, George Metzger, A. Burton, J. E. Hooper, A. S. Howe, Joseph Moran, Annie Mullen, O. E. Pierce, T. E. Zant, J. R. Roland, your, and each of your, attorneys, agents, employes, and all persons acting in aid of or in conjunction with you, or any of you, from in any manner agreeing or combining or conspiring together to injure or destroy the trade or business of complainants herein, or to interfere with the manufacture, transportation, or sale by complainants, or by any other person, firm, or corporation, of hats manufactured by complainants; from boycotting or agreeing or attempting to boycott and from declaring or continuing a boycott against complainants or complainants' trade or business or the product of complainants' said factory, or against any person, firm, or corporation, for the purpose of preventing or injuring, and from thereby preventing or injuring, the regular operation and conduct of complainants' trade or business or the transportation or sale of or trade in hats manufactured or sold by said complainants, and from abetting, aiding, or assisting in such boycott; from publishing or circulating, in combination, or in pursuance of any conspiracy or agreement to injure or destroy the trade or business of complainants, in writing or orally, any statements or representations advertising or calling the attention of complainants' customers or merchants or tradesmen or the public to any boycott or strike against complainants, or against the product of complainants' said factory, or that, or to the effect that, complainants, complainants' factory, or complainants' goods, or the hats or products made or sold by complainants, or sold by complainants' customers, are or were "unfair," or should not be purchased or dealt in or handled by the public or merchants or tradesmen; from publishing or circulating, in combination, or in pursuance of any conspiracy or agreement to injure or destroy the trade or business of complainants, or for the purpose of injuring or destroying the trade or business of complainants, in writing or orally, statements or representations to customers of complainants, or to dealers in hats, or tradesmen or the public, that complainants' factory, complainants' business, or complainants' hats, or the product of complainants' factory, or either or any of them, are unfair or have been boycotted or are boycotted, or should not be dealt in or with or sold, and from coercing or inducing or attempting to coerce or induce any such dealer, person, firm, or corporation, or the public, not to wear, buy, trade in, deal in, or have in possession, hats or any hat made by complainants, or the product of complainants' factory, for the purposes last aforesaid, and, for like purposes, from threatening any person, firm, or corporation with injury or loss to the business or trade of such person, firm, or corporation in case such person, firm, or corporation should purchase or deal in hats manufactured by complainants, or the product of complainants' said factory; from giving any orders or directions to committees, associations, or others for the performance of any acts or threats hereinbefore enjoined—which commands and injunctions you are respectively required to observe and obey until our said Circuit Court shall make further order in the premises.

Hereof fail not, under penalty of the law thence ensuing.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 1st day of July, 1905, and in the 129th year of the Independence of the United States of America.

In re WAGNER.

(District Court, D. Nevada. July 1, 1905.)

No. 22.

BANKRUPTCY—DISCHARGE—APPLICATION—TIME.

Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], provides that any person, after the expiration of 1 month and within the next 12 months subsequent to being adjudged a bankrupt, may file an application for a discharge, and, if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within, but not after, the expiration of the next 6 months. *Held*, that a court of bankruptcy had no jurisdiction to act on a petition for a discharge not filed until after 18 months from the date of the adjudication.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 694.]

Petition for Discharge.

Alfred Chartz, for petitioner.

Summerfield & Roberts, for opposing creditors.

HAWLEY, District Judge (orally). It appears from the record herein that the petition of creditors was filed September 22, 1902, and petitioner Wagner was adjudicated a bankrupt on October 21, 1902, and on the same day the case was referred to a referee. The creditors on April 21, 1904, objected to the allowance of certain claims in favor of P. A. Wagner and the estate of William Sadler, and petitioned for a re-examination of said claims. The referee filed an opinion allowing said claims, and certified his rulings thereon to the district judge, who sustained the rulings of the referee. On such hearing it was shown that petitioner Wagner had, after he was adjudged a bankrupt, collected certain moneys due him, and had not accounted for the same to the estate. The court informed him that he would not be entitled to a discharge unless said moneys were turned over by him to the estate for the benefit of the creditors. It appears that after said date he paid said moneys. On April 24, 1905, he regularly petitioned this court for his discharge, and gave notice to creditors, in pursuance of the provisions of the bankruptcy act. At the time set for the hearing thereof, certain creditors of the bankrupt, being persons interested in the estate of petitioner, appeared and opposed his discharge, and filed the following specification, viz.:

"That said E. A. Wagner, bankrupt, filed his application for a discharge from his debts more than eighteen months subsequent to the adjudication of bankruptcy, and not within the time provided by section 14 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427])."

This presents the single question, was the petition for discharge filed in time to give the court jurisdiction to consider it? It will be observed that petitioner was adjudged a bankrupt on October 21, 1902. His petition for discharge was not filed until April 24, 1905—a period of more than two years and six months. No application

was ever made for the court to extend the time for petitioner to make an application for his discharge.

Section 14 of the bankruptcy act provides:

"(a) Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months."

This language is clear, positive, and direct.

It is impossible to distinguish this case in its legal aspects from *In re Fahy* (D. C.) 116 Fed. 239; and, as my views coincide with those expressed by Judge Shiras, I content myself with a quotation from his opinion as to the true meaning of section 14 of the bankruptcy act:

"Section 14 of the act provides that within 12 months subsequent to the adjudication the petition for discharge may be filed, and, if unavoidably prevented from filing the same within that period, the judge may permit it to be filed within, but not after the expiration of, the next six months. In express terms the discretion of the judge is limited to the six months following the expiration of the year beginning with the date of the adjudication, and, as I construe the statute, this is a limitation on the jurisdiction of the judge over the matter of discharge. The power and right to grant a discharge effectual to bar the enforcement of debts is conferred by the statute, and is governed by the limitations found in the statute; and therefore, unless it is petitioned for within the time limit fixed by section 14 of the act, the court of bankruptcy is without the power and jurisdiction to grant a discharge."

See, also, *In re Wolff* (D. C.) 100 Fed. 430; *Kuntz v. Young*, 131 Fed. 719, 65 C. C. A. 477; *In re Knauer* (D. C.) 133 Fed. 805; *In re Anderson* (D. C.) 134 Fed. 319; *In re Lewin* (D. C.) 135 Fed. 252.

Petitioner has offered no excuse for the delay in making his application for discharge. He was not compelled to wait until the bankruptcy proceedings were completed before making his application. Petitioner has failed to show that he was unavoidably prevented from filing his application within the time mentioned in section 14. If he had surrendered all of his property, he could have petitioned for his discharge within the time provided by the act, and his creditors could not have prevented his discharge, unless they could prove that he had been guilty of some of the acts which deprived him of the right to his discharge, and the burden of proof in that regard would have been upon the opposing creditors to show that he was not entitled to his discharge. *In re Fitchard* (D. C.) 103 Fed. 742, 744; *In re Chamberlain* (D. C.) 125 Fed. 629; *Loveland on Bankruptcy* (2d Ed.) 753; *Collier on Bankruptcy* (5th Ed.) 174. But the present objection is made to the jurisdiction of this court, and is well taken. This court is powerless to extend any clemency through the inadvertence or neglect of petitioner in not applying for his discharge within the proper time and in the proper way.

The petition for discharge is denied on the ground that the court is without jurisdiction to consider it, and it is ordered that such action be without prejudice to the commencement of new proceedings in bankruptcy upon the part of the petitioner if he so desires.

UNITED STATES v. AMERICAN EXP. CO.

(Circuit Court, S. D. New York. May 19, 1905.)

No. 3,971.

CUSTOMS DUTIES—CLASSIFICATION—STATUARY—CARVED “CISTERN.”

Held, that a “cistern” in several pieces, with figures sculptured thereon in almost full relief, is “statuary,” within the meaning of that term as used in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision under review reversed the assessment of duty by the collector of customs at the port of New York. The case involves the construction of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678], the pertinent part of which reads as follows:

The term “statuary” as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal.

The opinion rendered by the Board of General Appraisers reads as follows:

Waite, General Appraiser. The item in controversy in this case is described in the invoice as “round cistern with hauts relief, dancing cupids in Carrara marble.” It consists of a circular object in several pieces, the prominent sculptural work being children’s figures, which are almost in full relief. There seems no doubt that the article is of a sufficiently high grade of work to be classified under paragraph 454 of the tariff act of 1897, under which the importers claim, if it is “statuary” within the meaning of that provision. In our judgment, it should be so classified. The protest claiming a rate of 15 per cent. ad valorem under Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678], and the Italian reciprocity agreement (31 Stat. 1979; T. D. 22,373), is accordingly sustained, and the collector’s decision assessing the article for duty at 50 per cent. ad valorem, as a manufacture of marble, under section 1, Schedule B, par. 115, of the act (30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]), is reversed.

Edward Hartley, for importers.

Henry A. Wise, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. Decision of the Board of General Appraisers affirmed on the authority of U. S. v. Perry (C. C.) 131 Fed. 841.

THE ELIHU THOMPSON.

(District Court, W. D. Washington, W. D. June 27, 1905.)

No. 452.

1. SEAMEN—WAGES—PAYMENT—TIME—LIBEL—STATUTES.

Under Rev. St. § 4529 [U. S. Comp. St. 1901, p. 3077], providing that a seaman engaged in the coasting trade shall be entitled to immediate payment of his wages on discharge, where seamen were discharged, and payment of wages refused, they were entitled to libel the vessel at once therefor, without instituting proceedings under sections 4546, 4547 [U. S.

Comp. St. 1901, p. 3087], authorizing a preliminary inquiry by summoning the master to show cause for nonpayment of wages, and providing that if he fails to appear or to show that the wages have been paid or forfeited, and the matter be not settled forthwith, the judge or magistrate issuing the summons may then certify that there is sufficient ground to issue process in rem against the ship; such sections being permissive only.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, § 143.]

2. SAME—SEAMEN SHIPPED CONTRARY TO LAW.

Where the mate of a vessel of more than 50 tons burden, engaged in the coasting trade, had general authority to hire seamen, and engaged libelants to serve as members of the crew on a certain voyage, without making any agreement with them with respect to their wages, and they were received on board by the mate as members of the crew, and treated as such while at an intermediate port, without having ever assented to any contract to work for their passage without other compensation, it was the duty of the master to require libelants to sign shipping articles for the voyage before carrying them to sea, as required by Rev. St. § 4520 [U. S. Comp. St. 1901, p. 3073], and Act Cong. Aug. 19, 1890, c. 801, 26 Stat. 320 [U. S. Comp. St. 1901, p. 3065]; and hence such libelants were entitled to recover the highest rate of wages paid at the port of departure for the time of their actual service, as provided by Rev. St. §§ 4521, 4523 [U. S. Comp. St. 1901, pp. 3073, 3075].

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, § 69.]

3. SAME—EVIDENCE—JUDICIAL NOTICE.

Where, on a libel for seamen's wages on a coasting vessel, libelants were entitled to the highest rate of wages paid at the port of departure for the time of their actual service, and, though there was no direct evidence as to the going rate of wages at that port, intimate commercial relations existed between the port of departure and port of destination, the court would take judicial notice of such relations, and, in the absence of proof to the contrary, would infer that the highest rate of wages at the port of departure was not less than the usual wages paid at the port of destination.

In Admiralty. Suit to recover wages for services performed as members of the ship's crew on a voyage from Nome to Tacoma without the signing of shipping articles. Decree for libelants.

F. S. Griffith and Sachs & Hale, for libelants.

A. R. Titlow, for respondent.

HANFORD, District Judge. In the month of September, 1904, the steamship Elihu Thompson, being at Nome, Alaska, in the progress of a voyage from Tacoma to northern ports and return, and then bound from Nome to Tacoma, via Taku, in southeastern Alaska, at which place she was to take on part of her cargo, the libelants were taken on board as additional members of the crew; but they were not required to sign shipping articles, and there was no express contract made for the payment of wages for their services. They were in the service of the ship 21 days, and during that time they were treated as members of the crew, and performed the ordinary duties of seamen, and worked faithfully in loading and storing the cargo taken on board at Taku. On arrival of the ship at Tacoma they left the vessel without any formalities of being discharged, and a day or two afterwards demanded payment of their wages, which the captain refused. This suit having been commen-

ced, and the vessel attached, exceptions to the libel were interposed, and were sustained by the court; and thereupon an amended libel was filed, alleging substantially the facts above recited, and to the amended libel the respondent answered, raising issues of facts, and also contesting on technical grounds the right of the libelants to maintain the suit.

It is contended that the suit was commenced prematurely, for the reason that the master was not summoned to appear before the judge or any magistrate, to show cause, preliminary to the issuing of process against the vessel, and the period of 10 days after discharging cargo had not elapsed when the libel was filed. In this it is assumed that sections 4546, 4547, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3087], constitute a legal obstruction to the prosecution of suits in rem by seamen to recover wages. That idea is directly contrary to the manifest intent of the law, which in terms allows proceedings to be commenced whenever there is a dispute concerning wages; and section 4529, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3077], entitles a seaman engaged in the coasting trade to payment of his wages immediately at the time of his discharge. These libelants were in fact discharged when the vessel arrived at Tacoma, for the captain has testified that he instructed the cook to discontinue their meals, as they were not to remain in the ship. Therefore their right to maintain a suit to recover what is due them became complete when payment was demanded and refused. It has been decided by the courts in a number of cases that section 4546 is a permissive statute and not imperative. See cases cited below. It authorizes a preliminary inquiry by summoning the master to show cause for nonpayment of wages, and the following section provides that if the master fails to appear in response to a summons, or fails to show that the wages have been paid or forfeited, and the matter be not settled forthwith, the judge or magistrate issuing the summons may then certify that there is sufficient ground upon which to issue process in rem against the ship. Manifestly this procedure contemplates a judicial or quasi judicial inquiry, affording the master an opportunity to introduce evidence to prove that the wages have been paid or forfeited, and the exercise of discretion in awarding or refusing a certificate of sufficient cause. Therefore the issuance of the certificate cannot be compelled by a writ of mandamus, and the law makes no provision for an appeal; and, if the proceeding by summons is prerequisite to the issuing of process in rem, a commissioner or a justice of the peace, by deciding, upon testimony introduced by the master, that the wages earned have been paid or forfeited, may defeat the lien for wages without a fair trial upon the merits by a court of competent jurisdiction. To thus construe the law so as to invest local magistrates with power to adjudicate finally a cause of admiralty jurisdiction renders it obnoxious to the Constitution, which confers exclusive jurisdiction of such causes upon the national courts which Congress is authorized to establish. The law does not in express terms enjoin the issuance of a summons or a certificate of sufficient cause as a prerequisite to the exercise of jurisdiction by a court upon

which general admiralty jurisdiction has been conferred, and the courts will not by construction incorporate into it such an addition to its provisions as will impair the jurisdiction conferred upon them by the Constitution and the laws enacted to make its provisions effective. It is my opinion that the law was intended to provide a simple and summary method for hastening the payment of wages admitted to be due. In effect, the summons is a mere warning of an intention to proceed in rem unless payment of the wages due shall be forthwith tendered. It is a useless proceeding in any case in which the right to wages or the amount of the balance due is disputed, and a burden which the courts will not lay upon sailors when not required to do so by any plain mandate of the law. See *The William Jarvis*, Fed. Cas. No. 17,697; *The M. W. Wright*, Fed. Cas. No. 9,983; *The Waverly*, Fed. Cas. No. 17,301; *Murray v. Ferryboat* (D. C.) 2 Fed. 86; *The Edwin Post* (D. C.) 6 Fed. 206; *The Frank C. Barker* (D. C.) 19 Fed. 332; *The Shelbourne* (D. C.) 30 Fed. 510.

The principal ground of defense alleged in the answer is that the vessel carried a full complement of seamen from Tacoma, who signed shipping articles for the round trip, and she did not require additions to her crew at Nome, and at the time the libelants were received on board there were at Nome a great many disappointed miners who wished to return to Puget Sound, but were destitute and unable to pay fare, and were willing to work for their passage; that the ship was engaged to carry as freight a large consignment of canned salmon from a cannery at Taku to Tacoma, and the captain anticipated that upon arrival at Taku there might be a scarcity of men there to put the cargo on board, and for that reason he authorized the mate to take four men as workaways to earn their passage from Nome to Tacoma by loading freight at Taku; and that the mate, without any other authority, engaged four men, including the libelants, upon those conditions. The evidence sustains the allegations of the answer in part, but not to the extent of making a complete defense. I find as a fact proven by the evidence that the mate had general authority to hire seamen, and that he did engage the libelants to serve as members of the crew on the trip from Nome to Tacoma, without making any agreement with them with respect to wages, and they never assented to any contract to work for their passage, without other compensation. They were received on board by the mate as members of the crew, and were treated as members of the crew; and at all times, while at sea, as well as when handling freight at Taku, they were obedient to the officers of the ship, and performed whatever duties were required. The *Elihu Thompson* is a vessel of more than 50 tons burden, engaged in the coasting trade, and by the provisions of section 4520, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3073], and Act Aug. 19, 1890, c. 801, 26 Stat. 320, and amendatory statutes [U. S. Comp. St. 1901, p. 3065], it was the duty of the master to require the libelants to enter into a contract in writing—that is to say, to sign shipping articles for the voyage—before carrying them to sea. Therefore the case is clearly within the purview of section 4521, Rev. St. U. S. [U.

S. Comp. St. 1901, p. 3073], and section 4523, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3075], which in effect give to every seaman shipped contrary to law an absolute right to recover the highest rate of wages paid at the port of departure for the time of his actual service. There is no direct evidence with respect to the highest rate of wages paid to seamen shipped at Nome, but the evidence does prove that the going rate of wages at Puget Sound ports at the time of the voyage in question was \$45 per month, and the court takes judicial notice of the intimate commercial relations existing between the ports of Puget Sound and Alaskan ports, and, in the absence of proof to the contrary, will infer that the highest rate of wages at Nome was not less than the usual rate of wages paid at Tacoma.

The suit was commenced in the name of three libelants, but only two of them, viz., Moore and Shea, have appeared in the proceedings, and the decree to be entered will be in favor of those two, and will award to each of them the sum of \$33 and costs.

THOMPSON et al. v. STALMANN et al.

(Circuit Court, D. Nevada. July 3, 1905.)

No. 799.

FEDERAL COURTS—JURISDICTION—PARTIES—DOMICILE—WIFE.

Where, in a suit in the federal courts, one of the plaintiffs was a married woman whose husband, for more than three years prior to the institution of the action and at the time thereof, was a resident and citizen of the state of Nevada, the wife's domicile for the purpose of jurisdiction was also there, though she in fact resided during such time in another state.

[Ed. Note.—Diverse citizenship as ground of federal jurisdiction, see *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.]

Plea in Abatement.

M. S. Bonnifield and Sardis Summerfield, for plaintiffs.
H. Warren, for defendants.

HAWLEY, District Judge (orally). After this court refused to remand the case to the state court (*Thompson v. Stalman*, 131 Fed. 809), the plaintiffs filed a plea in abatement against the jurisdiction of this court, praying that the cause be remanded to the state court. To this petition was attached an affidavit of Mrs. S. C. Thompson, one of the plaintiffs herein, wherein she states that she is a resident and citizen of the state of Utah, and "that at the time of the commencement of this suit, and before that time, she was residing and had her home in Salt Lake City, Utah, and has ever since so resided and now so resides with a part of her family, with her property and household effects, as her home and domicile, and that she is not a resident nor a citizen of any other state nor territory except the state of Utah, and has not been for a period of two

years last past." The defendants in due time filed a replication to said plea, denying that Mrs. Thompson was a resident of the state of Utah. The admitted facts upon the hearing are that Mrs. Thompson, at all the times stated in the pleadings, was the wife of George F. Thompson, who for more than three years last past has been and now is a resident and citizen of the state of Nevada. The only question to be determined is whether, under these facts, Mrs. Thompson, at the time the action was brought, was a resident of the state of Nevada or of Utah.

The general rule is that the domicile of the husband is the domicile of the wife. The mere fact that Mrs. Thompson, at all the times mentioned, was residing in Utah, does not change the general rule. In *Tsoi Sim v. United States*, 116 Fed. 920, 923, 54 C. C. A. 154, the Circuit Court of Appeals of this circuit said:

"That the domicile of the husband is the domicile of the wife is well settled. It was so expressly held in *Anderson v. Watts*, 138 U. S. 694, 706, 11 Sup. Ct. 449, 34 L. Ed. 1078."

Many authorities upon this point are cited in the *Anderson Case*, and others will be found in 10 Am. & Eng. Ency. L. (2d Ed.) 32. See, also, *Howland v. Granger* (R. I.) 45 Atl. 740.

Mrs. Thompson has not brought herself within any of the exceptions to the general rule, and in contemplation of law, upon the facts stated, must be considered and treated as a resident and citizen of Nevada.

Plaintiffs' plea is overruled, and prayer denied.

KRAUT v. UNITED STATES.

(Circuit Court, S. D. New York. February 15, 1905.)

No. 3,515.

CUSTOMS DUTIES—CLASSIFICATION—DRIED MUSHROOMS—VEGETABLES.

The provision in paragraph 241, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649], for mushrooms "prepared or preserved," does not include mushrooms dried merely by evaporation, which are dutiable under paragraph 257 of said act, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], as "vegetables in their natural state."

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,599, T. D. 25,065, which affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Herman Kraut, and overruled the importer's contention that the goods should have been classified under the provision in paragraph 257, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], for "vegetables in their natural state, not specially provided for."

James W. Purdy, for plaintiff.
D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge. This importation is of mushrooms dried merely by evaporation of the sap. They have been assessed as mushrooms "prepared or preserved," under paragraph 241 of the act of July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649]. The effect of such evaporation upon the nature of grown products was fully considered by Judge Blatchford in *Frazee v. Moffitt*, 20 Blatchf. 267, 18 Fed. 584, with reference to making hay. The conclusion was reached upon very satisfactory reasoning that the nature of the grass was not changed, but remained the same. Dry wood is merely wood, not prepared wood or preserved wood. There is a difference between slicing and kiln drying, as in *Petry v. United States* (C. C.) 99 Fed. 261, and mere evaporation, as here. The practice of the customs department seems to have been in accordance with this view under similar provisions till lately, and long enough to attract the attention of the law-making power if not agreeable.

Decision reversed.

Extract from Order.

It is ordered, adjudged, and decreed that there was error in said proceedings before said United States Board of General Appraisers, and that their decision therein be and the same is in all respects reversed, and that said merchandise is liable to duty only under paragraph 257 of the act of July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650].

HENSEL, BRUCKMANN & LORBACHER v. UNITED STATES.

(Circuit Court, S. D. New York. March 10, 1905.)

No. 3,655.

CUSTOMS DUTIES—CLASSIFICATION—UNWROUGHT GLASS PLATES POLISHED.

In construing the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 565, 30 Stat. 198 (U. S. Comp. St. 1901, p. 1684), for "glass plates or discs, rough cut or unwrought," with the proviso that "discs exceeding eight inches in diameter may be polished sufficiently to enable the character of the glass to be determined," *held*, that the proviso does not require the exclusion from said paragraph of polished square plates less than eight inches across, where the polishing is done simply to determine the character of the articles, is of no other use, and is taken off in their manufacture.

On Application for Review of a Decision of the Board of United States General Appraisers.

This case relates to importations at the port of New York by Hensel, Bruckmann & Lorbacher, consisting of glass discs about two inches square and one-quarter of an inch thick, the opposite ends of which had been ground and polished to afford passage of light through the glass in order to detect air bubbles. They were classified as manufactures of glass, not specially provided for, under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 112, 30 Stat. 158 (U. S. Comp. St. 1901, p. 1635), and were claimed to be free of duty

under paragraph 565 of said act (30 Stat. 198 [U. S. Comp. St. 1901, p. 1684]), which is set forth in full in the opinion following. This contention was overruled by the Board of General Appraisers on the authority of a former decision, G. A. 5,252, T. D. 24,150, where it was held that articles of the character mentioned in paragraph 565 are, when polished and under the size of eight inches, excluded from said paragraph by implication of the proviso therein.

W. Wickham Smith, for plaintiff.

D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge (after stating the facts). The free list of the act of 1897 provides for:

"565. Glass plates or discs, rough-cut or unwrought, for use in the manufacture of optical instruments, spectacles, and eye glasses and suitable only for such use: provided, however, that such discs exceeding eight inches in diameter may be polished sufficiently to enable the character of the glass to be determined." Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684].

This importation is of square plates less than eight inches across, which had been polished on opposite edges for determining the character and fitness of the glass for these uses. The evidence taken in this court shows that this polish is all taken off in making the articles intended, and is not of any use for that purpose; while the polishing of the large discs for determining the character of the glass is done upon the broad surfaces, and is of use in making them into lenses. What was done to these plates would merely ascertain whether they would come within the description of this paragraph, and not do anything towards their manufacture, and they were therefore unwrought.

This difference in the effect of what is done to the respective sizes, which is presumed to have been known to Congress, seems to account for the provision allowing what is done to the larger size without mentioning the other.

Decision reversed.

SHACKELFORD v. FULTON.

(Circuit Court of Appeals, Fourth Circuit. May 26, 1905.)

No. 560.

CONTRACTS—CONSTRUCTION—ADDITIONAL TERMS.

Where a contract for the sale of coal lands provided that the parties agreed to sell and convey, or cause to be conveyed, "the coal in and under the tracts of land hereinafter described and referred to and as stated in the contract of sale, options and deeds hereinafter named," and one of the options did not specify any particular kind of coal, but during an interval which elapsed between the date the contract was signed and the date of the payment, by which the option was converted into an absolute contract to purchase, plaintiff had an opportunity to learn the nature of the option and investigate the existence of and character of the coal underlying the land, he was not entitled to reject such option on the ground that the coal underlying the land referred to therein was not of the kind intended to be purchased.

In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

W. E. R. Byrne (Robert F. Kidd and Linn, Byrne & Caton, on the brief), for plaintiff in error.

W. E. Haymond (Reese Blizzard, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. This was an action of trespass on the case in assumpsit, brought by Fulton, defendant in error, against Shackelford, plaintiff in error, in which judgment was rendered in favor of the plaintiff below. Shackelford, and certain associates who subsequently assigned their interests to Shackelford, having acquired deeds to three tracts of coal land, contracts of sale and purchase for some seven tracts, and "options" for some 36 other tracts, entered into a contract which reads, so far as now material, as follows:

"This contract made and entered into this, the 15th day of February, 1901, between J. N. Shackelford, Lloyd Rinehart and C. M. Bennett, of Gilmer county, West Virginia, parties of the first part, and E. D. Fulton and J. W. Emery, of Pennsylvania, parties of the second part,

"Witnesseth: That for and in consideration of the sum of twenty-two and 50/100 dollars per acre, to be paid as follows: (\$600.00) six hundred dollars in hand paid, and twenty-five hundred dollars (\$2,500.00) to be paid before the 1st day of March, 1901, and the residue to be paid as soon thereafter as each tract of land hereinafter named and referred to can be surveyed and abstract of title made showing good title vested in the land owner to the land, the said parties of the first part agrees to sell and convey or cause to be conveyed to the parties of the second part, or to whom they may direct, the coal in and under the tracts of land hereinafter described and referred to and as stated in the contracts of sale, options and deeds hereinafter named, subject to all the provisions herein contained, that is to say: * * *

"An option executed by Emery Gough to J. N. Shackelford, dated December 31, 1900, for about 130 acres. * * * [Here follows a list of many options, of the absolute contracts and of the tracts which had been conveyed.]

"An option executed by J. S. Brannon to J. N. Shackelford, dated Jan'y. 4,

1901, for 300 acres; * * * containing in the aggregate about 5,000 acres to be ascertained by actual survey, situate in Gilmer county, W. Va."

"All such mining rights and privileges are to be conveyed as may be now or hereafter vested in said first parties.

"It is expressly understood between the parties hereto that all the coal in and under the tracts of land listed above as held by first parties under contracts of sale and purchased by deeds shall be paid for in full to first parties by second parties on or before April 15th, 1901.

"If the parties of the first part are unable to procure a good and sufficient deed, together with full mining rights because of some incurable defect in the title, they shall not be held liable for any such failure to convey in such case; each tract for which there is a good title is to be settled for independent of any other tract.

"It is further understood and agreed that the parties of the second part are to furnish sufficient money to pay for the tracts above referred to when deeds are ready to be delivered, said second parties agreeing to take title direct from the land-owner and any failure of the parties of the second part to furnish the money to pay for each tract as herein provided for shall relieve the parties of the first part from any and all liability to the parties of the second part on account of this contract.

"The parties of the first part are to have said coal surveyed and titles abstracted and to pay for the same.

"It is understood and agreed that if the second parties shall mail a New York draft or a certified check for the above-mentioned sum of twenty-five hundred dollars, payable to C. M. Bennett, at Glenville, W. Va., on or before said 1st day of March, 1901, that then this contract shall be and remain in full force and effect, otherwise said contract shall be null and void, and the \$600.00 paid this day shall be forfeited to the said parties of the first part.

"Witness our hands and seals the day and year first above written."

Emery subsequently assigned his rights under this contract to Fulton.

The \$600 was paid at the time of the execution of this contract, and the \$2,500, which was to have been paid on or before March 1, 1901, was paid in due time. Thereafter, from time to time, Fulton made many payments, some to the original owners and some to Shackelford. The payments made to Shackelford were made irregularly, on general account, and finally Fulton came to believe he had overpaid Shackelford, and brought this action to recover this supposed overpayment. While there was at the time of the trial below some other matter in controversy, it seems now that every question of difference has been settled except whether or not Shackelford is entitled to have the profit on the Brannon option, which was allowed to lapse.

The contention of Fulton was that the contract of February 15, 1901, should be construed as requiring him to pay only for the number of acres of land underlaid by "Pittsburg" coal, and that there was no bed of coal of this variety under the Brannon tract. Shackelford's contention was that the Brannon tract was underlaid by one or possibly more beds of other kinds of coal of at least prospective value, and that under the contract he was entitled to his profit if there was any coal of present or prospective value under the Brannon tract.

Counsel for Shackelford requested that the following instructions be given:

"No. 1. The court instructs the jury that by the terms of the contract of February 15, 1901, between J. N. Shackelford and others, of the first part,

and E. D. Fulton and J. W. Emery, of the second part, read in evidence, the parties of the second part, if they elected to avail themselves of its benefits, were required to take the coal therein mentioned, described in the contracts therein referred to, in accordance with the terms of said contracts; and if the jury believe from the evidence that the option from J. S. Brannon referred to in said contract provided for a sale of all the coal within and underlying the tract to which it related, without reference to any particular strata of coal, and that there is within and underlying the same coal of present or prospective value, then the said Fulton and Emery, or the said Fulton, as assignee of the said Emery, would be bound to take and pay for the same as provided for by said contract.

"No. 2. The court instructs the jury that if they believe from the evidence that the contract of February 15, 1901, read in evidence, related to what is called the 'Shackelford Coal Field,' and embraced some coal of superior quality which could have been readily sold at a much higher price than that of \$22.50 per acre, named in the contract, other coal which would be termed good, and still other coal of an inferior quality, and that it was all considered, sold, and purchased as a whole, at an average price of \$22.50 per acre, after an opportunity of inspection, then the purchasers, Fulton and Emery, or E. D. Fulton, the assignee of said Emery, would be bound to take all of said coal, and would not be allowed to take the best and reject the inferior grade."

The court refused to give these instructions, and charged the jury, in so far as is now material, as follows:

"The contract in this case is a contract for the entire block, comprising all the farms that were within that block, at \$22.50 per acre. There is no provision in the contract by which Fulton reserves the right of electing to determine whether any one of the farms comprising this block should be rejected. It follows, therefore, as a proposition of law, that the contract must be treated as an entirety. The contract sells this entire boundary, composed of these tracts. Now, of course, if Shackelford and his associates cannot deliver that entire boundary, or if there was any failure to title, or failure of possession to the land, by which the plaintiff in this action could not get possession of it, then, of course, he would be entitled to an abatement upon the contract price to the extent of that failure. I repeat, now, that the contract is an entirety, and it had sold this whole boundary, comprised, as I have said, of these various tracts of land, 46, I believe, in number. Each one of these tracts of land had to be surveyed, the title examined, and a plat made of it. Now, that seems to have been done, and Fulton cannot complain that it was not done, because he acquiesced in the action of the defendants in this case, and went on and paid very large sums of money until he came to the Brannon tract.

"Now, the whole question involved in this Brannon tract is whether or not there is coal there. If in the Brannon tract there is no coal—such coal as they were negotiating for—then the equitable side of this case would be that the plaintiff had a right to reject that; or, in other words, he would have a right to recover back any money that he paid for it, if such is the fact. And why? Because the contract says that it was for the purchase of coal. Why, further? Because the contract is silent as to the character of the coal they were purchasing; but the evidence is, with reference to all these contracts that were being made up in that country—as a general thing, or with very few exceptions—that they were for Pittsburg coal. This contract was silent as to the character of the coal, and that is just why these gentlemen got into litigation. They think that they can do all that lawyers can, in that country up there, and, instead of going and paying a lawyer fifteen or twenty dollars to draw a contract, they draw it themselves and get into trouble. If a lawyer did draw this contract, he certainly was very loose in drawing it; that is, on that question.

"I repeat, then, that the contract is silent as to the character of coal. Being silent as to that, and the claim of the plaintiff here being that it was for Pittsburg coal, while the claim of the defendant is that there was no coal mentioned, and that the plaintiff was bound to take any coal found there, that is a matter that you will have to determine from the facts and circumstances in this case. The evidence is before you. It is not for me to fix that matter

for you. If you find from the evidence in this case that these negotiations were based upon the fact that Pittsburg coal was underlying that tract of land, then the plaintiff would be entitled to have Pittsburg coal, although the contract did not so specify. It simply specifies coal. Now, then, upon what principle? Upon the principle, if no other, that here was a fair cash valuation being paid for the block of land; and it would be inferred, and rightly inferred, that where there was a fair cash valuation being paid, that they were selling, and that the purchaser was getting, what was understood to be coal lands of a certain character. Now, the whole controversy in this case is upon that question of whether there is coal under this land. Now, you are to determine that from the evidence you have had before you. If you find from the evidence that there was coal under this land, and coal that was merchantable and marketable, I think the plaintiff, as to the Brannon land, ought not to recover, because he bought this tract in a lump, and he must take it as he found it; but if you find from the evidence in this case that there was no coal upon that land of a merchantable character, then I think the plaintiff would be entitled to recover any money that he had paid in consideration of this tract of land."

Exceptions were duly taken, and the refusal of the court to instruct as requested, and the giving of the charge in part as given, are assigned as error.

The evidence tended to show that there was no Pittsburg coal under the Brannon tract. There was evidence tending to show that there were two other beds of coal at a considerable depth below water level under the land, which might have some prospective value. From the testimony it appears that the majority of the options and other contracts taken by Shackelford specified that the vendee was to take and pay for only the number of acres of land believed to be underlaid by the Pittsburg bed of coal. They also provided that, where it appeared from the location of the outcrop that the Pittsburg bed was under only a part of the tract of land, the acreage to be conveyed and paid for was only that underlaid by said bed of coal. The Brannon option had been lost prior to the trial, and, without objection, secondary evidence of its contents was introduced. The only witnesses on this point were Brannon, who executed the option, and Shackelford, the vendee. Both these witnesses stated that the word "Pittsburg" was not in the option; that the provision for a survey according to the outcrop line was stricken out; and that the paper was merely an agreement to sell the coal on and under the Brannon tract, with mining rights, the survey to be based on the boundaries of the vendor's land.

The only question which we find it necessary to consider is the propriety of the action of the learned trial judge in charging the jury, in effect, that they might find for the plaintiff if they believed that the plaintiff had bargained only for Pittsburg coal. By the contract of February 15, 1901, the first parties agreed to sell and convey, or cause to be conveyed, "the coal in and under the tracts of land hereinafter described and referred to and as stated in the contracts of sale, options and deeds hereinafter named." Under this provision it seems to us that the question raised by this writ of error was solvable only by the terms of the Brannon option. As that paper did not specify Pittsburg coal, we think the charge given below was erroneous, in that the jury were told that they might find in favor of the plaintiff if they believed that the parties to the action

contracted only as to Pittsburg coal. It seems probable that Fulton did not, at the time the agreement of February 15, 1901, was signed, know the contents of the Brannon option. But during the interval between that date and the time of the payment which converted this agreement from an option into an absolute contract of purchase, he had opportunity to learn the nature of the Brannon option, and to investigate the question as to the existence of the Pittsburg coal under the Brannon land. Under the terms of the Brannon option Fulton was not at liberty to refuse to pay Shackelford merely because the Pittsburg bed did not underlie the Brannon tract.

We are of opinion to reverse and remand this cause for further proceedings not inconsistent with this opinion.

Reversed.

FIDELITY & CASUALTY CO. OF NEW YORK v. BANK OF TIMMONSVILLE.

(Circuit Court of Appeals, Fourth Circuit. May 29, 1905.)

No. 562.

1. FIDELITY BONDS—CONDITIONS—CONSTRUCTION.

Where a fidelity bond provided that any "willful misstatement" or suppression of fact by the employer, in his statement or declaration concerning the employed, should render the bond void from the beginning, the phrase "willful misstatement" was intended to mean any material false statement made with knowledge of its falsity, voluntarily, and not inadvertently, and hence an instruction that the bond was not avoided unless the misstatements were made "with intent to secure renewals of the bond" was erroneous.

[Ed. Note.—Fidelity insurance, see note to American Credit Indemnity Co. v. Wood, 19 C. C. A. 273.]

2. SAME—MATERIALITY—BELIEF.

Where a fidelity bond provided that any willful misstatement or suppression of fact by the employer concerning the employed should render the bond void, a mere belief on the part of the employer's president that it was immaterial whether the questions asked were answered truly or not did not render such answers immaterial.

3. SAME—NOTICE OF DEFAULT.

A bank cashier was given a leave of absence on August 17, 1901, which expired on August 22d. His failure to return did not arouse suspicion until August 26th, when an examination of his books was made, which disclosed his defalcation. His sureties were then telegraphed, either on the 26th or 27th, whereupon each sent a representative, who participated in the examination of the books during the latter part of August, and on September 2d a formal notification of the cashier's flight and defalcation was sent to defendant surety company. *Held*, that whether defendant was given "immediate" notice of the defalcation, as required by the fidelity bond, was for the jury.

4. SAME—SCOPE OF BOND.

Where a bank cashier's fidelity bond, given March 7, 1901, covered only acts and defaults committed during its currency and within 12 months next before the date of the discovery of the act or default on which the claim was based, it did not cover an alleged larceny of silver coin claimed

to have been deposited May 19, 1900, but not found in the bank's vaults when the cashier absconded in August, 1901, there being no evidence as to when the same was taken.

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

See 121 Fed. 934.

J. P. K. Bryan and George H. Moffett, for plaintiff in error.

H. A. M. Smith and P. A. Willcox (Mitchell & Smith and Willcox & Willcox, on the briefs), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. This was an action at law brought by the bank against the fidelity company, to be called the defendant. One Lechner, the cashier of the bank, fled in August, 1901. The statement of his defalcations filed in this case by the bank showed losses to the extent of \$10,035.69. This action was based on a bond executed by the defendant, which was made on March 17, 1891, and was annually renewed, the last renewal covering the year from March 17, 1901, to March 17, 1902. The obligation of the defendant was to make good and reimburse to the bank, to the extent of \$5,000, pecuniary loss sustained by the bank by reason of fraud and dishonesty on the part of Lechner. In the bond is the following clause: "That any willful misstatement or suppression of fact by the employer in any statement or declaration to the company concerning the employed, or in any claim made under this bond, or a renewal thereof, renders this bond void from the beginning." Before delivery of the annual renewal contracts certain written or printed questions concerning Lechner were submitted to the bank for answer. The first of these found in the record was submitted in 1894. These questions differ somewhat in the different years. Answers to these questions were made by the president or the vice president. The purport of the questions of most importance in this case were whether or not Lechner was indebted to the bank and whether or not his books were examined. The evidence showed that the answers to the effect that he was not indebted to the bank were several times untrue in point of fact. But whether or not such misstatements were made with full knowledge and recollection of the true facts is not made entirely clear by the record. A detailed statement of the facts relating to the misstatements concerning Lechner would be profitless. We may say here, however, that we find no error in the action of the trial court in refusing to direct a verdict for the defendant on this ground.

In the certificates the date when the last examination of the books had been made is given. On such dates in several instances Lechner was apparently considerably indebted to the bank by note, and on some of these dates also by small overdrafts. The certificates were usually made some months after the date of examination of the books. Whether or not the untrue statements as to his indebtedness may have been the result of nonrecollection or inad-

vertence was under the evidence here peculiarly a question for the jury.

However, we are of opinion that the instruction given the jury on this point was erroneous. The learned trial court in effect instructed the jury that the bond was not avoided unless the misstatements were made with intent to secure renewals of the bond. If the misstatements in this case were made deliberately, with full consciousness of their falsity, it is rather difficult to conceive that they could have been made without an intent to deceive the defendant.

The Supreme Court in *Clafin v. Assur. Co.*, 110 U. S. 81, at page 95, 3 Sup. Ct. 507, at page 515 (28 L. Ed. 76), quotes approvingly the following: "Where one has made a false representation, knowing it to be false, the law infers that he did so with an intention to deceive."

We are of opinion that the false answers made to the defendant's questions in at least some of the certificates were material, so much so that we are wholly unable to say that the bond would have been renewed had truthful answers been made. Certainly the contract between the parties did not leave it to the bank to determine the materiality of the answers. And a mere belief on the part of the president of the bank that it was immaterial whether the questions were answered truly or not did not make the answers immaterial.

However, for the sake of argument, let it be conceived that the answers made in this case were made with full knowledge of their falsity, but with such belief of their entire unimportance that it could be said that they were made without any conscious design or set purpose to deceive the defendant. It is manifest that false answers made under such circumstances would be fully as prejudicial to the interests of the defendant as would be the same false statements made with specific design to deceive the defendant and thus secure renewals. Hence (if it be possible that one can make a false statement knowing it to be false and knowing that it will deceive, without an intent to deceive) it must be clear that the parties did not use the phrase "willful misstatement" with intent that it should be construed as meaning a knowingly false statement made with design to deceive. The rule of construction, "*contra proferentem*," is the least reliable and the last to be resorted to of all the rules of construction. 3 Washburn, Real Property (4th Ed.) 397; 2 Parsons, Contracts (4th Ed.) 639, § 508. Where the intent is clear, there is no room for the application of mere rules of construction.

We are not at liberty therefore to adopt of the many definitions of the word "willful" (8 Words and Phrases, 7468 et seq.) the one that is most disadvantageous to the defendant, simply because it is such. It is true that "willful" is sometimes properly defined as "done with a specific intent or with some particular design." But, for the reason above stated, we think it clear that the word was not used in this sense in the contract before us. We think the phrase "willful misstatement" as used here was intended to mean that any material false statement, made with knowledge of its falsity, made

not inadvertently, and made voluntarily, should avoid the obligation of the defendant. And this, whether such false statement was made with the conscious design to deceive the defendant, or made in a spirit of wanton disregard of its rights, or made with a belief that the statement was utterly unimportant.

The bond also provided that, upon the discovery of fraud or dishonesty on the part of the cashier, the bank should immediately give notice thereof to the defendant. On Saturday, August 17, 1901, Lechner was given a leave of absence, which expired on Thursday, the 22d. His failure to return does not seem to have aroused any very grave suspicion until Monday, the 26th, on which day the president of the bank commenced an examination of the bankbooks, and on that day the conclusion was reached that Lechner was a defaulter. The insurance companies were telegraphed, but whether this was done on the 27th or later does not clearly appear. In any event, a representative of the defendant arrived on the scene and participated in the examination of the books during the latter part of August. On September 2d a formal notification by letter of the flight of the cashier, stating also that a small shortage had been discovered, was sent by the bank to the defendant. On the ground that the immediate notice upon discovery of the cashier's dishonesty required by the bond had not been given, the trial court was asked to direct a verdict for the defendant. This request was refused and the question was left to the jury. We find no error in the course here taken by the trial court. The bank was under no duty to notify the defendant so long as there was only a suspicion that Lechner had defaulted. It was not until fraud or dishonesty had been discovered that the duty of notifying the defendant below arose; and, under the doctrine of *Fidelity Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193, "immediate notice" means no more than that degree of promptitude which was reasonable under the circumstances of this case. We think the trial court was entirely right in submitting this question to the jury.

Still another provision of the bond is the following:

"That any claim made under this bond, or a renewal thereof, shall embrace and cover only for acts and defaults committed during its currency, and within twelve months next before the date of the discovery of the act or default upon which such claim is based."

One of the items in the bill of particulars filed by the bank is: "May 19, 1900. W. J. Lockhart, deposit not on books, \$630." The evidence in regard to this item is that on May 19, 1900, Lockhart made a special deposit of a bag of silver coin, amounting to \$630, for which Lechner gave him, on that day, a receipt. No entry of this deposit was made on the bankbooks. After Lechner's flight, it was found that the bag of silver was not in the vault. The bank subsequently paid the amount to Lockhart. The total loss to the bank shown by the bill of particulars was \$10,035.69. It was shown that the American Surety Company, which had also insured Lechner's fidelity to the extent of \$5,000, had paid the bank this sum. As the jury found for the bank the sum of \$5,000, it is evident that

the bank recovered for the loss of the bag of silver in question. When the president of the bank was testifying he stated that he had not the slightest idea when Lechner took the silver. The foregoing is all of the evidence on this subject. Unless the silver was taken by Lechner within 12 months prior to the discovery of the loss the bank had no right to recover for this default. The trial court, over the objection of the defendant, left it to the jury to say whether or not the defendant was liable as to this item. In so ruling we are constrained to hold that the learned trial court erred. The burden of proof was on the bank. The evidence left the time when Lechner committed the default in respect to the bag of silver wholly uncertain. He may have converted this money more than 12 months before the loss was discovered. The evidence was so incomplete that the jury could merely surmise and speculate as to the time of the default. Under such evidence we are of opinion that the trial court should have instructed the jury that they could not find for the plaintiff as to this item. *Manning v. Ins. Co.*, 100 U. S. 693, 25 L. Ed. 761.

We think it unnecessary to discuss in detail the various assignments of error. In regard to the item concerning the account of the Carolina Savings Bank—the facts as to which it would be useless to state—the trial court will be guided on a retrial by our conclusion as to the bag of silver; that is, if no sufficient evidence be introduced tending to show that this loss occurred within twelve months prior to its discovery, the jury should be instructed that they cannot find for the plaintiff as to this item.

For the reasons above set out the judgment below must be reversed, and this cause must be remanded for further proceedings.

Reversed.

JAMES FREEMAN BROWN CO. v. HARRIS.

(Circuit Court of Appeals, Fourth Circuit. May 26, 1905.)

No. 567.

1. FEDERAL COURTS—JURISDICTION—COMITY.

Where a state court having jurisdiction of the administration of an insolvent's estate authorized plaintiff to sue its receiver "in any court of competent jurisdiction" to enforce plaintiff's contract and to settle and determine the rights of the parties thereunder, the necessary jurisdictional facts appearing to entitle plaintiff to sue in a federal court, such court was not prevented by comity from assuming jurisdiction.

2. SAME—JUDGMENT—FORM—SCOPE AND OPERATION.

Where, in replevin against a receiver tried by a federal court without a jury, the trial judge filed a memorandum declining to decide the case on its merits, on the ground of comity, but entered a finding for the defendant, and rendered judgment that defendant recover of plaintiff the possession of the property described in the complaint, or, in case a delivery could not be made, its value together with damages, such value and the amount of damages to be thereafter adjudicated and ascertained, such judgment was in form a judgment on the merits, which was *res adjudicata* against plaintiff's claim, and was therefore error.

McDowell, District Judge, dissenting.

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

C. P. Sanders and William A. Barber, for plaintiff in error.

William M. Jones, for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD and McDOWELL, District Judges.

BOYD, District Judge. Prior to the month of August, 1901, the Morgan Iron Works, a creditor of Fairmont Mills, which latter is a corporation under the laws of the state of South Carolina, and doing business as a manufacturer of cotton in said state, brought a creditors' bill of complaint against the said mills, in the court of common pleas of Spartanburg county, and, upon due proceedings had in the said court, L. Guy Harris was, on the 31st day of May, 1901, duly appointed receiver for the property and business of the said mills, and invested with all rights and powers as receiver, according to law. The said receiver qualified and took possession of the property of the mills, and, among other effects, of 189 bales of sheeting, which are the subject of litigation in the present suit. Thereafter the James Freeman Brown Company, a corporation duly chartered and organized under the laws of New York, and resident in the city of New York, intervened by petition in the court of common pleas of Spartanburg county, in the said suit of the Morgan Iron Works against Fairmont Mills, and on the 22d of July, 1901, the following order was made and filed by the judge of the said court:

"South Carolina, Spartanburg County, Common Pleas.

"Ex parte James Freeman Brown Company, Petr. In re Morgan Iron Works, Plaintiff, against Fairmont Mills, Defendant.

"On hearing the petition of the petitioner above named, wherein it appears that he has a cause of action against the Fairmont Mills arising out of a contract entered into with said mills prior to the appointment of a receiver, and that said receiver refuses to recognize said contract, or to carry out its terms, and that it is necessary to have the rights of the parties settled by the court: On motion of Duncan and Sanders, attorneys for petitioners, ordered that the petitioners above named have leave to bring suit in any court of competent jurisdiction against the receiver of said mills to enforce its said contract, and to settle and determine the rights of the parties thereunder.

"[Signed]

D. A. Townsend, Judge 7th Judicial Circuit."

"July 22, 1901."

Afterwards, to wit, on the 6th day of August, 1901, the said James Freeman Brown Company brought its action in the Circuit Court of the United States for the district of South Carolina against L. Guy Harris, as receiver of Fairmont Mills. In this action the plaintiff filed a complaint, alleging that it was a corporation chartered under the laws of New York, and was residing and doing business in the city of New York, and that the defendant, L. Guy Harris, was a citizen and resident of the state of South Carolina, and was receiver of Fairmont Mills, which was a corporation organized under the laws of South Carolina and a citizen of said state. In the complaint the plaintiff further alleged that by virtue

of certain contracts with Fairmont Mills, and assignments of invoices made to plaintiff by said mills, the plaintiff was the sole owner and entitled to the immediate possession of 189 bales of sheeting of the total value of \$10,950, which said 189 bales of sheeting were in the possession of the defendant, L. Guy Harris, as receiver, and which he refused, upon demand, to deliver to the plaintiff. At the commencement of the action the plaintiff, in accordance with the provisions of the South Carolina statute relating to proceedings in claim and delivery of personal property, filed an undertaking in the sum of \$21,900, conditioned as required by law, for the purpose of having the property sued for taken from the possession of the defendant and delivered to plaintiff. The summons and other process in the action were duly executed upon the defendant, the undertaking approved, and the property taken from the defendant and delivered to the plaintiff. In the regular course of the cause the defendant appeared and answered the complaint of the plaintiff, in which he denied plaintiff's title to the 189 bales of sheeting or any part thereof, or that the same were wrongfully in his possession. The defendant further averred that the property was worth \$12,000, and demanded judgment that plaintiff's complaint be dismissed, and that he have judgment for the return of the property, or for \$12,000, the value thereof, together with \$8,000 damages for the wrongful seizure and detention of the same, and so forth. In July, 1904, the cause came on for trial at an adjourned term of the Circuit Court at Charleston, S. C. The parties to the action waived a trial by jury, and submitted the case to the presiding judge upon an agreed statement of facts, which was filed in writing. The following finding was made by the judge, and entered of record under the head of trial of cause and verdict:

"At a stated term of the Circuit Court begun and holden at Greenville, S. C., and adjourned to Charleston, S. C., on the 19th day of July, A. D., 1904, this case came up for trial before the court, a jury having been waived. The pleadings were read to the court, and after argument of counsel for plaintiff and defendant the court entered the following verdict:

"This case, by agreement in writing, was heard by the court without a jury upon a written statement of facts.

"I find for the defendant, and award damages to an amount to be hereafter ascertained upon an accounting."

And thereupon this judgment was entered in the case:

"James Freeman Brown Company, a Citizen of the State of New York, Plaintiff, against L. Guy Harris, as Receiver of Fairmont Mills, a Citizen of the State of South Carolina, Defendant.

"This action having been brought to a trial at a Circuit Court held on the nineteenth day of July, A. D. 1904, and a verdict for the defendant having been rendered therein by the court, and the costs having been adjudged at forty-five and 10-100 dollars: Now, on motion of Nicholls and Jones, attorneys for said defendants, it is adjudged that the defendant recover of the plaintiff the possession of the personal property described in the complaint, or, in case a delivery of said property cannot be had, its value, together with damages, the value and the amount of damages to be hereafter adjudicated and ascertained."

Under the rule of practice the parties to a suit can waive trial by jury, and in such instance the presiding judge assumes the province

of the jury, and decides both the facts and the law of the case. The judge in the Circuit Court, when this case was submitted to him upon the agreed statement of facts, filed his finding in these words: "I find for the defendant, and award damages to an amount to be hereafter ascertained upon an accounting," and the judgment recited above was entered. This proceeding and judgment, we think, amounts to a final adjudication on the merits of the controversy, except as to inquiry for the ascertainment of the damages which defendant is entitled to recover of the plaintiff. But it is evident that the presiding judge did not intend, by the action which was taken, to dispose of the case on its merits, but to decline so to do on the ground that he was forbidden to entertain the action at all by the comity due to the state court, which had appointed the receiver; for, in a memorandum filed at the term and made a part of the record, he says:

"It may be that upon the hearing the plaintiff may be able to assert an undoubted right to possession of the goods. The case before me does not enable me to form any opinion on that point. All that I decide, and all that I can decide, is that the goods having been left in possession of the Fairmont Mills, in circumstances which have given rise to claims adverse to the plaintiff, and having come into the hands of a receiver of a court of competent jurisdiction, who holds for the benefit of all concerned, and it appearing that such adverse claimants are proceeding to assert their rights in the state court, this court, from consideration of comity, ought not to interfere with such possession. The parties claiming adversely are not before it, and, without hearing them, it is impossible to say that the plaintiff has an unquestionable right to possession."

We fully appreciate the desire of the learned judge at the trial in this case to observe the comity which exists between the federal and state courts, and which should, at all times, be carefully guarded; but, with due deference to him, we are of opinion that, after the state court (in which the original case was pending) had signed an order authorizing the plaintiff to bring suit to enforce whatever right he claimed to the property in question against the receiver, "in any court of competent jurisdiction," it was no invasion of the rule of comity to bring the action in the Circuit Court of the United States, since it fully appears by the pleadings that jurisdictional requirements, both as to parties and value of property in controversy, exist. The receiver against whom the suit was brought represented the interest of Fairmont Mills and its creditors. He denied the title of the plaintiff to the property sued for, and thus put in issue the latter's right to recover it. The pleadings show that the receiver was undertaking to defeat the plaintiff's recovery, and to hold the property as a part of the estate of Fairmont Mills, to be administered for its benefit and that of its creditors. If there were other parties claiming an interest in the property in suit, it was their privilege, if they saw proper, to intervene in this action and assert their right, but none such appeared.

In *Porter v. Sabin*, 149 U. S. 479, 13 Sup. Ct. 1010, 37 L. Ed. 815, the court says:

"When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the

estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it." (A number of authorities are cited in support of this position.) "It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjudge and settle them without suit, as, in its judgment, may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself to determine of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him."

Cited *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; *Texas & Pacific Ry. Company v. Cox*, 145 U. S. 593, 601, 12 Sup. Ct. 905, 36 L. Ed. 829.

The proceeding in the state court, by the creditors of Fairmont Mills, was a bill in equity. The claim of the plaintiff in the present case, as appears by the pleadings, and after the receiver had refused to deliver possession of the goods sought to be recovered, involves disputed facts, and the court in which the equity cause was pending had the right, either on its own motion or the prayer of the plaintiff, to allow suit to be brought against the receiver in a court of law, in order that such facts might be there tried and determined. See *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672.

The finding of the court, and the judgment entered thereon, seem to us to conclude the plaintiff, and leave it without further remedy. In another suit for the same cause of action, upon the plea of *res adjudicata*, the record in this case would be a bar to a recovery. We think that the order of the state court was ample to authorize the plaintiff to bring suit against the receiver in any forum, either state or national, having jurisdiction, for its terms are that the petitioner have leave to bring suit "in any court of competent jurisdiction against the receiver of said mills, to enforce its said contract and to settle and determine the rights of the parties thereunder," and we do not agree with the contention of the defendant that this meant only that the scope of the suit should be limited to a construction of the contract. The authority was to determine the rights of the parties under the contract. The right that plaintiff claimed was the ownership of the property, and this was the issue raised by the pleadings. The plaintiff and defendant submitted an agreed statement of facts in this case, upon which the presiding judge should have rendered a decision; but instead of determining the case upon a consideration of its merits, he proceeded upon an erroneous idea of comity, and still entered a judgment which is, in our opinion, final and conclusive. If the comity of jurisdiction forbade the entertainment of the action by the Circuit Court, the the same should have been dismissed without prejudice, thus leaving the plaintiff to pursue his remedy before some other proper tribunal. But it is clear to us that the plaintiff had full authority under the terms of the order of the state court (it appearing that the necessary jurisdictional requirements existed) to bring suit in the Circuit

Court for the possession of the property described, and that, upon the trial, the case should have been determined on its merits.

The plaintiff's counsel excepted to the ruling of the trial judge on the question of comity and to the finding and judgment entered. This exception, we think, should be sustained.

Such being our conclusion, the judgment of the Circuit Court is reversed, and the case remanded to the said court to the end that proceedings in harmony with this decision may be had.

Reversed.

McDOWELL, District Judge (dissenting). I am unable to concur in the conclusion of the majority of the court.

As to 169 of the bales: Under the pleadings and agreed facts, the contract under which plaintiff in error claimed the right of possession is void, under section 2655 of the Civil Code of 1902 of South Carolina for want of registry, as to some of the creditors represented by the receiver. This defense is one that was properly made by the receiver. *Bayne v. Brewer*, 90 Fed. 754; 3 *Cook, Corp.* (5th Ed.) § 869, and notes; 20 *Amer. & Eng. Ency.* (1st Ed.) pp. 252-3. This fact clearly made it the duty of the trial court to decide that the plaintiff in error, plaintiff below, did not have the right to the possession of 169 of the bales sued for, or to remit the controversy to the court which appointed the receiver.

As to the remaining 20 bales: If the contract as to these bales was not shown by the agreed facts to be void for want of registry—and such is my conclusion—still the facts in evidence showed a probable, and certainly possible, right in the receiver to the proceeds of sale of the 20 bales over and above the bank debt assigned to plaintiff in error secured by pledge of these bales. A strict legal right of possession in plaintiff in error may have been shown. Yet both comity and the duty of avoiding injustice required that the trial court should not take advantage of the ex parte order of the court which appointed the receiver, but should in effect remit the controversy to the court which could protect the rights of every one concerned.

The order entered by the trial court accomplishes this result, and it cannot estop plaintiff in error from asserting in the court of the receivership every substantial right to which it is entitled. The rights of plaintiff in error as a creditor of the mill company having unsatisfied money demands, and its rights as to priority of payment out of the proceeds of sale of any of the sheeting in question, have not been adjudicated. On the face of the judgment, nothing was adjudicated except the mere right of possession.

MYERS v. KNICKERBOCKER TRUST CO.

(Circuit Court of Appeals, Third Circuit. June 19, 1905.)

No. 29.

1. CORPORATIONS—BANKING COMPANIES—STOCKHOLDERS—LIABILITY TO CREDITORS—STATUTES—NATURE AND EFFECT.

The liability of stockholders to creditors of a banking association under Acts Gen. Assem. Md. 1892, p. 156, c. 109, § 85, declaring that each stockholder shall be liable to depositors and creditors for double the amount of stock at par held by such stockholder, though statutory, was contractual in its nature; each stockholder voluntarily agreeing to incur the liability at the time he became such, which liability was not a corporate asset, but a debt due directly by the stockholder to creditors of the corporation who became such while the stockholder held its stock.

2. SAME—STATUTES—CONSTITUTIONALITY—OBLIGATION OF CONTRACT—IMPAIRMENT.

Acts Gen. Assem. Md. March 25, 1904, p. 179, c. 101, repealing the pre-existing remedy of a creditor to bring a separate action at law to enforce a several statutory liability against a stockholder of a banking association for corporate debts to the extent of an amount equal to the par value of the stock held by him, conferred by Acts Gen. Assem. Md. 1892, p. 156, c. 109, § 85, and substituting therefor a remedy by bill in equity on behalf of all creditors against all stockholders in the state, and declaring that such statutory liability shall constitute an asset of the corporation if necessary to pay debts, etc., not only changed the remedy, but abrogated the contract right conferred by such former statute, and was therefore unconstitutional, as impairing the obligation of contract, as against creditors of a corporation who became such and had brought suit to enforce such statutory liability prior to the passage of the act.

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

See 133 Fed. 764.

J. H. McNeal, for plaintiff in error.

W. Calvin Chestnut, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The defendant in error, a corporation of the state of New York, (hereinafter called the plaintiff) brought suit against the plaintiff in error (hereinafter called the defendant), upon his statutory liability as a holder of 200 shares of the capital stock of the City Trust & Banking Company, an insolvent corporation of the state of Maryland, of which the plaintiff was a creditor to the extent of \$65,000.

The suit, which was an action at law, was instituted on March 21, 1904, in the Circuit Court of the United States for the Middle District of Pennsylvania, and came on to be tried on June 13, 1904. The alleged liability was based upon an act of the General Assembly of Maryland, of 1892, p. 156, c. 109, § 85 of which enacts that "each stockholder shall be liable to depositors and creditors of any such corporation, for double the amount of stock at the par value held by such stockholder in such corporation." The charter of the said City Trust & Banking Company, by an express provision thereof,

was made subject to this provision of the statute. It is a proposition of general law, and not here disputed, that, to quote the language of the learned judge of the court below, "the liability so imposed is absolute, direct and several, and any stockholder may be pursued by action at the instance of a creditor, and judgment recovered to the full extent fixed by the statute, so far as it is necessary to satisfy his claim, provided the stockholder has not already paid other corporate debts, for which, so far as he has, he is entitled to credit pro tanto." Nor is it denied that this is the law of Maryland, as evidenced by numerous decisions of its court of last resort. The relation between a creditor of a corporation and a stockholder therein who has become such, subject to the statutory liability thus imposed, is a contractual one, and the obligation arising therefrom may be enforced by any appropriate remedy at law or in equity. The right of action is transitory, and may be pursued in a court of competent jurisdiction in any state where such stockholder may be found.

Such being the state of the law when suit in the present case was instituted, the General Assembly of the state of Maryland, by the act of March 25, 1904, p. 179, c. 101, repealed section 85¹ of the act of 1892, as above quoted, and re-enacted the same so as to read as follows:

"85¹. The stockholders of every such corporation shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such stock. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee, shall not be personally subject to any liability on such stockholders, but the persons pledging the stock and the estate and funds in the hands of such executor, administrator, guardian or trustee, shall be subject to the liability imposed upon the holders of said shares. And the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary, to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation, acting under the orders of a court of competent jurisdiction; provided that this act shall not affect the rights or remedies of any creditor or depositor under the existing laws of this state against the stockholders of any such corporation, who were liable to any such creditor or depositor at the date of the passage of this act."

It will be observed that this act, by its express terms, was not retrospective, by reason of the proviso at the close of this section 85¹, as re-enacted. Eighteen days thereafter, however, to wit, April 12, 1904, an act of the said General Assembly was approved (being chapter 337, p. 597, of the Acts of 1904), by which it was provided that:

"The exclusive remedy for the enforcement against stockholders of all rights existing under the Code of Public General Laws, article 23, section 85¹, as said section stood before the repeal thereof by the act of March 25th, 1904," and the re-enactment of the same, with amendments, and which rights "were declared by said act not to be affected by the terms thereof, shall be as against stockholders residing in the state of Maryland, by bill in equity in the nature of a creditors' bill filed against such stockholders by one or more creditors on behalf of themselves and all other creditors of the

corporation who may come in and make themselves parties thereto, in a court having jurisdiction within the limits of the county or the city of Baltimore in which, as the case may be, the principal office of the corporation is situated at the time of the filing of the bill, or, in case any such corporation has, by reason of having been placed in the hands of a receiver, or from any other cause, ceased to have any principal office at the time of the filing of the bill, then the bill shall be filed in a court having jurisdiction within the limits of the county or the city of Baltimore, in which, as the case may be, the said corporation had its last and principal place of business; and to any such bill, stockholders residing beyond the limits of the state of Maryland may become parties defendant, and upon so becoming parties, shall not be proceeded against in any other state or territory or in the District of Columbia in respect of any liability imposed by the said section 85¹ as said section stood before the repeal thereof and which existed at the time of the passage of the act of 1904 hereinbefore referred to. This section shall become operative as of January first, nineteen hundred and three, and shall cause the abatement of all actions at law which shall have been brought against said stockholders since that date to enforce any liability created by section 85¹ as said section stood before the repeal thereof, and which existed at the time of the passage of the act of 1904 hereinbefore referred to: provided, however, that as to any plaintiff or plaintiffs in any of said abated suits who shall, within sixty days from the passage of this act, become a party or parties to a bill in equity of the character mentioned in this section, then as regards the operation of the statute of limitations upon the claims so sued on, the time elapsed between the institution of said abated suits and the time of such plaintiff or plaintiffs becoming a party or parties to said bill in equity, shall be excluded in ascertaining the period within which suits are required to be brought by the said statute of limitations. The costs taxable to any plaintiff or plaintiffs in any action at law which shall be abated under the provisions of this section the plaintiff or plaintiffs in which action shall become a party or parties to a bill in equity under the provisions of this section, shall become a part of the costs taxable in the proceedings in said equity case."

The court below permitted this act to be given in evidence by the defendant, under the plea of non assumpsit, as also the fact that on June 9, 1904, four days before this case was called for trial, the defendant had become a party defendant to a bill in equity in Baltimore City, under the provisions of said act. At the conclusion of the case, the defendant, in several prayers, asked the court to withdraw the case from the jury, and rule that the plaintiff must be nonsuited, on account of the passage of this act and the fact that he had become a party to the equity suit pursuant to its provision in that behalf. The court, however, declined to do so, and directed a verdict for the plaintiff, subject to two points of law which were reserved, with the first of which only we are here concerned, to wit, "whether there was any evidence on which plaintiff was entitled to recover, with leave to enter judgment in favor of the defendant, notwithstanding the verdict, if the court should be of the opinion that upon the law judgment should be so entered." The rule for judgment non obstante veredicto on the points reserved, was afterwards discharged and judgment entered upon the verdict. There are several assignments of error, but by stipulation of counsel, the only question for our determination is the constitutionality of chapter 337, p. 597, of the Acts of 1904.

It is to be observed that this act is entirely retrospective. It applies necessarily by its terms only to the rights of creditors against

stockholders, as they existed under article 23, section 85¹ of the law of 1892, at the time of its repeal, which were declared by said repealing act not to be affected by the terms thereof. It is contended by the plaintiff, and so held by the court below, that this act impaired the obligation of the contract between it and the defendant, as it existed at the time of its passage (April 12, 1904), and at the time of the institution of this suit for the enforcement of the same on March 13, 1904.

The liability of each stockholder to any creditor of the corporation, for double the amount of the par value of his stock, under the act of 1892, was statutory, but it was, as we have said, contractual in its nature, each stockholder voluntarily agreeing to incur the liability at the time of his becoming such. The creditor was authorized to sue and collect from any stockholder to the extent of such liability, without first exhausting his remedies against the corporation, the liability of the stockholder to the creditor being a primary obligation. The nature of the liability under the act of 1892, which we are now considering, is thus authoritatively stated by the court of appeals of Maryland, in the very recent case of *Miners' & Merchants' Bank of Lonaconing v. Snyder* (Md.) 59 Atl. 707, hereinafter referred to:

"The act of 1892, p. 153, c. 109, which was then in force created the liability of the stockholders of a trust company for its debts. That particular act has not heretofore been the subject of consideration by us, but we have several times had occasion to construe provisions of the Code and special charters imposing a liability of the like nature upon stockholders in manufacturing and other corporations. In those cases we determined that such liability does not constitute a corporate asset enforceable by a receiver of the corporation, but it is a debt due directly by the stockholder to those persons who became creditors of the corporation while he held its stock. We further held that any such creditor could enforce the liability by a separate action against any stockholder from whom it was due, and recover the debt from him to the extent of double the par value of the stock held by him at the time it was contracted. It was thus made possible for the creditor by the exercise of superior skill and diligence to secure payment in full of his debt from the stockholder sued by him to the exclusion of the other creditors. *Matthews v. Albert*, 24 Md. 535; *Norris v. Wrenschall*, 34 Md. 501; *Hammond v. Straus*, 53 Md. 10; *Attrill v. Huntington*, 70 Md. 197, 16 Atl. 651, 2 L. R. A. 779, 14 Am. St. Rep. 344; *Colton v. Mayer*, 90 Md. 717, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456, and cases there cited."

Accepting this interpretation of the Maryland act of 1892, by the court of last resort of that state, we are relieved from the necessity of independent interpretation on our part. It was to enforce the debt thus directly due from the stockholder to the creditor, the corporation plaintiff, that the suit below was instituted. The contention of the defendant below was, and is here, that though the payment of this debt was admittedly enforceable by the suit as instituted, prior to the enactment of the statute of April 12, 1904, it was no longer so, after the enactment of the same, and that the suit, by force of this statute, must abate. It is clear that such was the intended operation of this statute.

Whether the passage of such a law is within the competence of the state Legislature, is the single question now before us. The force and effect of the provision of section 10 of article 1 of the Con-

stitution of the United States, providing that no state shall pass any law impairing the obligation of contracts, has been considered by the Supreme Court of the United States in cases far too numerous for exhaustive citation.

In the earliest case in which the contract clause of the Constitution came up for direct and extensive discussion (*Sturges v. Crowninshield*, 4 Wheat. 122, 197, 4 L. Ed. 529), Chief Justice Marshall's definition of the words "obligation of a contract," as used in this clause of the Constitution, is, perhaps, as satisfactory as any since formulated. He says:

"In discussing the question, whether a state is prohibited in passing such a law as this [an insolvent law], our first inquiry is into the meaning of words in common use—what is the obligation of a contract? and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract."

Distinction was early made between those acts of the state Legislature which merely affected or modified the remedy upon a contract, without destroying the same, and those which affected its substantial obligation. In applying this distinction, however, the decisions of the Supreme Court show increasing care, to protect the substantial obligation of a contract from impairment by subsequent legislation which changes or modifies the remedy for its enforcement.

Chief Justice Taney, delivering the opinion of the Supreme Court in *Bronson v. Kinzie*, 1 How. 311, 317, 11 L. Ed. 143, says:

"It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

In *McCracken v. Hayward*, 2 How. 608, 611, 11 L. Ed. 397, the Supreme Court says:

"The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. * * * If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence, any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

In *Seibert v. Lewis*, 122 U. S. 284, 294, 7 Sup. Ct. 1190, 1194, 30 L. Ed. 1161, the Supreme Court, speaking by Mr. Justice Matthews, says:

"It is well settled by the decisions of this court, that 'the remedy subsisting in a state, when and where the contract is made and is to be performed, is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract

is forbidden by the Constitution, and is therefore void.' *Edwards v. Kearzey*, 96 U. S. 595, 607, 24 L. Ed. 793. It had been previously said upon a review of the decisions of the court, in *Von Hoffman v. City of Quincy*, 4 Wall. 535, 553, 18 L. Ed. 403: 'It is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void.' * * * In *Louisiana v. New Orleans*, 102 U. S. 203, 206, 26 L. Ed. 132, Mr. Justice Field, in the opinion of the court, said: 'The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened.' In various forms, but with the same meaning, this rule has been often repeated in subsequent decisions by this court."

In *Bryan v. Virginia*, 135 U. S. 685, 693, 10 Sup. Ct. 972, 982, 34 L. Ed. 304, the Supreme Court, speaking by Mr. Justice Bradley, says:

"It is well settled by the adjudications of this court, that the obligation of a contract is impaired in the sense of the Constitution, by any act which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed at the time it was contracted, and does not supply an alternative remedy equally adequate and efficacious."

Let us consider, then, how the act of April 12, 1904, if given the effect claimed for it, operates upon the law of the contract, as it existed at the time it was passed. We have already seen that the right of the plaintiff, as a creditor of the corporation when this suit was instituted, was to demand from the defendant, as a stockholder, payment of or upon his debt, up to the amount of double the par value of defendant's stock; that by the exercise of diligence, this right might become, and in this case actually did become, exclusive of that of every other creditor as to this particular defendant, and that the right was enforceable in a common-law suit, such as was being proceeded with in the Circuit Court of the United States for the Middle District of Pennsylvania, at the time of the passage of the said act of April 12, 1904. But by this latter act, it was provided that the exclusive remedy for the enforcement against stockholders of such rights as existed under the act of 1892, and which were saved by the repealing and re-enacting act of March 25, 1904, should be by a bill in equity against stockholders residing in the state of Maryland, by one or more creditors, on behalf of themselves and all other creditors of the corporation who should come in and make themselves parties thereto in a state court having jurisdiction within the limits of the city of Baltimore, and that to any such bill, stockholders residing beyond the limits of Maryland might become parties defendant, and upon so becoming should not be proceeded against in any other state or territory in respect of any liability imposed by said section 851 (being the law of 1892). This is indeed a change of remedy, but one so drastic that it operates directly upon

the contract and clearly impairs its obligation. Before the passage of the act, the contract which the plaintiff was properly seeking to enforce, was one, by which the stockholder had incurred an obligation to the plaintiff to respond to his demand, in a suit prosecuted with the requisite diligence, in a sum twice the amount of the par value of his stock. The remedy to enforce this right, and which was being pursued by the plaintiff at the time of the passage of the obnoxious law, was the one decided to be appropriate by the court of last resort in the state of Maryland. It was something more, then, than a mere change of remedy, to say that the right thus described and defined as existing under the law of Maryland of 1892, as interpreted by the highest courts of that state, no longer existed, but that this liability of the individual stockholder to the individual creditor, should be changed into a right vested in all the creditors, to proceed in one action against all the stockholders. As said by Judge Lowell, in *Dexter v. Edmonds* (C. C.) 89 Fed. 467, "It is a difference between two substantive rights." It is not a question of an alternative and equally efficacious remedy for the enforcement of a right, but a change in the essential nature of the right itself, and a clear impairment of the obligation of the contract out of which such right arose. The Maryland statute of 1892 gives this plaintiff, as an individual, a substantive right as against this individual defendant. The law of April 12, 1904, says that this substantive right can no longer be enforced. We have no difficulty, therefore, in deciding that this act of the Legislature of Maryland, of April 12, 1904, entirely retrospective in its operation as it is, is void as being within the inhibition of article 1, cl. 10, of the Constitution, declaring that no state shall pass a law impairing the obligation of contracts.

With the policy of this later law, we are not here concerned. It may well be, that it is wiser and more equitable to make this stockholders' liability an asset of the corporation, and either to allow a receiver to collect from all stockholders, and account pro rata to all creditors, or to accomplish the same result by a creditors' bill, in which all creditors may be parties and all stockholders defendants. But the law of the contract was not of this character at the time the liability of the defendant to the plaintiff accrued. The only question before us is, whether the law of 1904 works an impairment of the contract existing between plaintiff and defendant at the date of its passage. Our attention has been called to the case of *Miners' & Merchants' Bank of Lonaconing v. Snyder* (Md., decided November 30, 1904, not yet officially reported) 59 Atl. 707, and above quoted from. In that case, the Court of Appeals of the state of Maryland had before it the very questions here presented, as to the effect of the law of 1904 upon the rights of creditors of an insolvent corporation as they existed under the law of 1892, and have come to an opposite conclusion to that which we have just stated as our own in the case before us. They held that this act does not impair the obligation of a contract, as the Legislature had the power to alter and modify the remedy to enforce the contract, without impairing its obligation. We have read the opinion and judgment of the

court in this case, with the interest and respect due to its high character, and with the deference to which it is entitled as the court of last resort in the state whose legislation is now under review. We are, however, compelled to adhere to the views we have expressed, and regret that they should be in opposition to those of that learned tribunal.

The judgment of the court below must therefore be affirmed.

NARETTI v. SCULLY.

(Circuit Court of Appeals, Third Circuit. June 26, 1905.)

No. 14.

RELEASE OF JUDGMENT—IMPEACHMENT—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to impeach the validity of a release of a decree on the ground that it was without consideration, or that it was procured by collusion and fraud.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

See 131 Fed. 399.

J. Hill Brinton, for appellant.

George Hart, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal in admiralty. On March 18, 1904, an order pro confesso for want of an answer was entered against the appellee. On May 28, 1904, the appellant executed and delivered an instrument under seal, by which, for the stated consideration of \$5, he released the appellee from the damages claimed by the libel. Subsequently, on June 22, 1904, a decree based upon the order of March 18, 1904, was entered against the appellee for \$300, with interest and costs. On December 12, 1904, the district court, upon consideration of the proofs submitted, and after hearing the proctors of the respective parties, directed the clerk, upon payment of the costs by the appellee, to file the release above mentioned "as a satisfaction of said judgment"; and "the question raised in this appeal [as stated in appellant's brief] is whether or not there was sufficient evidence to show that a formal release executed by the libelant was procured through collusion and fraud, and without consideration." This question of fact was rightly resolved by the court below. Independent examination of the testimony has brought us to the conclusion that, although it discloses some circumstances to excite suspicion of unfairness, it would not, as a whole, justify a finding that the release in question was obtained either by duress or by fraud, or that it lacked consideration. As was said by the learned District Judge:

"The notary public before whom the paper was executed, and two of Naretti's own countrymen, together with another witness, were called to show that he voluntarily, and with knowledge of what he was doing, executed this pa-

per; and there is further evidence to establish the fact that he received \$5 for so doing; and, moreover, during the pendency of the suit he had worked for Scully again from April 2d to June 16th, and in fact was working for him when the paper was executed."

The decree is affirmed.

FRANK et al. v. BUTLER COUNTY, NEB.

(Circuit Court of Appeals, Eighth Circuit. June 2, 1905.)

No. 2,127.

1. MUNICIPAL CORPORATIONS—VALIDITY OF BONDS.

The Constitution of Nebraska authorized the issue of bonds by a county in aid of the construction of railroads on condition of the vote of the qualified electors of the county authorizing the same, with the proviso that the bonds or evidences of indebtedness so issued should not be valid unless the same shall have indorsed thereon a certificate signed by the Secretary and Auditor of State, showing that the same are issued pursuant to law. Statutes were enacted by the state Legislature in execution of the constitutional provision, requiring that such bonds should be presented for registration to the state officer, and for their certification as aforesaid. *Held*, that the bonds so authorized by such a vote, and issued by the county commissioners, without such registration and certification, were nonenforceable in an action at law against the county at the suit of the holder of such bonds.

2. EQUITABLE REMEDY AND LACHES.

The holder of a part of said bonds in 1880 presented them for registration and certification, which were refused by the State Auditor for the reason that the proposition submitted to the electors was in the alternative—for a subscription to one of two roads which should first comply with subsequent conditions, one of which did accept the subscription and comply with the conditions imposed. In subsequent mandamus proceedings, at the relation of other holders of the same issue of bonds, to compel their registration and certification, the Supreme Court of the state upheld the action of the State Auditor. In 1903 the present suit in equity was brought, alleging that said bonds were legally entitled to registration, and that the refusal of the State Auditor was wrongful. Invoking the rule in equity that regards that as having been done which should have been done, the bill prays for a decree for the enforcement and collection of the bonds. *Held*, in view of the long lapse of time and the changed conditions which have supervened, the remedy, if it existed in equity, is barred by reason of laches.

3. SAME—CONCURRENT REMEDY BY MANDAMUS—STATE AND FEDERAL COURTS.

The remedy by mandamus was recognized by the state statute and practice for review of the action of the State Auditor in refusing to register said bonds. This remedy was equally open to the nonresident citizen in the federal court, which expired by the state statute of limitations within four years. As the holder of said bonds had the right to invoke this legal remedy on the maturing of the annual interest coupons, a court of equity after the lapse of 20 years should decline any equitable relief.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Nebraska.

This is a bill in equity by appellants, the executrices of Augustus Frank, resident citizens of the state of New York, against the appellee, Butler county, in the state of Nebraska, seeking to recover the principal and interest of 40 bonds held by said Frank at the time of his death, claimed to have been issued

by said county in aid of the construction of the Lincoln & Northwestern Railroad Company.

On the 1st day of May, 1879, the commissioners of said county passed a resolution to submit a proposition to the voters of said county to vote aid "to the Lincoln & Northwestern Railroad Company or the Blue Valley & Northwestern Railroad Company." After due publication, the proposition so submitted was voted on by the qualified electors of the county and carried. The said resolution and order of submission provided that the commissioners should not be authorized to issue said bonds unless one of the railroad companies on or before July 1, 1879, should file in the office of the county clerk its written acceptance of the bonds provided for, should the same be authorized to be issued, and that the company so filing its acceptance would be entitled to have said bonds issued to it, to be delivered upon its compliance with the conditions for the construction of said road. The county commissioners found that said bonds had been so voted by the electors, and that the said Lincoln & Northwestern Railroad Company had accepted the proposition, and ordered the bonds to be issued to the trustee appointed in behalf of the railroad company and the county to deliver said bonds in accordance with the terms of said proposition. Afterwards, on the 1st day of July, 1879, the bill avers, said commissioners issued and delivered said bonds to the extent of \$53,000, 106 in number, of the denomination of \$500 each, with annual interest-bearing coupons attached thereto, bearing 8 per cent. interest. The bonds contained a recitation of the facts of said election, the act under which they were issued, etc. The bill avers that the law was complied with in the issuance of said bonds, and that the Blue Valley & Northwestern Railroad Company, named in the proposition, did not accept the proposition or construct said road. After the said bonds had been issued to said accepting railroad company, it delivered \$40,000 thereof to Fitzgerald in payment of construction work upon the line of said railroad, which bonds the said Augustus Frank purchased of said Fitzgerald before any question was raised touching their legality. The bill admits that about the 26th day of July, 1880, after the said railroad had been constructed, the said county made protest against the legality of said bonds; that soon after said Frank purchased the bonds he presented them for registration and certification to the Auditor of State, which were refused, which offer was repeated on the 4th day of June, 1903, and they were again refused, for the reason that the proposition for voting said bonds was in the alternative; it being contended by said Auditor that, said proposition being in the alternative, there was no donee named therefor, and the bonds were not entitled to registration, which action of the said Auditor, the bill alleges, was wrongful, as that in law said bonds were entitled to registration as valid obligations of the county, notwithstanding the fact that said proposition was in alternative form. The bill then avers "that, by reason of the fact that said bonds have not been so registered and certified, complainants are remediless in the premises, and have no adequate remedy at law by which they can enforce the payment of said bonds and obligations, because of the wrongful and unlawful refusal on the part of the Auditor of State to register said bonds and to properly certify the same as required by law." To the bill of complaint the defendant county filed a demurrer, which was sustained by the court, to reverse which this appeal is prosecuted.

The Constitution of the state of Nebraska (article 12, § 2) declares that "no city, county, town, precinct, municipality, or other subdivision of the state, shall ever make donations to any railroad, or other works of internal improvement, unless a proposition so to do, shall have been first submitted to the qualified electors thereof, at an election by authority of law, provided, that such donations of a county with the donations of such subdivisions in the aggregate shall not exceed ten per cent. of the assessed valuation of such county, provided, further, that any city or county may, by a two thirds vote, increase such indebtedness five per cent. in addition to such ten per cent.; and no bonds or evidences of indebtedness so issued shall be valid unless the same shall have endorsed thereon a certificate signed by the Secretary and Auditor of State, showing that the same is issued pursuant to law." In conformity to this constitutional provision the Legislature enacted laws requiring the holder of such county bonds to present the same to the Auditor of State for

registration, upon his being satisfied that such bonds had been issued according to law, and requiring him and the Secretary of State to indorse a certificate to that effect on such bonds; declaring that "no such bonds shall be issued or be valid unless they shall be so registered and have endorsed thereon a certificate of said Auditor and Secretary of State, showing that such bonds are issued pursuant to law, the data filed in the office of said Auditor being the basis of such certificate."

The statute of the state (chapter 45) declares:

"Section 1. That any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per centum of the assessed valuation of all taxable property in said county or city; provided the county commissioners or city council shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city, in the manner provided by chapter 9, of the Revised Statutes of the state of Nebraska, for submitting to the people of a county the question of borrowing money."

"Sec. 4. If two thirds of the votes cast at any such election for the purposes herein set forth be in favor of the proposition submitted, the county commissioners, in the case of a county, and the city council, in the case of a city, shall cause the proposition and result of the vote to be entered upon the records of said county or city, and a notice of its adoption to be published for two consecutive weeks in any newspaper in said county or city, if there be one, and shall thereupon issue said bonds, which shall be and continue a subsisting debt against such county or city until they are paid and discharged."

"Sec. 6. Any county or city which shall have issued its bonds, in pursuance of this act, shall be estopped from pleading want of consideration therefor, and the proper officers of such county or city may be compelled, by mandamus, or otherwise, to levy the tax herein provided to pay the same."

John L. Webster (Frank M. Hall, on the brief), for appellants.
John C. Cowin, for appellee.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

That the bonds in question are unenforceable at law is not debatable. The Constitution above quoted expressly declares that "no bonds or evidences of indebtedness so issued shall be valid unless the same shall have endorsed thereon a certificate signed by the Secretary and Auditor of State showing that the same is issued pursuant to law." The act of the Legislature required the Auditor to examine the statement and bonds submitted to him for registration, and, if satisfied that they had been voted in conformity to law, he should record the statement and register the bonds in his office, and declares that no bonds shall be issued or be valid unless so registered, and having the certificate of the Auditor and Secretary of State indorsed thereon, showing that they were issued in pursuance of law, etc. The Supreme Court of Nebraska, in construing said constitutional provision and acts of the Legislature, has uniformly held that said registration and certification were prerequisites to the validity of such bonds, in whosoever hands found, as they bear evidence on their face that the law authorizing their transfer and circulation as commercial paper had not been complied with. *State v. Babcock*, 19 Neb. 223, 230, 27 N. W. 98; *State v. Roggen*, 22

Neb. 118, 34 N. W. 108. A like question was presented in the case of *Anthony v. Jasper County*, 101 U. S. 693, 25 L. Ed. 1005, under a similar act of the Legislature of Missouri, requiring the registration of municipal bonds. It was held that the bonds issued without such registration, etc., conferred no right of action thereon on the purchaser and holder. See, also, *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153.

Indeed, the complainants concede the invalidity of the bonds without such registration and certification, and on this ground seek the aid of equity to validate them; the contention of complainants' counsel being that the State Auditor wrongfully refused to register the bonds on the ground of the objection to the alternative feature of the order of submission on which the vote was taken; that, in view of the description as to the location of the railroad and the direction it was to take, the submission was sufficiently definite; and that as the holder of the bonds was, in equity, entitled to have them registered and properly certified, it is competent for a court of equity, in recognition of the maxim that that which should have been done may be regarded as having been done, to declare that the complainants are entitled to a decree against the county for the amount of the principal and interest of said bonds.

The bonds in question were issued on the 1st day of July, 1879, and delivered to the railroad company, which transferred them to Fitzgerald, shortly after they were issued, in payment of construction work done by him on the railroad. The bill alleges "that Augustus Frank purchased eighty of said bonds, of the face value of forty thousand dollars, shortly after they had been issued," which inferentially was in 1880. The bill for relief was not filed until the 11th day of June, 1903, 23 years after the acquisition of the bonds. It is true that the principal of the bonds did not mature until the 1st day of July, 1899, but the coupons, representing interest, became due each year after July 1, 1879, each of which gave the holder the right to test the validity of the bonds in an action at law; and the statute gave to the holder the remedy of mandamus to compel the collection of taxes for the payment thereof. The bill discloses the further fact "that soon after the purchase of said bonds said Augustus Frank presented them to the Auditor of the state of Nebraska, and requested their registration and certification, both of which were refused." He was then advised by the State Auditor that they were regarded by him as invalid and not entitled to registration, on the ground that the alternative proposition submitted to the voters, making uncertain the donee named, rendered them invalid. Thus he was advised not only that the bonds lacked the required registration and certification by the designated officials of the state, but that those officers, to whom the law of the state intrusted the duty of ascertaining whether the bonds had been "issued pursuant to law," refused them registration and their attestation to entitle them to go upon the market. A cause of action then accrued to Frank to apply to the proper court for the writ of mandamus to compel said officers to register and certify to the bonds, if they wrongfully refused to act, or to resort to the remedy in

equity his executrices now invoke. There was then pending before the Supreme Court of Nebraska a bill in equity entitled *Jones v. Hurlburt*, 13 Neb. 125, 13 N. W. 5, in which Jones, a taxpayer of the county, suing on behalf of himself and other taxpayers, sought to enjoin the commissioners of Seward county, in said state, from issuing bonds voted in aid of a railroad, to test the validity of a like alternative proposition submitted to the voters, which bill was sustained by the Supreme Court on the ground that the submission was illegal. And on the 2d day of October, 1880, one Spruck, a taxpayer of said Butler county, in the state district court instituted a suit in equity against the county commissioners, the county treasurer, the Auditor and Secretary of State, and the Lincoln & Northwestern Railroad Company, setting out the proceedings respecting the submission of the question of the subscription involved in this case, and the subsequent action thereon, to enjoin the issue of said bonds, etc., and to enjoin said Auditor and Secretary from registering and certifying to the same. From the decree granting an injunction as prayed, an appeal was taken to the Supreme Court of the state, which affirmed said decree. *Spurck v. Lincoln & N. W. R. Co.*, 14 Neb. 293, 15 N. W. 701. Later on, one Abby Gardner, the holder of one of said bonds, instituted in the Supreme Court of the state a proceeding in mandamus against the State Auditor to compel him to register one of said bonds of the issue involved in this case. See *State v. Roggen*, 22 Neb. 118, 34 N. W. 108, reported January, 1887. She claimed to be an innocent holder for value, in ignorance of the provisions of the state Constitution, etc., requiring the registration and certification of such bond. The Supreme Court followed the preceding decisions; holding the election void on the ground of the alternative proposition in the order of submission, and on the further ground that the bonds, without such registration and certification, were void. These cases establish the right, under the laws of Nebraska, to test the action of the Auditor and Secretary of State for refusing such registration and certification by the writ of mandamus. Against such action the statute of limitation runs in four years. *State v. School District*, 30 Neb. 520, 46 N. W. 613, 27 Am. St. Rep. 420. The statute of limitations of the state bars an action on the interest coupons in four years after maturity. During all these years the holder of these bonds could have brought suit in the state or federal court on the coupons to test the validity of the bonds. The only reason assigned in the bill of complaint for not resorting to an action at law on said coupons is that, by reason of the failure of the state officers to register and certify the bonds, no suit at law was maintainable.

It is utterly incredible to assume that the owner of these bonds, who knew as early as 1880 that the Auditor and Secretary of State refused to register and certify them on the ground of their invalidity, was not taking notice of the public litigation pending in the state respecting the validity of the bonds, and the public rulings of the courts thereon. As pertinently observed by Judge Hook, speaking for this court in the recent case of *Williamson et al. v. Beardsley*, 137 Fed. 467, "A party who has the opportunity of knowing the facts

of which he complains cannot avail himself of his inactivity, and thus escape the imputation of laches." During this great lapse of time between the issue of these bonds and the institution of this suit, lands in Butler county were being purchased by persons seeking homes therein. They had the right to assume that any holders of such outstanding claimed obligations of the county had acquiesced in the repeated decisions of the Supreme Court of the state declaring such bonds void, and that their property would not be burdened with assessments for their payment. The holder of said bonds is presumed to have known that no taxes were being imposed upon the property owners of said county for the payment of interest on the bonds, and that the administration of the county finances were not annually being arranged and adjusted with a view to such indebtedness. The men in office, the active participants in ordering and conducting the election and issuing the bonds, the state officers who refused their registration and certification, are all out of office. And after the lapse of 23 years many may be presumed to have moved from the state, and become scattered far and wide, and others of them may have died. After all these events and changes, these complainants come, pleading many facts existing alone in pais, invoking the aid of the court of conscience, which proceeds *et æquo et bono*, to afford them relief against the infirmities of the bonds at law, apparent on their face when bought. Equity favors the vigilant and active. Where a party seeks its aid, he should evince reasonable eagerness and promptness. He cannot lie dormant throughout a period of 20 years or more, with knowledge of the facts, and after conditions have changed and rights of third parties have supervened, and the relief sought would increase the burdens and hardships which have accumulated while he slept in indifference, expecting a court of equity to exert its extraordinary powers to assist him. "Courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights." *Badger v. Badger*, 2 Wall. 94, 17 L. Ed. 836. When the relief sought is based upon a right claimed to be purely equitable—cognizable alone in a court of conscience—equity acts upon its own inherent rules in respect of limitations, founded on a conservative sense of justice. The doctrine of laches being founded upon public policy, which, for the peace of society, discourages stale demands, where the party complaining has been guilty of gross negligence or deliberate delay, the court will refuse relief. *Mackall v. Casilear*, 137 U. S. 566, 11 Sup. Ct. 178, 34 L. Ed. 776.

Mr. Justice Brown, in *Gallihier v. Cadwell*, 145 U. S. 372, 12 Sup. Ct. 873, 36 L. Ed. 738, speaking of the application of the doctrine of laches under varying conditions, said the courts "proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or

relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

The case of *O'Brien v. Wheelock*, 184 U. S. 450, 22 Sup. Ct. 354, 46 L. Ed. 636 (first reported in [C. C.] 78 Fed. 673), while differing in some material particulars from this case, is most instructive and pertinent in some of its enunciations in the consideration of this case. Under an act of the General Assembly of Illinois, a large amount of bonds were issued by the commissioners of Pike county for the purpose of constructing a levee. Assessments had been made to pay for them against the lands alleged to have been benefited. Certain landowners contested the judgment on the assessments, and the act was adjudged by the Supreme Court of the state to be unconstitutional, so that the assessments and the bonds fell with the act. The bonds so issued were turned over to the contractor who constructed said levees in payment for his work. A large number of them were bought from said contractor by one Palms, who, after the lapse of several years, filed a bill in equity against the commissioners and others in the district for the purpose of collecting the amount of said bonds and interest, on the theory that the levee district had received the benefit of the proceeds of the bonds in the construction of the levee work, which inured to the benefit of the property owners of the district. Pending this suit leave was granted to the complainant to file an amended bill for the purpose of bringing in the landowners of the district to be affected by the decree sought. He took no action toward effecting such amendment for nine years, when he died, and the cause was sought to be revived by his representative in law. Mr. Chief Justice Fuller, in the course of his opinion, adverting to the fact of the failure of Palms to avail himself of the privilege given him to file such amended bill and to proceed, although a large amount of interest was unpaid, and although nearly \$100,000 of the bonds of the first issue had fallen due, said:

"If the case depended alone upon the question of laches, there would be strong ground for holding that the plaintiffs and their testator so long delayed the institution of proceedings against the landowners that a court of equity ought to decline giving them any relief. * * * That the mere institution of a suit does not of itself relieve a person from the charge of laches, and, if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun."

Further on he said that the bill could not be maintained on the theory "of the validity of the act of 1871 [the act under which the bonds were issued], even though some other equity might have been asserted if in the exercise of reasonable diligence. The result is not inconsistent with the cases that hold that, although a law is found to be unconstitutional, a party who has received the full benefit under it may be compelled to pay for that benefit according to the terms of the law." He further maintained that the owners who participated in any way in the creation of the drainage district were as much interested in the invalidity of the law as Palms was in relying upon its validity when he bought the bonds. Referring

to the statute of limitation of the state, which barred actions on unwritten contracts, express or implied, within five years, he said:

"Courts of equity usually consider themselves bound by the statutes of limitation which govern courts of law in like cases. In the second aspect of their bill, appellants did not rely on their bonds as legal instruments, but they sought the aid of a court of equity for the enforcement of a lien in payment of the bonds by reason of an estoppel in pais, and the cause of action so created would seem to have been barred by that statute. But courts of equity go further in the promotion of justice, and, where laches exist, deny the relief sought, even though the statutory period may not have run under the applicable statute. The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief."

On the theory of the bill of complaint, the only impediment in the way of the collection of the bonds in a suit at law was the lack of the required registration of, and certification indorsed on, them, and that the ground on which the refusal to register and certify the bonds was bottomed was the misconception of said state officers respecting the alternative feature of the proposition submitted to the electors vitiating the election. As already shown, the validity of that objection could have been tested by the writ of mandamus. Frank, the holder of the bonds, a nonresident citizen of the state, had the right, if he preferred, to invoke that remedy in the federal court, and take its independent judgment on said question. "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state court of the same locality." *Davis v. Gray*, 16 Wall. 203, 221, 21 L. Ed. 447. See, also, *Cummings v. Bank*, 101 U. S. 157, 25 L. Ed. 903; *Schurmeier et al. v. Connecticut Mutual Life Insurance Co.* (recently decided by this court) 137 Fed. 42. Instead of this course, Frank chose to stand inactive not only four years, whereby he permitted this adequate remedy at law to expire by limitation, but for twenty-three years, while all the changing conditions in Butler county, heretofore adverted to, were taking place, and then appeals to the equity side of the court to hear and try out the question of law and fact as to whether the bonds should have been registered and certified by the Auditor and Secretary of State. Under such conditions the door of a court of equity ought not to be opened to such a suitor to disturb the long repose of this bond controversy.

The decree of the Circuit Court is affirmed.

ARTHUR et al. v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. May 16, 1905.)

No. 2,044.

1. CARRIERS—BILL OF LADING—LIMITATION OF LIABILITY—FIRES.

The consideration expressed in a bill of lading for the transportation of cotton was sufficient to support the whole contract, including a provision exempting the carrier from liability for a loss by fire.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 641-643.]

2. SAME.

Where a shipper accepted a bill of lading for the transportation of cotton containing a fire exemption clause, without requesting that the carrier furnish a rate at which it would ship the cotton under a common-law liability contract, the shipper merely assuming that such a rate would not be conceded, the carrier was not liable for loss of the cotton by fire not due to the carrier's negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 691, 692.]

3. SAME—INDEPENDENT CONTRACTORS—NEGLIGENCE.

Pursuant to a rule of the Texas Railroad Commission, providing that when cotton is tendered to railroad companies on compress platforms situated on the track of such railroad companies it shall be the duty of such companies to take charge of and receipt for the cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at their own depots or platforms, etc., defendant's company issued a bill of lading for cotton delivered by plaintiff to an independent compress company on a compress receipt, the bill of lading providing that each carrier carrying the cotton should be entitled at its own cost to compress the same for greater convenience in handling and forwarding, etc. While the cotton was on the platform of the compress company with other cotton, and before actual delivery to defendant, but after the issuance of such bills of lading, it was destroyed by fire communicated by the engine of another railroad company. *Held*, that the compress company, being a separate independent contractor, was not the servant or agent of defendant, and that the latter was therefore not liable for its negligence in storing or handling the cotton.

[Ed. Note.—Negligence of employé of independent contractor, see note to Atlantic Transport Co. v. Coneys, 28 C. C. A. 392.]

In Error to the Circuit Court of the United States for the Western District of Arkansas.

This is an action instituted by plaintiffs in error against the defendant in error to recover \$2,605.53, the value of 50 bales of cotton alleged to have been delivered to the defendant company by plaintiffs at Texarkana, Tex., to be transported to Utica, New York. The defendant company, a railroad corporation in the state of Texas, had its depot station in Texarkana on the Texas side, the state line between Texas and Arkansas running through said city. The defendant company had no line of railway from Texarkana to Utica, N. Y., but had a traffic arrangement for the division of revenues between it and connecting carriers between Texas and Utica. The defendant company had authority to give a bill of lading for the shipment of cotton made over the through line, the rate of shipment from Texarkana to St. Louis being 25 cents per 100 pounds, and from there to Utica 60 cents, making in the aggregate 85 cents. The petition alleged that the defendant company held itself out as a common carrier for such transportation.

The Union Compress Company was an independent corporation, engaged in the business at Texarkana of compressing cotton delivered by shippers at said point for transportation. Its platforms for such purpose were on the Arkansas side of the state line. According to the usage of such business which pre-

vailed at that place, as at other shipping points in Texas and Arkansas, when cotton was brought in by shippers it was unloaded at the platforms of the compress company, and a receipt taken therefor from said last-named company by the shipper, which he would carry to the agent of the railroad company, who would take the same up, and issue, based thereon, a bill of lading to the shipper. The compress company retained possession of the cotton until such time as it could compress the same, and when compressed it delivered the same on board the cars of the railroad company. The bill of lading in this case contained the following stipulation: "That neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to or destruction of said cotton by fire, nor for any loss thereof or damage thereto by causes beyond its control." It contained the further stipulation that: "Each carrier over whose route the cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing same, for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression." Two days after the cotton was so left upon said platform it was destroyed by fire, in connection with a large amount of cotton belonging to other shippers, with which it had been mingled. The fire was caused by sparks communicated to some part of the quantity of cotton on the platform from a passing engine of another railroad company.

The petition alleges that said platform of the Union Compress Company was not a safe place on which to keep cotton; that it was not inclosed, and no proper provision was made to prevent its destruction by fire; that the compress company had failed to provide suitable or proper apparatus for putting out fires, or to keep proper watch over the same; and that it was destroyed by reason of the negligence of those in charge thereof. The further allegation of the petition is that the defendant railroad company received the cotton from the plaintiffs and turned the same over to the compress company as its agent, to be compressed, and that it is responsible for the negligent act of its agent.

The answer denied that the defendant company received the cotton from the shipper; but alleges the facts, as above stated, that the shippers delivered the cotton in fact to the compress company as an independent contractor, and that it was not at the time the agent of the defendant company for the compression and preparation of said cotton for transportation. It put in issue the allegation of the petition that it held itself out as a common carrier for said cotton from Texarkana to Utica, or that it was in partnership with the other roads which were to carry the cotton to its destination. It admitted that it had a traffic arrangement with the other roads upon a division of revenues for the carriage of said cotton over the lines to Utica, N. Y. The answer alleged that the entire line owned and operated by the defendant was in the state of Texas; that it had its own depot station in Texarkana, in the state of Texas; and that the cotton was delivered as aforesaid at said platform of the compress company for compression according to the rules and regulations that prevailed in such matters.

The evidence tended to show that the cotton, while on said platform, was not properly safeguarded against accident or destruction by fire, and that the servants of the compress company perhaps did not keep sufficient watch over the cotton to prevent its destruction in the event of fire being communicated to it by railroad engines passing said platform.

The Railroad Commission of the State of Texas had adopted and maintained in force the following rule in reference to the receipt of cotton by railroads in Texas located on cotton compress platforms: "When cotton is tendered to railroad companies upon compress platforms, which is situated on the track of such railroad companies, it shall be the duty of the railroad companies to take charge of and receipt for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at its own depot or platform erected for such transactions; provided, however, that the shipper or the compress company shall in such cases assume the additional risk of insurance involved by such act of the railroad company." Pursuant to said regulation the defendant railroad company adopted rule 11, covering substantially the requirements of said regulation. The plaintiffs were cotton buyers at Texarkana, and had for some time prior to the shipment in question been shipping

cotton on like arrangements with the defendant company, and were familiar with the usages that obtained at said place in respect of such shipments.

At the conclusion of the evidence the court directed the jury to return a verdict for the defendant, which was done, and judgment entered accordingly, to reverse which the plaintiffs prosecute this writ of error. Other facts will appear in the following opinion.

W. H. Arnold, for plaintiffs in error.

Hiram Glass (W. L. Estes and John J. King, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

The plaintiffs seek to avoid the stipulation in the bill of lading, which exempted the railroad company from liability for the loss of said cotton occasioned by fire, on the ground of what counsel terms duress in accepting said bill of lading, and for the want of proper consideration for such special exemption. He contends that the railway company had established and offered but one rate for such through shipment, based upon such exemption, without affording the shipper the alternative opportunity of paying a higher rate of carriage to fix upon it the common-law liability of such common carrier. The validity of such provision in such shipping contract was considered by the Court of Appeals of the Fifth Circuit in *Cau v. Texas & Pacific Railway Company*, 113 Fed. 91, 51 C. C. A. 76. That case grew out of a loss from the same fire involved in the case at bar. The validity of the fire exemption clause in the bill of lading was assailed on grounds quite similar to these here interposed. The ruling of the court is expressed in the syllabus as follows:

"A shipper is bound by a provision in a bill of lading exempting the carrier from liability for loss of the goods by fire, where he was chargeable with knowledge that the bill contained such clause, and made no objection thereto, and it is not shown that the loss resulted from the carrier's negligence."

On writ of error to the Supreme Court this ruling was affirmed. 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053. The Supreme Court decided, in effect, every contention here made by plaintiffs in error. It held that it was perfectly competent for the carrier, by special contract, to limit its common-law liability in this respect, so long as it practiced no deceit or fraud on the shipper in making it. In respect of the suggestion that there was no independent consideration for the exemption, the court said:

"This point was made in *York Co. v. Central Railroad*, 3 Wall. 107, 18 L. Ed. 170. In response it was said: 'The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company probably had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made.' In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate. It was the rate also of all other roads, and

presumably it was adopted and offered to shippers in view of the limitation of the common law liability of the roads."

In respect of the contention that no option was given to the shipper to select under which, the common law or limited liability, he would ship his cotton, the court said:

"Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the 'option and opportunity' which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper (*New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 463), and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law (*Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872). Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed."

There, as here, the plaintiff introduced evidence to show that the railroad company had but one schedule of rates for said carriage. About the only discernible difference in the proof there offered and here consists in this: that here one of the plaintiffs, or their agent, testified that on some former occasion he was informed by defendant's agent that he was not authorized to give any other rate than that expressed in the bill of lading, with the fire exemption clause, and that no other kind of bill of lading had been furnished him by the railroad company. Coupled with this, however, the agent testified that he was not authorized to make such change without the permission of the superintendent at Dallas. The testimony of the superintendent of the company was that the company had such established common-law rate, higher than that specified in the bill of lading, and that the shipper could have obtained it by the asking. The plaintiffs conceded that on the occasion of this particular shipment they did not ask for such common-law rate, simply assuming that it would not be conceded. This fact does not differentiate the case from the rule of law laid down by the Supreme Court in the *Cau Case*. Being entitled to hold the public carrier to its common-law liability to accept and carry his goods without the fire exemption clause, by paying the higher rate, if he would hold the carrier to its common-law obligation he should, at the time the goods are tendered, demand of the carrier an unqualified acceptance, and put upon it the responsibility of a refusal. *Hutchinson on Carriers*, § 240, says that:

"Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common-law liability of the carrier. He knows, moreover, that bills of lading are given, not only in evidence of the receipt of the goods, but as expressing direct notice that they will be carried on certain terms. Knowing this, he cannot be willfully blind, and plead ignorance, when it was his duty to know; and knowing in such cases is assenting. As it was his intention to hold the carrier to his common-law liability, he should have said so, and have either declined to employ him or have sued him for his refusal, after tendering a reasonable sum for his services and risk."

In the view we take of the effect of the fire exemption clause, it is not necessary to determine the question discussed by respective

counsel as to whether or not the defendant railway company should be held to the acceptance of the cotton under its common-law obligation as a carrier beyond the limits of its own line, as the non-liability for the loss by fire would apply in either event.

To avoid this obstacle to a recovery, the final contention of counsel for plaintiff in error is that the railroad company in fact received from them the cotton and turned it over to the compress company for compression as matter of its own convenience in shipping, and that the compress company at the time of the fire held the cotton as the agent of the defendant in error, and therefore the negligence of the compress company is imputable to the carrier. The railway company did not, as alleged in the petition, first receive the cotton from the shipper, and then turn it over to the compress company. On the contrary, according to the universal custom which prevailed throughout the Southwest, the cotton when brought in for the merchant buyers was unloaded upon the platform of the compress company, which receipted therefor to the shipper, who then took the receipt to the railroad company at its station and exchanged it for the bill of lading. Under the regulation made by the Railroad Commissioners of Texas, the railroad company had no discretion in the matter of issuing a bill of lading in exchange for the receipt given by the compress company to the shipper. It cannot be maintained, however, that because of this arbitrary regulation the Compress Company became the agent of the railroad company for the custody and care of the cotton, so as to render the latter liable for injury thereto through the negligence of the former. The doctrine of respondeat superior rests upon the right and duty of the principal to direct and control the conduct and action of the imputed agent. Any regulation prescribed by an agency of the state, which would undertake to impose a pecuniary liability upon one person for the conduct or act of a third party, who is an independent actor, would contravene fundamental law. The compress company was a separate, independent contractor. Where the party sought to be held responsible as master for the negligence of the servant is without the authority to direct the time and manner of doing the work, or to select or direct the employes engaged therein, the doctrine of respondeat superior has no application. In short, to fix this obligation of accountability upon the party as master, he must have the right to direct the manner in which the business shall be done; "not only shall be done, but how it shall be done." *New Orleans R. Co. v. Hanning*, 15 Wall. 656, 21 L. Ed. 220; *Singer Mfg. Co. v. Rahn*, 132 U. S. 523, 10 Sup. Ct. 175, 33 L. Ed. 440; *Brady v. Chic. Gt. Wn. Ry. Co.*, 114 Fed. 100, 52 C. C. A. 48, 55, 57 L. R. A. 712; *Bailey v. Troy, etc. Co.*, 57 Vt. 256, 52 Am. Rep. 129; *Casement v. Brown*, 148 U. S. 615, 622, 13 Sup. Ct. 672, 37 L. Ed. 582. *Bliss, J.*, in *Hilsdorf v. City of St. Louis et al.*, 45 Mo. 94, 98, 100 Am. Dec. 352, said:

"The rule that prescribes the responsibility of principals, whether private persons or corporations, for acts of others, is based upon their power to control. If the master cannot command the servant, the acts of the servant are clearly not his. He is not the master, for the relation implied by that term is one of power—of command; and if the principal cannot control his agent

he is not an agent, but holds some other or additional relation. In neither case can the maxim *respondet superior* apply to them, for there is no superior to respond."

From this has resulted the established doctrine that where one renders a service to another representing the will of his employer only in the result of his work, and not as to the means, he is a contractor, and not a servant. *Clark's Adm'x v. H. & St. Joseph R. Co.*, 36 Mo. 218; *Fink v. Missouri Furnace Co.*, 82 Mo. 276, 52 Am. Rep. 376; *Burns v. McDonald*, 57 Mo. App. 601; 20 Am. & Eng. Enc. of Law (2d Ed.) pp. 11, 12.

The compress company was a separate, independent contractor. It provided its own platform, its own machinery, its own employes, and determined for itself the manner and time of preparing the cotton for shipment. The right of the railroad company to thus have it prepared was recognized by the contract in the bill of lading. The actual custody and care of the cotton, until compressed and delivered on the cars of the carrier, remained with the compress company. This was the usage of the business in such shipments, well understood between the parties. It was *hæc est conventio*, as much as if written into the bill of lading. The giving of such bill of lading under such circumstances does not render the carrier liable until it has actually taken possession of the cotton described. Mr. Justice Miller, in *Pollard v. Vinton*, 105 U. S. 8, 26 L. Ed. 998, discussing the nature and effect of a bill of lading, said:

"It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of the property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry and to deliver. And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land as well as by sea."

In *Missouri Pacific Railway Company v. McFadden*, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944, the answer alleged a state of facts quite similar to those under review. While admitting that the defendant had issued the bill of lading for the cotton, the cotton had not, indeed, been delivered to it; that according to the custom, well known to the shippers, after the cotton was placed on the platform at the compress to be compressed the latter would issue a bill of lading to the consignors, when the agent of the compress company would check out the cotton intended the shipper would make out a bill of lading, which would be O. K'd by the superintendent of the compress company, and afterwards would be brought to the agent of the defendant, and by it signed, and the defendant would actually receive the cotton only after it was compressed and delivered upon its cars; that this course was pursued as a matter of convenience by the compress company and the shipper; and that it was not intended that the liability of the carrier would attach until the cotton was actually delivered upon its cars. The cotton was destroyed by fire while in the hands of the defendant. Exceptions to this answer were taken by the plaintiff,

and were sustained by the Circuit Court. While the bill of lading raised a prima facies that the goods had been received by the carrier, yet as the fact was that the property at the time of signing the bill of lading was in the hands of the shipper through the compress company for the purpose of being compressed according to the prevalent usage, the Supreme Court applied the elementary rule that the liability of the carrier with respect to the goods "commenced with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other, and until it has become imposed upon the carrier by a delivery and acceptance he cannot be held responsible for them."

The case of *Edwards & Co. v. Texas Midland R. Co.* (Tex. Civ. App.) 81 S. W. 800, in its essential facts is quite similar to the case at bar. The only practical difference is that after the cotton was brought by the owner to the platform of the compress company and receipted for, and after the receipt was taken to the agent of the carrier to exchange for a bill of lading, it was delayed to await the taking out of the insurance policy contemplated by said regulation of the State Railroad Commissioners, but before it was issued the cotton was destroyed by fire. The mode of procedure was practically identical with that in the case at bar. The cost of compression was included in the rates paid by the shipper to the railroad company, which was to pay the compress company. It was held that under such custom and usage the compress company exercised a distinct and independent employment; that the cotton had not "been stored for compression in the first instance by the railroad company"; that, as the cotton at the time of the fire had not been compressed, it was not, therefore, ready for shipment. "Until the cotton was compressed and loaded onto the cars, it was in the exclusive and physical possession and under the exclusive control of the compress company, to be stored wherever and cared for as the compress company saw fit; and neither the owner nor the carrier had or exercised any control whatever over its care, custody, storage, or compression while it was on the compress platform. * * * After the cotton had been placed on the platform of the compress company, the shipper exercised no control over it, and had nothing whatever to do with it, except to give shipping directions to the compress company. The superintendent of the compress company was the only one to determine when the shipping conditions should be carried out; that is, when the cotton would be compressed and loaded onto the cars." There, as here, the particular cotton, when the fire occurred, had not been compressed. The court further found that "there was absolutely no evidence in the case which had any tendency to show that the railroad company had or exercised any control over the cotton or the place where it was kept by the compress company before it was put upon the cars by that company." The conclusion of the court was that "appellee is not liable, and appellants are not entitled to

recover unless appellee had possession or control of the cotton at the time it was destroyed by fire." So, in *Martin v. Railway Co.*, 55 Ark. 510, 19 S. W. 314, a case parallel to this, it was distinctly held that the compress company was of the character of an independent contractor, and therefore the railroad company was not liable for the negligence of the compress company in storing or handling the cotton.

There is much force in the suggestion of counsel for defendant in error that in principle the office of the compress company should be likened to that of stevedores engaged in the business of loading and unloading water carrying crafts, who are held to be independent contractors, for whose acts of negligence the carrier is not liable, as the stevedores are not its agents. *Dwyer v. National Steamship Co.* (C. C.) 4 Fed. 493; *Rankin v. Merchants' & Miners' Tr. Co.*, 73 Ga. 229, 54 Am. Rep. 874.

Other questions are discussed by learned counsel for plaintiffs in error, which have, by the courts of recognized authority, either been determined adversely to the contention of counsel, or which do not affect the conclusion of this court.

It results that the judgment of the Circuit Court must be affirmed.

MILLER et al. v. WALKER PATENT PIVOTED BIN CO.

(Circuit Court of Appeals, Third Circuit. June 27, 1905.)

PATENTS—INFRINGEMENT—TILTING BINS.

The Walker patent, No. 614,279, for a tilting, pivoted, and counterbalanced bin, for store use, *held* not anticipated, valid, and infringed, as to claim 1, by two different styles of bin made by defendants, both operating on the same principle as that of the patent.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Henry E. Everding, for appellants.

Ernest Howard Hunter, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, in a suit in equity, in which the Walker Patent Pivoted Bin Company, the appellee, was complainant, and the appellants were the defendants. The bill prayed the restraint of an alleged infringement of letters patent No. 614,279, granted to Edwin J. Walker, November 15, 1898, for an improvement in pivoted or tilting bins. The appellee claims ownership to the patent by assignment, and such ownership is not disputed. The answer of the defendants-appellants denies infringement of said patent, and alleges that the patent is void, in view of the prior state of the art. The decree affirmed the validity of the patent and ordered an injunction and an accounting against the appellants. The validity of the patent here in suit had been passed upon and sustained in the court below, by the same judge (Archbald, District Judge, specially assigned) in a previous case between the same complain-

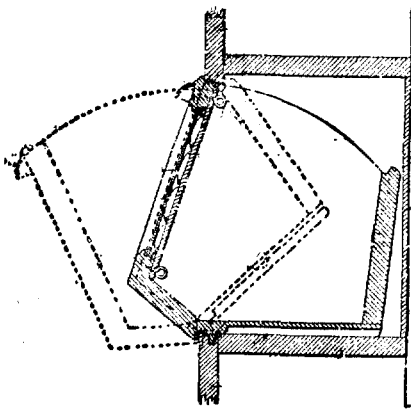
ant and other alleged infringers. No useful end would be served by attempting to supplement the thorough, and to us satisfactory, discussion of the questions here involved, presented by the opinions in both cases. We therefore adopt the opinion of the court below in the case before us (132 Fed. 823) which is as follows:

The patent in suit was considered and sustained in this court in *Walker Patent Pivoted Bin Co. v. Brown and Krause* (C. C.), 110 Fed. 649; and while the defendants, not being parties, are not bound thereby, yet, as was said in *Penfield v. Potts*, 126 Fed. 475, 61 C. C. A. 371, "a decent respect for the stability of judicial decision and a proper regard for the security of property in the same patent" require that this shall not be disturbed, unless there was very palpable error.

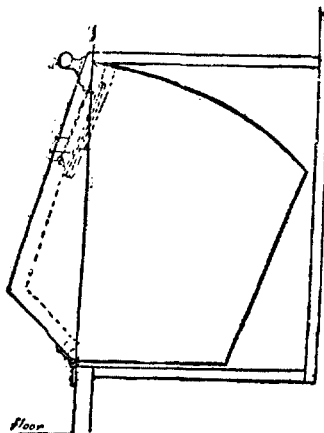
So far as the same references are relied upon to negative novelty, nothing particularly new is suggested, and as to this the same conclusion must therefore be reached. The *Schultz* (1861), the *Porter* (1867), and the *Powell* (1885) are additionally cited, but neither of them differs materially from the *Stewart*, the *Carr*, or the *Burgett*, previously considered; each being simply different forms of tilting, pivoted, more or less counterbalanced bins. That of the complainants belongs to the same general class; but, as pointed out before, it is distinguished from the rest by its swell front, and—except as to the *Carr*—by the location of the axis of oscillation at the front edge of the supporting casing, whereby a more perfect counterbalancing is secured. The attempt that is made to prove that the invention could be realized by changing over some of the others, such as the *Stewart*, only serves the more to emphasize the distinction. Not only do the proposed changes fall far short of their purpose, but to the extent that they go in that direction they work a practical transformation. The *Stewart*, made over, is neither itself, nor the bin of *Walker*, nor, for that matter, anything that any one would be likely to construct or use, which is fair proof, not only of the underlying difference between the two, but of the invention involved in devising it. The required changes are not mere matters of degree, as argued, but are substantial, and go to the creation of a new character of bin. I see no occasion, therefore, for departing from my previous opinion, by which the patent was upheld, and the only question now is whether it has been infringed.

The first claim, which is the one relied upon, is as follows:

Complainants' Bin.



Defendants' Bin (First Type).



"(1) The combination with a casing, comprising a bin chamber, of a bin tiltably mounted in said chamber, and of depth substantially equal thereto, the axis of oscillation of said bin being at the front edge of said casing, and a counterbalance-front for said bin projecting forward of said axis, substantially as and for the purpose set forth."

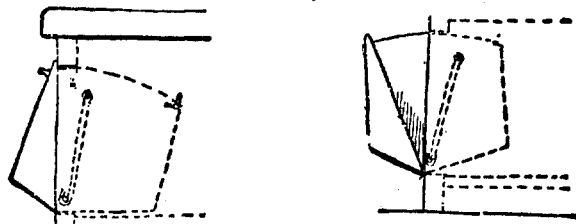
The defendants manufacture two different types of bins, both of which in general outline pattern exactly after that of the complainants. The identity is so complete that, as in the case of Brown and Krause, referred to above, the intent to copy is manifest; a persistence in resorting to this particular form of bin, in the face of the decision upholding the patent by which it is protected, which is strongly persuasive of its utility and value. The only attempted distinction between them is with respect to the axis of oscillation.

In the first type the bin, instead of rocking on the front edge of the casing, turns on a hinge, one leaf of which is fastened to the under exterior face of the swell front of the bin, and the other to that of the casing; the pintle or axis of the hinge being at the point where the two meet. It is said that this locates the axis of oscillation, not, as called for by the patent, at the front edge of the casing, but beyond and outside of it. But this is a splitting of hairs. The complainants' bin, in rocking back and forth, turns on the point where bin and casing come together, which is accurately described as at the front edge of the latter, and the defendants' bin, with its hinge, does the same. There may be a fraction of an inch displacement between the two, but it is not sufficient to affect or change the relation or the attendant mode of operation, which are alike in both.

It is said, however, that the defendants' bin is not supported or mounted in the casing, but is held up by the hinge on which it turns, and does not, therefore, rock on the front corner of the casing, as called for by the specifications. But this contention is little better than the first. The bin would be nothing without the casing to form a chamber for it; nor would the hinge be a support, except as it was affixed thereto. And while the inventor is particular to state that he does not intend to limit himself to the precise embodiment of the invention which is shown, nevertheless, adhering strictly to the specifications, the bin to all intents and purposes rocks upon the front corner of the sustaining structure, as well with a hinge at that point as without it. The extreme expedients to which the defendants are thus compelled to resort in order to escape, if possible, the charge of infringement, only fasten it the more upon them.

The second type of bin is also the same in form as that of the complainants. But, instead of turning on a hinge, like the first, it is mounted upon links or hangers, the upper extremities of which are pivoted on the sides of the

Defendants' Bin (Second Type).



bin chamber, and the lower extremities end in hooks, which engage pins on the sides of the bin at the front edge of the casing.

By reason of this double pivoting there are two axes of oscillation, although for different and distinct purposes; one at the upper end of the links and the other at the lower. The former enables the bin to be drawn forward out of the bin chamber, into which it swings back again, when released, through the retracting effect of the links; while it rocks, when in ordinary working position, on the pins by which it hangs in the hooks of the links, at the front edge of the enclosing structure. Aside from its ability to swing forward out of the casing, it thus fulfills in every particular the terms of the claim; being tiltably mounted in the bin chamber, and of a depth substantially equal thereto, having a counterbalance front projecting forward of the axis of oscillation, and such axis being located at the front edge of the casing. The invention is not confined, as we have seen, to any particular character of

axis, not being addressed to the means, so much as the place; and it is therefore just as fully realized, if the axis is a pin turning in the end of a hanger or link at the place designated, as if the bin rocked at that point on the casing itself.

It must be recognized, however, that by reason of the bin being hung, as it is, on links, the axis shifts at times, and the question is with regard to the effect of this superadded feature. There is nothing particularly novel in suspending and tilting a bin upon links or hangers, this being shown in the Gage (1893) and the Inger (1895). The only thing is that, if the defendants by the use of this device have produced a new character of bin, they are entitled to the benefit of it. This depends, however, on whether, for the rest, they have drawn on their own resources or appropriated the ideas of others; and there is just the difficulty. Every feature of the complainants' invention has been taken bodily, and the combination which the defendants have put together cannot be made out without it. This, moreover, is without any new mode of operation or effect resulting therefrom, but consists only in something grafted on. Notwithstanding that the bin is hung as it is, and is therefore able to be swung forward from the casing, it still remains a tiltable, swell-front, counterbalanced bin, pivoted to this end at the front edge of the casing. The feature which has been superadded may contribute to its general handiness, and to such extent an improvement may have been produced. But, even so, being built upon the complainants' device, it must pay tribute accordingly. The shifting of the axis, moreover, is merely temporary, to accomplish a certain disconnected purpose; and, when the bin is restored to its normal operative position in the bin chamber, the axis takes its place as before at the edge of the casing, where it must be to get the advantage of the special tilting and counterbalancing effect which is the feature of the invention. This type of bin, therefore, offends as much as the other, and infringement must be declared in consequence as to both.

The decree of the court below is hereby affirmed.

SCOTT et al. v. FISHER KNITTING MACH. CO. et al.

SAME v. REGAL TEXTILE CO. et al.

(Circuit Court, N. D. New York. July 14, 1905.)

Nos. 6,911, 6,912.

1. PATENTS—INFRINGEMENT—KNITTING MACHINES.

The Bellis patent, No. 561,559, for improvements in knitting machines, consisting essentially of jacks or loopers adapted to weave a supplemental thread into the fabric as it is being knitted to form a backing or a two-ply fabric, is not entitled to a broad construction, as covering a pioneer invention, the elements being essentially old in the art. As reasonably construed, it is not infringed by the machine of the Fisher patent, No. 656,535, which employs a device not the equivalent of such jacks, which operates in a different manner, and also produces a different fabric.

2. SAME—CONSTRUCTION OF CLAIMS.

Where claims following the specification in a patent end with the words "substantially as described," the specification must be looked to in construing such claims which may be thereby limited or qualified.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 243.]

3. SAME—INFRINGEMENT.

A patent for a machine, which was inoperative, cannot be broadly construed to cover a subsequent machine which is successful.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 379.]

In Equity.

Two suits in equity for alleged infringement of complainants' United States letters patent No. 561,559, granted June 9, 1896, to David C. Bellis, for improvements in knitting machines. The defendants in suit No. 6,911 are the manufacturers of the alleged infringing machine, while the defendants in suit No. 6,912 are mere users of same. Suits in equity, No. 6,963, Scott et al. v. Fisher Knit Goods Co., and No. 6,964, Scott et al. v. Seal Black Underwear et al., pursuant to stipulation, are submitted on the proof in case No. 6,911. Infringement of claims 1, 3, 6, and 7, only, is alleged. Defendants in suit No. 6,911 make the alleged infringing machine under and in accordance with United States letters patent No. 656,533, dated August 21, 1900, granted to M. J. Fisher, the president and manager of the defendant Fisher Knitting Machine Company, for "improvements in knitting machines." The defendants in suit No. 6,912 are users of this machine.

Howson & Howson, for complainants.

Kernan & Kernan (Charles Neave and Alfred Wilkinson, of counsel), for defendants.

RAY, District Judge (after stating the facts as above). The machines of both the complainants and the defendants are circular knitting machines, and have two sets of needles, the cylinder needles and the dial needles, which co-operate. Each machine produces a ribbed fabric if desired, and has means for introducing into the fabric as it is being knit a so-called "supplemental thread." This thread, interwoven, produces, in the one case, a backing capable of being fleeced, or of being used as a lining to the fabric, or as a two-ply fabric, and in the other a loose backing capable of being fleeced. This is also in a sense a two-ply fabric. The question at issue is, does each machine employ the same means for introducing into the fabric the supplemental thread, and, if so, do the two machines operate in the same way, and produce the same result; that is, the same fabric? The defendant strenuously insists that the means employed in the two machines for introducing and interlacing this supplemental thread are different, not equivalents, and that the fabrics produced are absolutely different. It is familiar law that, if complainants' patent shows patentable invention in the respects in controversy, and if their machine is protected by the patent, and defendants' machine uses substantially the same means, operating in substantially the same way, and produces substantially the same result as does complainants' when the fabric is made in accordance with their patent, infringement is made out, other factors of infringement being present. In this case much, and perhaps all, depends on the construction to be given to complainants' (the Bellis) patent. We will refer to the alleged infringing patent as the "Fisher Machine." If the Bellis patent is for an invention substantially different from that used by defendants, it is not infringed. It is contended that when construed, as complainants contend it should be, so as to cover defendants' machine, the Bellis patent is invalid. Also that when properly construed there is no infringement. The claims in controversy read:

"(1) A knitting-machine having two sets of needles and cams therefor for producing ribbed fabrics, jacks or loopers, cams, and a bed therefor operated by the driving mechanism of said machine to interlace a supplemental thread

with the meshes produced by the said needles, substantially as and for the purposes set forth."

"(3) A circular-knitting machine having two sets of needles, needle-cylinder, cam-cylinder, needle-dial, and cam-dial, together with jacks or loopers operatively mounted in grooves of a jack-bed fastened to the needle-dial, and cams adapted to operate the said jacks or loopers in conjunction with the said needles to interlace a supplemental thread with the meshes produced by the said needles, substantially as and for the purposes set forth."

"(6) A circular-knitting machine having two sets of needles and means for operating the same, a system of loopers or jacks operated by cams to interlace a supplemental thread with the meshes produced by the said needles, and means for supplying the said loopers with yarn, substantially as and for the purposes set forth."

"(7) In a circular-rib-knitting machine the combination of two sets of needles a cylinder and a dial therefor, a system of loopers or jacks, guided in slots of the said dial, a bed for said loopers or jacks, and means for operating the said needles and loopers, substantially as and for the purposes set forth."

The specifications say:

"My invention relates to those knitting-machines which produce ribbed fabrics and are commonly called 'rib-frames.' The object of my invention is to construct a machine which is capable of producing a two-ply rib-knit webbing, or of providing a backing on the ribbed knit fabric, which may be of a different material from that of which the body of the fabric is composed, while the latter is being produced by the machine. * * * The invention consists of a knitting-machine having two sets of needles disposed at an angle to each other, to produce a ribbed knit fabric, and one or more sets of jacks or loopers operated to act in conjunction with the needles to interlace a supplemental thread with the meshes composing the body of the ribbed fabric produced by the said two sets of needles. The invention further consists of the improvements hereinafter more fully described and pointed out in the claims. * * * To produce a plain ribbed fabric, the vertical needles, v^1 , v^2 , and horizontal needles, h^1 , above mentioned, are necessary only; but to produce a backing on such fabric while the latter is being produced devices must be provided which bring the backing or supplemental thread from the inside of the machine over the needles at certain and predetermined intervals, so that it may be interlaced with the meshes of the fabric, as will be hereinafter more fully described, various devices may be employed to accomplish this; but preference is given to jacks, j^1 , j^2 , which are of such dimensions as to pass between the needles, and of such strength and stiffness as to sustain wear and tear."

It will be noted that the specifications of complainants' patent say: "But to produce a backing [which is made by the interlacing of the supplemental thread with the meshes composing the body of the ribbed fabric] on such fabric [plain ribbed fabric] while the latter is being produced, devices must be provided which bring the backing [thread, not completed backing] or supplemental thread from the inside of the machine over the needles at certain and predetermined intervals, so that it may be interlaced with the meshes of the fabric." In short, these devices for bringing this supplemental thread from the inside of the machine and over the needles must be present. If such devices are not present, the whole object of the invention, which is to produce a two-ply rib knit webbing, or, what is the same (in fact), a backing on the rib-knit fabric, fails; the declared object of the improvements cannot be accomplished. In claim 5, not in controversy, we read:

"A knitting machine for producing ribbed knit fabrics, having two sets of needles and cams therefor, and jacks or loopers, operated by cams, to bring an

extra thread from the inside of the machine over certain of the needles, substantially as and for the purposes set forth."

These purposes have just been stated, viz., to produce the backing on the rib knit fabric. Claim 1 says "needles and cams therefor, for producing ribbed fabrics," and "jacks or loopers," etc., "to interlace a supplemental thread with the meshes produced by the said needles." This makes the backing. In claims 3 and 6 and 7 we have the same jacks or loopers performing the same office. The office is described in a different way, and in claim 7 the office of the jacks or loopers, viz., to bring the backing or supplemental thread from the inside of the machine over the needles, "so that it may be interlaced with the meshes or loops of the fabric," is pointed out by the use of the words "substantially as and for the purposes set forth." Turning to the specifications, we find, following the words already quoted, viz., "so that it [the supplemental thread] may be interlaced with the meshes of the fabric," these words: "various devices may be employed to accomplish this, but preference is given to jacks, j¹, j². * * * These jacks or loopers," etc. Jacks or loopers, or their mechanical equivalent, performing the office or function of bringing the backing or supplemental thread from the inside of the machine over certain of the needles, and putting and holding it for the necessary time in the proper position, so that it may and will interlace with the meshes of the fabric, and until that interlacing has been accomplished and the backing formed, are an element, and a necessary element, of each and every claim in controversy here. This is plain, and cannot be successfully controverted.

The complainant says:

"The defendants' machine [the alleged infringing machine] is illustrated in sleeve form in exhibit defendants' machine, and is illustrated and described in complainants' exhibit Fisher patent."

That patent (No. 656,535, dated August 21, 1900, granted to Michael J. Fisher), in its specifications, says:

"My invention relates to a circular-knitting machine having a dial and cylinder with two sets of needles carried thereby of usual construction and mode of operation; and it consists in adding thereto a supplementary cylinder having grooves in its outer surface in which are carried sinkers depressed by a cam-cylinder of suitable construction to engage with an extra thread and secure it on one surface of the fabric, forming floating loops. This is the essence of my invention, which may be varied more or less in construction. I have shown it embodied in a simple and practical form of machine, which will be easily understood by reference to the accompanying drawings, in which the same letters and numerals of reference indicate the same parts in all the figures. * * *

"The new parts which I have invented are the supplementary or small cylinder, 20, connected to the dial by any suitable means. As here shown, the dial and small cylinder are equal in outer diameter, and a small groove, 21, is cut in the edge of the former corresponding in horizontal depth to the thickness of the small cylinder, so that when this cylinder is forced into position in this groove the parts are secured together and rotate as one. In the vertical grooves, 22, in the outer face of the small cylinder, are arranged the sinkers, 23, which are depressed and elevated by the engagement of their heels in cam-groove, 24, of smaller cam-cylinder, 25, formed of separate sections or side plates, and carried on annular plate or ring, 26, supported on frame or table by posts, 27, and arms, 28. Alternately with grooves, 22, are

cut grooves, 40, in the lower edge of the small cylinder for the passage of the dial-needles, 29 is the depressing-cam, 30 a plane segment above the groove, and 31 the elevating-cam. 32 is an elastic band or girdle of steel-spring construction surrounding the upper cylinder to maintain the sinkers and hold them in position. 33 is the feed for main thread, and 34 the feed for supplementary thread, with brush, 35, for guiding and holding thread against sinkers. These feeds are secured to ring, 26, and may be of any desirable form. As here illustrated, the machine is adapted to knit one-and-one rib fabric (though this may be changed easily to knit other desirable stitches), the sinkers being arranged to operate between the dial-needles and immediately back of the main-cylinder needles. The particular mode of operation I have here shown will be best understood by reference to Figs. IV and V. As the dial and cylinder needles begin to move respectively out and up, the sinkers are depressed from point a to point b, and engage with the supplementary thread fed to them by feed, 34, arranged slightly in advance of main feed, 33. When the sinkers are depressed to point b, they are in the position shown in Fig. V, pressing down the supplementary thread between the alternate dial-needles, so that it rests on the open latches of those needles. The reason of this engagement with the open latches is that as the dial-needles continue their outward movement the extra thread slips back over the ends of the latches onto the shanks of the needles, where it is left with just a trifle of slack, so that as the dial-needles move in again, having engaged with the main thread, they draw it easily under the extra thread, which is cast off over the needle-hooks at the same time as one loop of the main thread and is caught on the inside of the fabric by the loops of the main thread without strain or breaking the thread or danger of the extra thread showing through on the front. While this continuation of the outward movement and the return movement of the dial-needles is proceeding the sinkers are moving from b to c, holding down the extra thread at the same level; but after the extra thread is cast off over the needle-hooks the sinkers are further depressed a trifle by the short incline, d, which operates to tighten the extra-thread loops, taking up the slack and perfecting the smoothness of the fabric. After that it is evident that the sinkers are again elevated by incline, e, and the operation is repeated, the number of feeds being proportioned to the size of the machine."

Claim 1 is a sample of the 11 claims of this Fisher patent, and reads as follows:

"(1) The combination with a circular knitting machine, of the ordinary construction, having two sets of operating-needles of a supplementary cylinder of smaller diameter than the main cylinder mounted above the dial and arranged to move therewith, said supplementary cylinder having peripheral grooves, sinkers arranged in said grooves, and means for elevating and depressing said sinkers, so as to engage and press down a supplementary thread to form loops on one surface of the fabric."

The Bellis machine brings the extra or supplementary thread from the inside of the machine and firmly interlaces it with the meshes formed by the cylinder needles. Bellis uses devices which engage with this thread and push a loop thereof over the cylinder needles. This the alleged infringing machine of defendants does not do. It pushes no thread over the needles, nor does it interlace the supplemental thread in tightly with the meshes of the fabric. By the Fisher machine this extra or supplemental thread is laid in the trough or furrow of the fabric, so to speak, as it is being woven or formed, and at stated times pushed through the fabric in loops by a "sinker." This extra thread is not securely fastened or interwoven or interlaced. The fabric produced by it (the Fisher machine) is not, like the fabric produced by the complainants' machine, fit or suitable for use when it comes from the machine. It must be fleeced in order to make a fabric such that these loops will

stay in place or serve a useful purpose. In the work of the Bellis machine we have a finished two-ply fabric; a knit fabric with a very firm smooth backing, or, so to speak, lining, which may or may not be fleeced, depending on whether a fleeced or a double garment or fabric is desired. One of the most complete and satisfactory demonstrations of the fact that the two machines do not operate in substantially the same way with substantially the same means, or their equivalents, is that when operating on—that is, knitting—the same material in their ordinary ways or modes of operation the two machines do not produce substantially the same result or fabric. Bellis obtained separate letters patent for the fabric produced by his patented machine in its ordinary operation, but there is no pretense, nor can there be, that the fabric produced by defendants' machine infringes that patented article of manufacture. The Fisher patent cannot produce it. If it cannot infringe in what it produces, in its results, it certainly does not operate in substantially the same way with substantially the same means to produce substantially the same results. Its results are not an improvement on those produced by complainants' machine, nor are such results of the same general character or description, only inferior thereto. They are different. It would be going beyond all reason, in view of the prior art, which has been carefully examined and considered, to hold that the Bellis patent is a pioneer in the art in such sense that the patent covers all means and machinery for producing a double knit single or plain fabric, or a double knit ribbed fabric, or either, with a backing on such fabric formed by interlacing an extra or supplementary thread with the meshes of the fabric as it is being formed. In fact, such fabrics were not new at the time of the filing of Bellis' application. I am of the opinion and hold that the proper construction of the claims of the Bellis patent excludes, or does not include, the machine made under the Fisher patents or the Fisher devices.

Another evidence of the fact that the Fisher patent, defendants' (alleged to infringe), does not operate in substantially the same way by substantially the same means, is that October 22, 1896, Bellis applied for, and December 29, 1896, obtained, a patent for an improvement of the device described in and covered by letters patent No. 561,559, dated June 9, 1896 (the patent in suit). In the specifications of that patent he says of the patent in suit:

"My invention is an improvement on the knitting-machine for which United States patent No. 561,559 was granted to me on June 9, 1896, and which is adapted to produce ribbed knit fabric with a backing. The improvements consist of providing a ring between the needle-cylinder and the periphery of the needle-dial, first, to prevent the backing-loops after they have been formed from interfering with the jacks and dial-needles; secondly, to shield the last-formed backing-loops, so that when the next set of jacks push the woolen backing-thread over the cylinder-needles such jacks will not cut or disarrange the loop formed previously by the other set of jacks; thirdly, to provide a guide or support for the dial-needles and jacks; and, fourthly, to so form the upper part of the ring as that in looping the backing-thread a proper feed or slacking of the latter is had to produce uniform scallops and to form the dial-stitches on the peripheral edge. And the improvements further consist of the said ring in combination with devices, as hereinafter more fully described

and pointed out in the claims. * * * The upper peripheral edge, *s*, of the ring, *S*, also serves to direct the finished fabric, which is drawn by suitable take-ups, downward, so that the newly-formed backing-loops do not come into the way of the jacks to be next actuated, which, as has been found, was the case where no such ring, *S*, was provided on the machine, the jacks on such machines generally catching the loop previously formed and tearing on its upward motion the threads apart, destroying in this way the backing; but this is entirely obviated by the use of the said ring, *S*."

This is a substantial confession that the device of complainants' patent is inoperative for the purpose intended. We find no such defect in the operation of the Fisher patent. It is not claimed—at least not shown—that defendants' patent infringes complainants' later patent No. 574,129, of December 29, 1896. Hence it is fair to infer that as defendants', the Fisher patent, is not defective, as was complainants', and did not and does not have the device of complainants' later patent, which remedies such defect, there is a substantial and wide difference in the construction and operation of the two machines, the one alleged to have been infringed and the alleged infringing machine.

In the Fisher patent we find the inventor followed and imitated or built upon and drew from the prior art to some extent, but not from the Bellis patent, except as it followed, etc., the same prior art. This he had the right to do. The prior art was free to both.

Turning to the Cooper and Ford British patent of 1887, No. 172, we find a circular knitting machine with cylinder needles for making a plain fabric. In combination with these we have a set of hooks operated by cam plates to project between the frame needles as shown, and then receding to draw the loop thread between them, thus forming loops, which may be left as formed or afterwards cut as in ordinary pile fabrics. Cam plates are attached to vary the length of the loops. These hooks revolve around a center, and the cam plates, as it is desired to lengthen or shorten the loop, can be nearer to or further from this center. The first claim of this patent says:

"In a circular knitting frame, the combination with the frame needles, of hooks, such as *E*, for drawing the thread, *c*², into loops between the needles, substantially as described."

The Cooper and Webb (British) patent of 1887 says:

"Improvements in circular knitting machines and the fabrics produced thereon. * * * This invention relates to circular knitting machines of the self-acting needle class, and the object thereof is to enable thick thread to be laid in at the back of the fabric in loops, and also to provide for the introduction or laying in of weft or backing threads."

What for, if not to form a backing, or even a two-ply webbing? Complainants' patent (1896) says:

"The object of my invention is to construct a machine which is capable of producing a two-ply rib-knit webbing, or of providing a backing on the ribbed knit fabric," etc.

Defendants' patent (1900) says:

"My invention relates * * *, in which are carried sinkers * * * to engage with an extra thread and secure it on one surface of the fabric, forming floating loops."

Cooper and Webb have "hooks" which draw the extra thread into loops in the back of the fabric as it is woven. The loops, when so formed in the back of the fabric, may be cut and napped. Bellis has "jacks" or "loopers" to interlace the extra thread, while Fisher has sinkers to "engage with" the "extra thread and secure it to one surface of the fabric." Bellis came in about nine years after Cooper and Ford in the same art, using the same means, or their substantial equivalents, in a similar way, to accomplish the same general purpose. Cooper and Ford, not Bellis, are the pioneers. The complainants' expert admits, in effect, that the function of the "hooks" in Cooper and Ford is to draw out slack loops back of the cylinder needles (and these may or may not be cut), and that the cams which control such hooks may be adjusted so as positively to draw more or less of the supplemental thick threads, so as positively to regulate the length of the slack loop. The devices used in the Bellis patent may not have been, and, so far as appears, had not been, used in the prior art in precisely the same way as Bellis uses them to produce the fabric he describes and for which he obtained a patent. But his devices of two sets of needles operating at an angle to each other, and "jacks or loopers" or "pushers" or "pullers" or "hooks," and, we might say hookers, all substantially equivalents, and performing the same function, and operating on the supplemental thread, whether that was of the same material as the main fabric or not is immaterial, were all old. It seems clear that Bellis uses in his machine old devices. In fact, he says of some of those used (the main ones), "Those parts are constructed in the well-known manner." He sets out to produce a certain result in a particular way, and he says: "But to produce a backing on such fabric while the latter is being produced devices must be provided which bring the backing or supplemental thread from the inside of the machine over the needles at certain and predetermined intervals, so that it [the extra thread] may be interlaced with the meshes of the fabric," etc. He is not confined to the devices of jacks or loopers (hooks of the prior art may be used), but whatever is used to do what Bellis proposes to do, what his invention undertakes to do, and what his claims are for and say is to be done, and what he, by virtue of his monopolies, has the exclusive right to do, the machine, to be within that patent and monopoly, must produce the "backing on the rib-knit fabric or a two-ply rib-knit webbing by bringing the backing or supplemental thread from the inside of the machine over the needles at certain and predetermined intervals, and interlacing it with the meshes of the fabric." It is clear that this fabric can be produced in no other way than by devices acting in the manner stated in this patent. As defendants do not and have not used a device or machine that produces or that can produce this fabric, and as they do not use these mechanisms of complainants combined and operating in substantially the same way, or their equivalents, how can it be said that defendants infringe? Giving the broad construction to the claims of complainants' patent that they claim they are entitled to, it is clearly anticipated in the prior art, and void, and shows no patentable inven-

tion. Giving to them the limited and reasonable construction to which they are probably entitled in view of the prior art, and there is invention, but no infringement. This court can reach no other conclusion, after a careful examination of the exhibits, the evidence, and the arguments of counsel. The court has not attempted to give more than a mere outline of the reasons that demand these conclusions. To do otherwise would lengthen this decision beyond all reason, and demand extensive quotations from the evidence and from the authorities.

I will call attention to a few of the decided cases which seem applicable and decisive. That (in such a case as this) infringement is an affirmative allegation, the cause of action, and that it must be proved, cannot be disputed as a question of law. It was so decided in *Agawam Co. v. Jordan*, 7 Wall. 583-609, 19 L. Ed. 177, and has not been questioned since. The difference in the fabric produced by two machines is evidence of importance—many times—as showing the difference in the mode of operation of the two machines. See *Werner v. King*, 96 U. S. 218, 230, 24 L. Ed. 613. In that case the court also said:

"It is not only necessary to an infringement that the arrangement which infringes should perform the same service, or produce the same effect, but, as Mr. Justice Nelson said in *Sickles v. Borden*, 3 Blatchf. 535 [Fed. Cas. No. 12,832], it must be done in substantially the same way. *Burr v. Duryee*, 1 Wall. 531 [17 L. Ed. 650, 660, 661]."

Claims 1, 3, 6, and 7 of the patent in suit end, "substantially as and for the purposes set forth." This language in these claims has sent the court back to the specifications for an explanation, and in one instance a qualification of the claim, and a description and qualification or limitation of the elements of which the combination or structure of the patent is composed. This is justified and required by the authorities. *Brown v. Guild*, 23 Wall. 181, 218, 23 L. Ed. 161; *Brown v. Davis*, 116 U. S. 237, 251, 6 Sup. Ct. 379, 29 L. Ed. 659; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 558, 18 Sup. Ct. 707, 717, 42 L. Ed. 1136. In this last case it is said:

"The claim is for a triple valve device, etc., for admitting air from the main air pipe to the brake cylinder 'substantially as set forth.' These words have been uniformly held by us to import into the claim the particulars of the specification, or, as was said in *Seymour v. Osborne*, 11 Wall. 516, 547, 20 L. Ed. 33, 'where the claim immediately follows the description of the invention, it may be construed in connection with the explanations contained in the specification, and where it contains words referring back to the specification it cannot properly be construed in any other way.'"

It was wisely said in *Western Electric Co. v. Western Tel. Constr. Co. (C. C.)* 79 Fed. 959, 961, "The main purpose of the invention must control the scope of the claims." See, also, *Snow v. L. S. & M. S. R. W. Co.*, 121 U. S. 617, 7 Sup. Ct. 1343, 30 L. Ed. 1004. It is quite true that a patentee is entitled to the benefit of all the good and beneficial results his patented invention brings, even if some of them, even the most important, were not in his mind when he applied for and obtained his patent. But this rule does not entitle the patentee to say that another patented machine, or

some machine not patented, is an infringement of his patent because it produces a fabric similar to his, one that may be used for the same purpose, one that may compete with his in the market, and also fill the same "long-felt want," unless the same elements of the one machine are used in the other, and operate therein in substantially the same way to produce the result. Two entirely different machines, different in elements, in combination of elements, and in operation, may produce the same result. Here the one does not infringe the other. If the results—the products—of the operation of two machines in the same art are different, this fact is not conclusive that there is no infringement. This result may be due to a different way or mode of operating the machines discovered by some person. But if the machines necessarily operate differently, and were intended to operate differently, and if one cannot do what the other does and was intended to do, there is no infringement, even when both belong to the same art. Such is this case.

There is another consideration entitled to some weight here. The complainants' patent did not go into practical use. We have seen why. Machines made in accordance with it and put in operation destroyed their products. It proved a boomerang. In view of this fact alone this court cannot give to the claims of the patent in suit—the Bellis—the broad construction claimed; one that would include the defendants' machine, which was and is a success. On this subject, see *Deering v. Winona Harvester Works*, 155 U. S. 286, 295, 15 Sup. Ct. 118, 39 L. Ed. 153, and *Bradford v. Belknap Motor Co. (C. C.)* 105 Fed. 63. This court has not gone extensively into the questions whether, in any view, the complainants' patent discloses invention. Assuming that, properly constructed, as it reads, taken as a whole, and in view of the prior art, invention is disclosed, there has been no invasion of complainants' rights.

Defendants have not infringed, and in each of the cases there will be a decree dismissing the bill of complaint, with costs.

DE LONG HOOK & EYE CO. v. FRANCIS HOOK & EYE & FASTENER CO.

(Circuit Court, W. D. New York. June 26, 1905.)

1. UNLAWFUL COMPETITION—EQUITY—MISLEADING MISREPRESENTATIONS.

Where the printing on the back of complainant's card containing hooks and eyes did not claim that the hump feature was patented, but merely directed attention to complainant's articles by referring thereto as the "De Long Patent Hook and Eye," and contained a sketch thereof, with an index line pointing significantly to the hump or a spring tongue of the hook, such reference to a patent, which had been held invalid except as to the triple band of spring wire to strengthen the hook, did not constitute such a deception of the public as precluded complainant from relief in a court of equity against unfair competition.

2. SAME—DRESS OF GOODS—CARDS—SIMILARITY.

Where cards used by complainant and defendant, containing competing hooks and eyes, which were attached thereto by thread, were substantially the same in size, color, and form, and, though the words printed on defend-

ant's card were different, the style, printing, spacing, etc., were made to simulate complainant's card as closely as possible, and defendant later simulated complainant's mode of fastening the invisible eyes to the card, though stitched in a different manner, defendant was guilty of unfair competition.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 81.]

See 118 Fed. 938.

Stern & Rushmore (Charles E. Rushmore and William C. Strawbridge, of counsel), for complainant.

Macomber & Ellis (Tracy C. Becker, of counsel), for defendant.

HAZEL, District Judge. This action is brought to enjoin the defendant from selling and exposing for sale hooks and eyes stitched upon cards together with what are known as "invisible eyes," and which cards bear letters, words, and pictures arranged in simulation of complainant's previously adopted method of introducing its commodity to the trade. Complainant claims that the defendant placed its merchandise upon the market in a form calculated to mislead the ordinary purchaser into the belief that its goods were those of complainant. Although complainant also used upon its cards the registered trade-mark, "See that Hump," in connection with the name "De Long," this action is simply for unfair competition in trade. The defendant challenges complainant's asserted exclusive right to use the style of dress adopted for its commodity, denies an intention to defraud, and alleges that complainant has persistently practiced a deception and fraud upon the public by falsely advertising its ownership of the patent upon a hook which has a so-called spring tongue or hump. In other words, the defendant claims that the complainant falsely and fraudulently advertised in newspapers, periodicals, and show cards in such manner as insidiously to mislead the public into believing that the hump feature of the hook (hereinafter referred to with more particularity) was a patentable invention conceived by complainant's predecessor. The rule is invoked that he who seeks the aid of a court of equity in trade-mark cases to enjoin infringement must not himself be guilty of false or misleading representations in respect to such trade-mark, or the business which is the subject thereof. *Hilson Co. v. Foster* (C. C.) 80 Fed. 896; *Dadirrian v. Yacubian et al.*, 98 Fed. 872, 39 C. C. A. 321; *Allan B. Wrisley Co. v. Iowa Soap Co.* (C. C.) 104 Fed. 548. In this connection the evidence shows that complainant's predecessor obtained a patent on October 1, 1889, for the hump feature of the hook. The validity of the patent was sustained in *Richardson v. Shepard et al.* (C. C.) 60 Fed. 273. Afterwards, however, the patent was limited to a triple bend or spring wire to strengthen the hook. *Richardson v. American Pin Co.* (C. C.) 73 Fed. 476. The printing upon the back of complainant's card does not claim that the hump feature is patented, as contended by the defendant, but merely directs attention to complainant's vendible articles by referring thereto as the "De Long Patent Hook and Eye," and contains a sketch thereof, with an in-

dex line pointing significantly to the hump or spring tongue of the hook. This trivial reference to a patent for the hook and eye may not have been strictly accurate, but I am not convinced that it worked a deception upon the public, or wrongfully induced the sale of complainant's merchandise. Hence the evidence in support thereof must be deemed wholly immaterial.

The next point is whether the defendant imitated the complainant's dress for its merchandise in such manner as to practice a fraud and deception upon the ultimate purchaser. A description of the cards upon which the hooks and eyes are stitched is necessary to a proper consideration of the controverted question. The cards of the complainant and defendant containing the hooks and eyes and the invisible eyes, which are attached thereto by thread, were substantially the same in size, color, and form. The exact description of the complainant's slightly modified card adopted in 1893 may be taken from the complainant's brief. The card has printed upon its face the words "See that," printed in the upper panel, and the word "Hump" in the lower panel, and on the bottom space were printed the words "United States and Foreign Countries." On the upper horizontal column were the words, in shaded type, "The De Long Hook and Eye, No. 4." In the upper panel the words "See that." In the middle horizontal column the words "Easy adjustment; Security; Durability." In the second or lower panel the word "hump?" On the bottom horizontal panel, in the left-hand margin, in a heavily shaded space, were the words "Pat. Oct. 1, 1889." The color of the card is white. The type and shading is in black. On the back of the card was a white label, upon which was printed in plain black type the names of the foreign houses where the hooks and eyes could be purchased. The label also contained a sketch of a hook and eye, with a dotted line running to the spring tongue. To the left of the sketch are the words "See that Hump?" the word "Hump" being printed in large black type. The later cards of the complainant have also the words "See that Hump?" printed diagonally across the label, and on its face, between the rows of hooks, is a narrow label containing the words in red, "See that Hump?" The label just mentioned is pasted upon that portion of the card upon which appeared the words "Easy adjustment; Security; Durability" of the earlier cards of complainant.

The proofs show that the "Adelaide" card of the defendant was introduced to the trade in 1898, and was a marked change from its earlier card. The words "The Adelaide Hook and Eye No. 4" are prominently printed upon the upper portion of the card. Running through the upper panel between the hooks, and easily discernible, is the word "Security." In the central horizontal space are the words "Easy Working Self Acting Spring." The type is plain black upon a white background, and it will be noted that the initial letter "S" of the word in the upper panel is the same as that of the word in the same panel of complainant's card, and also that the initial word "Easy" in the central space is the first word used by complainant in the same portion of its card. The word "Comfort"

is printed between the hooks and eyes in the bottom row, in apparent simulation of the word "Hump," printed in the same portion of complainant's card. In the left-hand corner at the bottom is a heavily shaded space containing the words "Rust Proof," and upon the bottom margin of the card are the words "Made in the United States." The shaded space and the words last mentioned are in resemblance of the lower portion of complainant's card. Defendant also has a label on the back of its card, upon which is prominently printed, in plain black type, the word "Adelaide," in simulation of the words "See that Hump?" in complainant's cards. Reference is also made thereon to various houses where defendant's commodities may be purchased, and a sketch of a spring tongue hook is contained in the right-hand corner, with dotted lines indicating the hump of the hook, as in complainant's design.

I have no hesitation in determining that, owing to the general characteristics of the cards, namely the color, style of type, shading, and other details, the arrangement of the hooks and eyes and invisible eyes thereon, and the label, as heretofore indicated, the cards of the defendant are an evident resemblance of those of complainant. The evidence shows that the complainant in March, 1890, placed its hooks and eyes upon the market; and, with some trifling modifications, they have ever since been carded as herein set forth. The method of fastening the invisible eyes upon the cards was adopted by the complainant in 1900. Soon afterwards hooks and eyes carded with an invisible eye of defendant's manufacture appeared on the market. Although the witness Francis testified that the defendant corporation carded the invisible eyes in the form mentioned early in 1901, yet it sufficiently appears that the cards of the complainant with its invisible eyes were then upon the market.

Much evidence was given by defendant tending to show that a number of the elements of complainant's cards were old, and were in prior use for a similar purpose. It is insisted that the method of sewing the hooks and eyes on the cards, the arrangement of printing thereon, the use of shaded type, the custom of pasting labels on the reverse side of the cards, and the practice of using a picture of the hook and eye, with an index line pointing to the hump of the hook, were familiarly known, and that complainant was not the first to use the elements mentioned. True, some of the elements may have been old, but it is not required that the separate details must have been original with a complainant seeking relief from infringement. The question is whether the adoption of the collocated features of the complainant's card and style of dress disclosed a differentiation from that previously adopted, and by which the public has come to recognize the product of complainant. Did the complainant, by its adoption and presentation of the hooks and eyes in connection with the invisible eye, popularize its merchandise and aptly designate it, so that the same became distinctively known? If the complainant had assembled known features without creating a dissimilarity, then no unfairness would be apparent in defendant's adoption of a like dress for its product. That complainant has distinguished its merchandise from that of others engaged in a similar

industry is beyond dispute. That the defendant simulated the distinguishing features of complainant's adaptation is undeniable. As hereinbefore stated, the complainant, since 1900, when the principal features of its cards were adopted, had modified the same. Not only did the defendant closely approach the earlier garb, but later it simulated the complainant's method of fastening the invisible eyes to the card. That such eyes were stitched to the card in a different manner is unimportant.

Little difficulty arises with respect to a decision of the question of fraud and intentional wrongdoing. The rule is stated by Judge Lacombe, speaking for the Circuit Court of Appeals, in *Fairbank Co. v. Luckel*, 102 Fed. 327, 42 C. C. A. 376, as follows:

"The law is well settled that in suits of this character the intention of the respondent in adopting the style of package, or choosing a name for a similar product, is to a certain extent immaterial. It is not essential to the right of complainant to an injunction to show absolute fraud or willful intent on the part of the respondent. Upon familiar principles, it will be presumed that the respondent contemplated the natural consequences of his own acts. * * * The court must determine the intent from respondent's acts and the results produced thereby."

Scheuer v. Muller, 74 Fed. 225, 20 C. C. A. 161; *Von Mumm v. Frash* (C. C.) 56 Fed. 830; *Lever v. Godwin*, 36 Chan. Rep. 1; *Fuller v. Huff*, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.*, 64 Fed. 841, 12 C. C. A. 432.

The expert testimony of the defendant that its adopted dress did not deceive the trade or buyers is not entitled to the consideration claimed for it. True, mere similarity, standing alone, is insufficient to prove a wrongful intention to defraud. Fraud in the case at bar is determinable from the similarity of the cards in connection with the defendant's conduct in adopting the "Adelaide" card, in addition to its "Brownies" card, then in use, and later in stitching the invisible eyes to the cards in simulation of complainant's appropriation. *R. Heinisch's Sons Co. v. Boker et al.* (C. C.) 86 Fed. 765; *Scheuer v. Muller*, supra. The resemblance need not be such as to deceive persons skilled in the industry to which the commodity belongs. As was said in *Fairbank Co. v. Bell Mfg. Co.*, 77 Fed. 875, 23 C. C. A. 560:

"Undoubtedly no one who bought from defendant was ever deceived. No effort was ever made to delude the trade into the belief that defendant's salesmen were selling complainant's goods. But equity regards the consumer as well as the middleman. It is to him, more than the jobber or wholesale purchaser, that the various indicia of origin with which merchants dress up their goods appeal; and courts will not tolerate a deception devised to delude the consuming purchaser by simulating some well-known and popular style of package."

Lever v. Godwin, supra; *R. Heinisch's Sons Co. v. Boker*, supra. The complainant has incurred great expense in advertising its wares dressed in the garb mentioned, and that defendant had knowledge of such extended advertising, and of the general descriptive character of the complainant's cards, is admitted. In these circumstances, the rule announced in *Waltham Watch Co. v. U. S. Watch*

Co. (Mass.) 53 N. E. 141, 73 Am. St. Rep. 263, 43 L. R. A. 826, is apt, and may be quoted:

"Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff, merely on the strength of having been first in the field, may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom."

Other propositions claiming inferentially to show defendant's intention to palm off its goods for those of complainant, and the suggestion of laches in bringing suit, need not be discussed, although they have been considered.

When the motion for injunction pendente lite was decided, I was of the opinion that the essential characteristics by which complainant's goods were introduced to the public solely depended upon the trade-mark, "See that Hump?" which concededly is not infringed by the defendant. The opposing affidavits upon the question of whether there was originality in complainant's adaptation, and whether defendant's cards were calculated to deceive, justified a refusal of the injunctive relief. The right of the complainant against his rival, the defendant, to enjoin unfair competition, was not then as certain and clear as the evidence now establishes.

A decree may be entered, with costs, restraining the defendant from selling or offering for sale any cards upon which hooks and eyes and invisible eyes are stitched, including the "Adelaide" and any similar card, such as the "Astoria," "Niagara," and "Waldorf," and simulation of complainant's particular form of carding its hooks and eyes, which, by reason of the collocation of size, shape, colors, lettering, spacing, shading, and general appearance, resemble the complainant's cards, as hereinbefore described.

REVERE RUBBER CO. v. CONSOLIDATED HOOF PAD CO.

CONSOLIDATED HOOF PAD CO. v. REVERE RUBBER CO.

(Circuit Court, S. D. New York. June 30, 1905.)

No. 8,083.

1. UNLAWFUL COMPETITION—DECEPTION OF PUBLIC—INJUNCTION.

Complainant and defendant both manufactured rubber hoof pads so similar in appearance that a purchaser would hardly distinguish the one from the other, both being adapted and applied to the same use. The pads were sold in sharp competition, and there was evidence that defendant's pads were inferior to complainant's, and were sold at a less price. Complainant's predecessor first began making the pads under the firm name of "Air Cushion Rubber Pad Company," and the pads became known as "Air Cushion Pads," and as "A. C. Pads." After complainant's pad had been patented, defendant began the manufacture of its pads, on which it stamped the name "Air Cushion," and below used the words, "Consolidated Hoof Pad Co., 18 Vesey St., N. Y.," and filed and registered the letters "A. C." as a trade-mark. *Held*, that defendant's acts in thus imitating complainant's goods constituted unlawful competition, which complainant was entitled to restrain.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 81.]

2. SAME—TRADE-MARKS.

Where complainant's hoof pads were made and on the market, and known as "A. C. Pads" to the trade, for a long time before defendant used the marks "A. C." on its inferior similar pads, defendant was not entitled to the exclusive use of the letters "A. C." on its pads by having subsequently registered such letters as a trade-mark.

In Equity.

Bill in equity to restrain defendant from using trade-name "Air Cushion," or the letters "A. C.," in connection with horseshoe pads not made by the Revere Rubber Company, complainant. Cross-bill in equity by defendant in original suit to restrain the complainant in original suit from making or selling hoof pads or horseshoe pads with the (alleged) trade-mark "A. C.," stamped thereon, or from announcing or proclaiming in any way to the public that it has the right to use the mark "A. C." on the hoof pads or horseshoe pads made by it.

Arthur C. Fraser (Joseph A. Stetson, of counsel), for Revere Rubber Company.

James Harold Warner (Clarence G. Galston, of counsel), for Consolidated Hoof Pad Company.

RAY, District Judge. In 1899 Roscoe R. Bell, Elizabeth Kent, and William J. Kent were a co-partnership in the business of selling horseshoe pads. The firm name was "Air Cushion Rubber Pad Company." They were the first to use this name "Air Cushion" as a trade-name and designation for their horseshoe pads. The Revere Rubber Company made the pads. The name "Air Cushion" was in a sense partially descriptive of these pads, as, when fitted to the foot of the horse, there was a space between some part of the pad and the hoof with airholes, and the pad was so shaped that, when the horse rested any substantial part of his weight on such foot, it pressed out the air gradually, and so formed a sort of cushion, breaking to a degree the force of the concussion when the foot struck the pavement or hard road. "Air Cushion" is not, however, descriptive of such pads, as the pads are not air cushions. These pads became known in the market and to the trade and horse-shoers generally as "Air Cushion Pads" and as "A. C. Pads." There is no question that the words "Air Cushion" and the letters "A. C." designated the pads made by the Revere Rubber Company and sold by the above firm, and later by such company, the complainant in the original suit and defendant in the cross-suit. Quite generally, and almost universally, a person calling for an "A. C." pad meant one of these pads. These pads had no other name. There was a large and well-established demand for them. The said pads were plainly marked or stamped: "Air Cushion." "Rubber Pad." "Pat. Mar. 27, 1900." About June 1, 1900, the business of said firm was transferred to the Revere Rubber Company, and it has continued the business and use of such name and letters "A. C." on and in connection with the making and sale of such pad. After the said pad had been patented, the said Consolidated Hoof Pad Company made a pad which was so similar to and such a copy of the one made by the Revere Rubber Company that this court has recently held it an infringement and restrained its making and

sale. On this pad and others the said hoof pad company stamped the said name "Air Cushion," and below them the words, "Consolidated Hoof Pad Co., 18 Vesey St., N. Y." It has also filed and registered at Washington the letters "A. C." as a trade-mark, and now claims the exclusive right and title to same as its trade-mark.

As early as October, 1901, the Revere Rubber Company adopted, and as early as December 5, 1901, put upon the market, its hoof pads or horseshoe pads, with the following stamped thereon, viz.: "Revere Rubber Co., A. C. Special. Pat. No. 33,039." December 14, 1901, the said Consolidated Hoof Pad Company claims to have adopted "A. C." as its trade-mark or name, and in January, 1902, it put on the market its hoof pads, with the following stamped thereon, viz.: "A. C. Consolidated Hoof Pad Co., 18 Vesey St., N. Y." When the Consolidated Hoof Pad Company took the field with its hoof pads or horseshoe pads, and began calling and advertising and selling them as "Air Cushion" or as "A. C." pads, it found the field occupied by the Revere Rubber Company, complainant in the original suit and defendant in the cross-suit. The Revere Rubber Company and its predecessor, the Air Cushion Rubber Pad Company, from the beginning of business in the summer of 1899, had adopted and used the name "Air Cushion Rubber Horseshoe Pad," and these pads had become known all over the country as the "Air Cushion" and the "A. C." Pads. The words "Air Cushion" were the most prominent words in all the advertising, and the words "Air Cushion Pads" were words indicating the pads made and sold by the Revere Rubber Company and were the words used by it for such purpose. The Revere Rubber Company and its predecessor were at great expense in advertising and putting on the market and building up a trade for these "Air Cushion" pads under and by that name. In a short time the trade, dealers in and users of these pads, came to use the short name or abbreviation "A. C." when speaking of or ordering or purchasing these pads, and an "A. C." pad meant one of the Revere Rubber Company's pads. It was after the trade in these pads had been built up, and they had become well known and popular under the name "Air Cushion" and "A. C.," that the Consolidated Hoof Pad Company came into the field and commenced to appropriate and use the name as a designation for its own pads. The pads of the Revere Rubber Company were advertised and sold as "Air Cushion Pad," as "Air Cushion Bar Pad," as "Air Cushion Banner Pad," as "Air Cushion Racing Pad" and later as "A. C. Special." The Consolidated Hoof Pad Company, at request of the said Revere Rubber Company, has abandoned the use of the name "Air Cushion," but asserts the right to use it to designate its pads, and insists on the right to use and continue the use of the name "A. C." as applied to these pads. The pads of the said Revere Rubber Company and those of the Consolidated Hoof Pad Company are very similar in appearance, a purchaser would hardly distinguish the one from the other by appearances, and both are adapted and applied to the same use. They are sold in the market in sharp competition. There is evidence

showing that the pads of the Consolidated Hoof Pad Company are inferior to those of the Revere Rubber Company and are sold for a less price. These acts have been done and are being done by the Consolidated Hoof Pad Company, defendant in the original suit, knowingly and willfully, and evidently for the purpose of putting on the market its own inferior goods, made in imitation of those of the complainant, Revere Rubber Company, and sold under the name used by that company, as and for the goods of the said Revere Rubber Company. The effect is to defraud the Revere Rubber Company and deprive it of a portion, at least, of the trade to which it is entitled, and to deceive and mislead the public into purchasing, paying for, and using the pads of the Consolidated Hoof Pad Company, when the intention and desire was to purchase and use the pads made and sold by the Revere Rubber Company. Such acts, having such effects, ought to be restrained, and within the authorities may be.

As to the right of the complainant in the cross-suit, Consolidated Hoof Pad Company, to the alleged trade-mark "A. C.," little need be said. The facts stated settle that question. The Revere Rubber Company's pads, hoof pads, horseshoe pads, were made and on the market and known as "A. C." pads to the trade and to users quite a long time before the complainant in the cross-suit used the marks "A. C." or attempted to appropriate such letters as its trade-mark—before it registered such letters as its trade-mark. The acts of the Consolidated Hoof Pad Company are but the unlawful appropriation of the trade-name of the Revere Rubber Company, and an attempt to obtain the apparent sanction of the general government to the unlawful appropriation by clandestinely procuring such trade-name belonging to Revere Rubber Company to be registered as the trade-mark of Consolidated Hoof Pad Company. When one manufacturer or dealer has used certain letters as a trade-name until his goods have come to be known and called for generally by that name, a competitor in the same business cannot gain any right, superior or otherwise, by procuring such letters (or such name, if it be a name), to be registered under the trade-mark laws as his, or its, trade-mark. Such larceny as this is neither encouraged, sanctioned, nor legalized. *Glencove Mfg. Co. v. Luedeling* (C. C.) 22 Fed. 823; *Welsbach L. Co. v. Adam* (C. C.) 107 Fed. 463; *Brower v. Boulton*, 58 Fed. 888, 7 C. C. A. 567.

The complainant in the original suit, Revere Rubber Company, is entitled to a decree, restraining the defendant, Consolidated Hoof Pad Company, from using the name "Air Cushion," or the letters "A. C.," as a name for its pads and for costs, and in the cross-suit is entitled to a decree dismissing the bill of complaint, with costs.

UNITED STATES v. R. F. DOWNING & CO.

(Circuit Court, S. D. New York. February 15, 1905.)

No. 3,654.

CUSTOMS DUTIES—CLASSIFICATION—IMITATION PRECIOUS STONES—INCRUSTED STONES—DECORATION.

In construing the provision in paragraph 435, Schedule N, § 1, Tariff Act July 24, 1897, c 11, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for imitation precious stones not "ornamented or decorated," *held*, as to stones which have been incrustated but in which the incrustations are a part of the imitation, that they are not ornamented or decorated within the meaning of said provision.

On Application for Review of a Decision of the Board of United States General Appraisers.

The merchandise consisted of so-called "incrusted stones," imported at the port of New York by R. F. Downing & Co. The collector of customs at that port classified them as manufactures of glass or paste, under paragraph 112, Schedule B, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635], against the importers' contention that they were dutiable under paragraph 435, Schedule N, § 1, of said act, c. 11, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], as "imitations of * * * precious stones, composed of glass or paste, * * * not engraved, painted or otherwise ornamented or decorated." The Board of General Appraisers sustained this contention, on the authority of a former decision, *In re Eichenberg*, G. A. 5,610, T. D. 25,105. The government contended that, as the articles are incrustated, inlaid, or set with stones or other material, they are "ornamented or decorated" within the meaning of said paragraph 435, and therefore excluded from its purview.

Charles D. Baker, Asst. U. S. Atty.

Comstock & Washburn, for importers.

WHEELER, District Judge. These are imitations of precious stones, within the description of such in paragraph 435, Schedule N, § 1, Act July 24, 1897, c. 11, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676]. They are incrustated, but that appears to be a part of the imitation. They are not engraved nor painted, nor otherwise ornamented or decorated than in constituting the imitations which they simply are.

Decision affirmed.

BOBBS-MERRILL CO. v. STRAUS et al.

(Circuit Court, S. D. New York. July 11, 1905.)

1. COPYRIGHTS—SALES—RESTRICTION—NOTICE—EFFECT.

Where the publishers of a copyrighted book printed a notice on the page following the fly leaf that the price of the book at retail was \$1 net, and that no dealer was licensed to sell it at a less price, and the sale at a less price would be treated as an infringement of the copyright, such notice did not purport to reserve to the publisher any interest in the book, or any right to control it or the action of its owner in the use and disposition thereof, and was insufficient to constitute a license agreement or contract restricting or modifying the absolute title acquired by purchasers.

2. SAME—INFRINGEMENT.

Where a publisher of copyrighted books voluntarily parted with all control over them by selling the books to purchasers, such purchasers were neither licensees nor agents of the publisher, though buying the books for resale, and hence such resale did not constitute an infringement of the copyright, under Rev. St. § 4964 [U. S. Comp. St. 1901, p. 3413], declaring that it is an infringement of a copyright to print or publish a copyrighted book without the consent of the proprietor given in writing, or knowingly to sell or expose for sale a copy or copies of such copyrighted book "when unlawfully printed or imported," though the books so sold each contained a notice that no dealer was licensed to sell it at a less price than that fixed by the publisher, and that a sale at a less price would be treated as an infringement of the copyright.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, §§ 41, 47.]

3. SAME.

The act of a publisher of a copyrighted book in putting it on the market and selling it does not constitute a license to the purchaser to use and sell the same, which the publisher is entitled to restrict by a notice brought to the attention of the purchaser that the sale of the book at retail for less than the price fixed by the publisher shall be considered an infringement of the copyright.

4. SAME—COMBINATIONS IN RESTRAINT OF TRADE—INTERSTATE COMMERCE.

Where the publishers and booksellers of the United States organized two membership associations, one known as the "American Publishers' Association," and the other as the "American Booksellers' Association," and together controlled the publication and sale of at least 90 per cent. of all copyrighted books, the objects of which were to compel owners and dealers of such books to purchase them of the members of the combination at an arbitrary price fixed by it, regardless of the actual value of the books as determined by a demand in an open market, or the condition of the books, and to compel all publishers and dealers of such books to come into the combination, be controlled by it, and sell books at prices fixed by it, regardless of the value of the books or of the exigencies of the trade and situation of the seller, or be deprived of the privilege of purchasing, owning, and selling such books through a system of black-listing, etc., the effect of which would be to cripple the business of any publisher or bookseller outside of the combination, such agreement was a violation of the Sherman anti-trust law (Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), declaring that every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is illegal.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 13.]

In Equity.

Suit to enjoin the sale at retail of books containing a copyright novel, "The Castaway," at a price less than \$1 for each copy of the book. Such sales of such book are alleged to be in violation of the terms of a notice printed in each copy thereof upon the page immediately following the title-page and immediately below the statutory copyright notice. Defendants insist that the books containing such novel have been lawfully printed for sale to the general public, and to be read by the general public, and put upon the market and sold, and that the right of the owners of such books to sell same at such price as they severally may see fit to ask cannot be and is not limited or affected by the notice. They also insist that this suit is to enforce an unlawful combination and agreement, and press other defenses.

Boardman, Platt & Soley (W. H. H. Miller, Albert B. Boardman, and Henry W. Clark, of counsel), for complainant.

Spiegelberg & Wise (John G. Carlisle and Edmond E. Wise, of counsel), for defendants.

RAY, District Judge (after stating the facts as above). The main facts in this case are not disputed. They may be stated as follows:

(1) The Bobbs-Merrill Company, the complainant, is, and at all times mentioned in the bill of complaint was, a corporation duly organized and existing under the laws of the state of Indiana, engaged in the business of publishing and selling books, and having its principal office in the city of Indianapolis, in the state of Indiana.

(2) The complainant is, and at all times mentioned in the bill of complaint was, the owner and proprietor of a book or novel in one volume, entitled "The Castaway," written by Hallie Erminie Rives.

(3) The allegations contained in paragraphs of the bill of complaint numbered III to VI, inclusive, relating to the complainant's compliance with the copyright laws of the United States, are true. Such paragraphs read as follows:

"III. That your orator is the proprietor of a copyright book or novel in one volume, entitled and known as 'The Castaway.' That the author of said book was Hallie Erminie Rives. That prior to the publication of said book, and prior to the month of May, 1904, the author thereof, said Hallie Erminie Rives, duly sold, assigned, and transferred to your orator all her right, title, interest, and property in and to said book, and your orator thereupon became, and at all times since said sale has been, and still is, the sole and exclusive proprietor and owner thereof.

"IV. That your orator, being then proprietor of said book as aforesaid, and desiring to secure a copyright thereof, before the day of publication of said book duly deposited in the mail within the United States, to wit, in the city of Indianapolis, in the state of Indiana, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of said book, and duly paid to said Librarian of Congress the fees required by law, to wit, fifty cents, for recording said title, and your orator did also, not later than the day of publication of said book in this or any foreign country, to wit, on the 24th day of May, 1904, deposit in the mail within the United States, to wit, in the city of Indianapolis, in the state of Indiana, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of said book printed from type set within the limits of the United States.

"V. Your orator is informed and verily believes, and therefore avers, that the Librarian of Congress on the 18th day of May, 1904, duly recorded the name and title of said copyright book in pursuance of the statute in such case made and provided.

"VI. That your orator has given due notice and information of its said copyright by inserting and printing in each and every copy of said book published, upon the page immediately following the title-page thereof, the words and figures: 'Copyright 1904. The Bobbs-Merrill Company. May.'"

(4) No copies of "The Castaway" were sold or otherwise issued prior to securing the copyright thereon.

(5) Each and every copy of "The Castaway" printed, published, or issued by complainant contained at the time of such publication and issue the following notice, printed upon the page of the book immediately following the title-page, and just below the statutory copyright notice:

"The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.
The Bobbs-Merrill Company."

(6) The defendants in the course of their business procured copies of said book before the commencement of this suit for the purpose of sale at retail. The defendants purchased 90 per cent. of said copies from dealers at wholesale at a reduction from said specified retail price of about 40 per cent., and 10 per cent. of said copies they purchased at retail, paying the full retail price therefor.

(7) Defendants at the time of their purchase of copies of said book knew that said book was a copyright book, and were familiar with the terms of the notice printed in each copy thereof, as described in paragraph 5 of this statement, and knew that this notice was printed in every copy of said book purchased by them.

(8) The wholesale dealers, from whom defendants purchased copies of said book, obtained the same either directly from the complainant or from other wholesale dealers at a discount from the net retail price, and at the time of their purchase knew that said book was a copyright book, and were familiar with the terms of the notice printed in each copy thereof, as described in paragraph 5 of this statement, and such knowledge was in all wholesale dealers through whom the books passed from the complainant to defendants. But said wholesale dealers were under no agreement or obligation to enforce the observance of the terms of said notice by retail dealers or to restrict their sales to retail dealers who would agree to observe said terms.

(9) The defendants have sold copies of said book at retail at the uniform price of 89 cents a copy, and are still selling, exposing for sale, and offering copies of said book at retail at said price of 89 cents per copy, without the consent of the complainant.

(10) That during the year 1900 a large number of publishers in the state of New York and throughout the states of the United States entered into an agreement for the purpose of maintaining the net retail price of copyrighted books published by any of them as designated by the publisher of each book, and to prevent the sale at retail of any such copyrighted books by any dealer at retail at less than said fixed net retail price. That pursuant to that agreement a membership corporation was formed under the laws of the state of New York under the name of the "American Publishers' Association," which included among its members the complainant herein and a large majority of the publishers of all books, copyrighted or uncopyrighted, in the state of New York and throughout the United States.

(11) That immediately after the incorporation of said American Publishers' Association a resolution was adopted and its members entered into agreements with each other and with the American Publishers' Association, a copy of which is as follows:

Exhibit A.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct some of the evils connected with the cutting of prices on copyright books was adopted at the meeting of the American Publishers' Association held February 13, 1901:

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be

published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all other of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"IV. That the only exception to the rule of maintaining the retail price shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. Libraries entitled to this discount may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount.

"V. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VI. That after the expiration of a year from the publication of any such net copyrighted book dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VII. That when the publisher sells at retail a book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"VIII. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"IX. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"X. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which association shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XI. That the report, when adopted by the board of directors, be submitted to the association and voted upon in accordance with the association's rules, article II, section 1."

(12) That thereafter a voluntary association, called the "American Booksellers' Association," was formed, which was intended to and did include a large majority, to wit, about 90 per cent.,

both in number and extent of business, of all wholesale and retail book dealers throughout the state of New York and the United States. That the avowed purpose of this association was to co-operate with and assist the American Publishers' Association and its members in the maintenance of the so-called net price or restricted price system for the sale of books at retail, and to supply the American Publishers' Association with the names of book-sellers who cut the prices of net price or restricted books at retail, and to refrain from selling such price-cutters, or any individuals, firms, or dealers believed to be price-cutters, any books of any kind, whether copyrighted or uncopyrighted, at wholesale or at retail prices. That said American Booksellers' Association thereafter at its annual convention in June, 1901, adopted the following resolution:

Exhibit B.

"Reform Resolution No. 1.

"Whereas, the American Publishers' Association has adopted a net price system and entered into an agreement for its maintenance, by which the members of said association will cut off the supply of all their books, net, copyrighted, or otherwise, to any dealer who fails to maintain the net price of any or all books published under the net price system:

"(1) Now, therefore, be it resolved, that this, the American Booksellers' Association, in convention assembled, accept the said net price system, with the distinct understanding that it is the intention of the American Publishers' Association to include fiction under the net price system as rapidly as possible; and

"(2) Furthermore, be it resolved, that all members of the American Booksellers' Association shall give to each of the members of the American Publishers' Association, and to all publishers who co-operate with them in the maintenance of the net price system, our most cordial support; and that to this end we agree not to buy, not to keep in stock, nor to offer for sale, after due notification, the books of any publisher who declines to support the net price system.

"(3) Furthermore, be it resolved, that we instruct our secretary promptly to notify all members of this association that this resolution is applicable and in force with reference to any publisher who shall have made it manifest that he is unwilling to co-operate with this association, and with the members of the Publishers' Association, in the maintenance of the net price system.

"(4) Furthermore, be it resolved, that this resolution, on being ratified by two-thirds of the members of this association, voting by formal ballot, shall immediately become a law to each and all of the members of this association; and if it shall appear, upon the presentment of any three members of this association, that a member has purchased, put in stock, or offered for sale the books of the publisher who has been formally denounced, such member shall be expelled from membership in this association, and all members of this association shall then and thereafter be restrained from supplying any books to such expelled member at a discount from the usual retail price.

"(5) Furthermore, be it resolved, that all members of this association shall be restrained from furnishing any books at less than the net or usual retail price to any dealer who shall have been denounced by the Publishers' Association for cutting the price of net books, or for otherwise violating the net price system, and who shall have been therefor cut off by the members of the Publishers' Association from the supply of their books.

"(6) Furthermore, be it resolved, that all members of this association shall endeavor to keep in stock and push the sale of net books so long as they are reasonably in demand, provided such discount is allowed by the publishers to the dealers as will yield them a living profit; and they shall maintain

the net prices of the same in accordance with the terms of the publishers' agreement for the maintenance of the net price system.

"I [or we] vote for the adoption of Reform Resolution No. 1 as above stated.

"[Signed] Name
"Address....."

(13) That thereafter and in pursuance of said agreements neither of said associations nor any of the members thereof, including the complainant, would sell or supply, or sanction the sale or supply, of any books at any price to any dealer in the state of New York, or elsewhere in the United States, whether a member of said associations or not, and whether said books were copyrighted or not, or were published by any of the members of the said American Publishers' Association or not, who did not maintain the arbitrary net retail price on copyrighted books published by the members of the American Publishers' Association, or would resell or was believed to resell such copyrighted books to any dealers who thereafter sold the same at less than the arbitrary price named by the publisher and maintained pursuant to the rules and agreements of the two associations and their members.

(14) That on or about the 8th day of January, 1902, the plan, resolutions, or agreements of the American Publishers' Association were amended by the addition thereto of the article relating to a certain discount to be allowed from the published price of works of fiction (not net) published by members of the said association, and a change in article 4 relating to discounts to be allowed to libraries, and in article 6, and the omission of article 11 of the original plan. A copy of said resolutions, with the said amended articles indicated by italics, is marked "Exhibit C." Thereafter, on the 27th day of May, 1902, the said plan, resolutions, or agreements were further amended by the addition to article 4 thereof of a paragraph relating to the sending of a work of fiction postpaid, a copy of which said resolutions as so amended is marked "Exhibit D." That thereafter, and on the 15th day of January, 1903, the said plan, resolutions, and agreements were amended by the addition to article 3 of a paragraph relating to the sale of protected books in combination with a periodical, and in article 12 a paragraph was added relating to an agreement to be entered into by all purchasers of books from the members of the Publishers' Association. A copy of said resolutions as amended is marked "Exhibit E." That thereafter, and on or about the 13th day of February, 1903, the said plan, resolutions, or agreements were again amended as to articles 1 and 4, so as to provide for the exclusion at the option of a publisher of certain copyrighted juvenile books from the class of so-called net publications, and the inclusion of such books in the class of copyrighted works of fiction not net. Article 5 was likewise amended so as to grant libraries a discount on certain juvenile books (not net), a copy of which resolutions or agreements as amended is marked "Exhibit F." That thereafter, on the 13th day of January, 1904, the said resolutions or agreements were amended as to articles 1 and 5, so as to apply to all juvenile

books, and article 4 thereof was so amended as to provide for the publication and sale of all juvenile books (not net) under the system applying to the publication and sale of copyrighted works of fiction, a copy of which said resolutions or agreements as so amended is marked "Exhibit G."

Exhibit C.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction were adopted at a meeting held February 8, 1902.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33 1-3 per cent. on fiction. Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

"VI. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted books issued under these regulations dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable

person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to."

Exhibit D.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction were adopted at meetings held January 8, 1902, and May 27, 1902.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

"When a work of fiction published under this rule is sent postpaid, the price to the purchaser shall be not less than the minimum price plus the postage.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33½ per cent. on fiction. Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

"VI. That the association suggests a discount on net copyrighted books of 25 per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to."

Exhibit E.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction were adopted at meeting held January 15, 1903.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, protected

books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given. When a work of fiction published under this rule is sent postpaid, the price to the purchaser shall be not less than the minimum price plus the postage.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33½ per cent. on fiction. Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

"VI. That the association suggests a discount on net copyrighted books of 25 per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association."

Exhibit F.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"Plan as Amended to March 4th, 1903.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction, juveniles, and other matters were adopted at later meetings.

"Special attention is called to changes in the following sections: 1, 3 (last paragraph), 4, 5, and 12.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also, at the desire of the individual publisher, any new editions, any work of fiction (not juveniles), or any juveniles of the class that may be described as board books, flat picture books, or toy books.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, protected books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile board books, flat picture books, or toy books (not net), published after March 1st, 1903, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of fiction and juvenile books published on the same basis as fiction. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33⅓ per cent. on fiction and juvenile board books, flat picture books, or toy books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

"VI. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price; and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and, when directed, shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association through its agents and members aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important centre or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association.

"Dated March, 1903."

Exhibit G.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"Plan as Amended to January 14th, 1904.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction, juveniles, and other matters were adopted at later meetings.

"Special attention is called to changes in the following sections: 1, 3 (last paragraph), 4, 5, and 12.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also, at the desire of the individual publisher, any new editions, any work of fiction, or any juvenile.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, protected books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net), published after April 1st, 1904, the greatest discount allowed at retail for one year after publication shall be 25 per cent.: and all the rules for the protection of net books shall apply to this extent to the protection of fiction and juvenile books published on the same basis as fiction. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

"V. The only exceptions to the foregoing rules shall be in the cases of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33⅓ per cent. on fiction and juvenile books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discounts on net books, nor to any special discount on fiction or juvenile books.

"VI. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price; and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board, the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association through its agents and members aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association."

(15) That thereafter, and during the month of February, 1904, in an action brought in the Supreme Court of the state of New York, it being a court of competent jurisdiction, wherein the defendants in this action were plaintiffs and the American Publishers' Association and the American Booksellers' Association and such of their respective members as were within the jurisdiction of the said court were made parties defendant, the New York Court of Appeals, being the highest appellate court in the said state, rendered its decision that the combinations and agreements described in paragraphs 10, 11, 12, and 14 of this statement were unlawful and void, and contrary to the statute law and public policy of the state of New York, and more especially of the statute law of said state known as chapter 690, p. 1514, of the Laws of 1899, which said law, for the purposes of this statement, is made part of the record. The prevailing opinion of the court, to which reference is hereby made for the

true construction of said decision, reported 177 N. Y. 473, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819, is as follows:

"Isidore Straus et al., Composing the Firm of R. H. Macy & Company, Respondents, v. American Publishers' Association et al., Appellants.

"Monopolies—An Agreement Which in Effect Prevents the Sale of Uncopyrighted Books in the State is Illegal under the Anti-Monopoly Act (Laws 1899, c. 690). An agreement between publishers representing ninety-five per cent. of the books published in the United States, and ninety per cent. of the business done in the book trade, that all copyrighted books published by any of them after a specified date should be published and sold at retail at net prices; that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers and jobbers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to them by the association as one who cut such prices; and that evidence shall not be required by the bookseller or jobber in order to restrain him from selling to one who has been blacklisted, but that all that shall be required to govern his action and to prevent him from selling to such persons shall be that the name has been given to him by the association as one who cuts such net prices—is an agreement which, while purporting to secure to the owner and publisher of copyrighted books the monopoly permitted by federal law, may, and as practically construed by the parties does, operate in fact so as to prevent the sale of books of any kind or at any price to any dealer who resells, or is suspected of reselling, copyrighted books at less than the arbitrary net price, whether such dealer be a member of the association or not. Such an agreement undertakes to interfere with the free pursuit in this state of a lawful business in which a monopoly is not secured by the federal statute, viz., that of dealing in books which are not protected by copyright. It is, therefore, in violation of chapter 690, p. 1514, of the Laws of 1899, enacted to prevent monopolies in articles or commodities of common use, and to prohibit restraint of trade and commerce.

"Straus v. American Publishers' Ass'n, 85 App. Div. 446, 83 N. Y. Supp. 271, affirmed.

"(Argued January 19, 1904; decided February 23, 1904.)

"Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered July 30, 1903, which reversed an interlocutory judgment of Special Term sustaining demurrer to the complaint.

"Stephen H. Olin and Thaddeus D. Kenneson, for appellants. John G. Carlisle and Edmond E. Wise, for respondents.

"Parker, C. J. Chief Justice Marshall said long ago, in *Grant v. Raymond*, 6 Pet. 217, 241, 8 L. Ed. 376: "To promote the progress of useful arts is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries," is among those expressly given to Congress. * * * It is the reward stipulated for the advantages derived by the public from the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made, and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield. It receives all which it has contracted to receive. The full benefit of the discovery after its enjoyment by the discoverer for 14 years is preserved, and for his exclusive enjoyment of it during that time the public faith is pledged.' That case and many

others were considered recently by the United States Supreme Court in *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, Mr. Justice Peckham writing. After an examination of the cases which may be said to restrict the exceptions which grow out of a proper exercise of the police power of the state, of which *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115, is an illustration, he says (186 U. S. 91, 22 Sup. Ct. 755, 46 L. Ed. 1058): 'Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.' That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the *Park & Sons Co. Case*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, upon which defendants apparently rest their claim that the judgment of the Appellate Division should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein, which will now be pointed out.

'While the leading object of this association and agreement purports to be to secure to the owner and publisher of copyrighted books that protection which the federal government permits them to enjoy for the reasons stated by Chief Justice Marshall (*supra*), it does not stop there. It also affects the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all, if he fails to comply with the rules of the association. A combination creating a monopoly of the sale of books not protected by copyright offends against the law of this state as much as if it related to bluestone (*Cummings v. Stone Co.*, 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655), or to envelopes (*Cohen v. Envelope Co.*, 166 N. Y. 292, 59 N. E. 906); and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible, but probable. But it is not of moment whether such a result is probable or not; for the test to be applied is, what may be done under the agreement? Reference to the complaint makes it clear that the association has undertaken to provide for the practical exclusion from the business of selling books not protected by copyright all who refuse to be bound by the rules of the association; and it appears from the complaint that the practical construction given to this agreement by those operating together under it is that, if a dealer is suspected of selling copyrighted books at less than the arbitrary net price, it is quite sufficient to exclude him from selling books altogether. The agreement nowhere suggests that it is the object of the association to control the sale of books not protected by copyright. Indeed, the object of the association seems to be merely to protect the copyrighted books. But while the other part of the scheme is apparently sought to be hidden, it is after all uncovered by the clauses authorizing the exclusion of any members of the association, or those who refuse to be bound by its rules, from selling books of any description. The fifteenth paragraph of the complaint alleges 'that during the year 1900 a number of prominent publishers, including defendants, hereinbefore described as publishers, for the purpose of securing to themselves an unreasonable and extortionate profit, and at the same time with intent to prevent competition in the sale of books, and for the purpose of establishing and maintaining the prices of all books published by them, or any of them, and all books dealt in by them, or any of them, and preventing competition in the sale thereof, unlawfully, illegally, and contrary to the public policy and the statutes of the state of New York, * * * combined and associated themselves together,' etc. The sixteenth paragraph refers to the method of organization, and the fact of the adoption of a resolution and an agreement to carry out their object, while the seventeenth states the nature of the agreement as follows: 'That

as a part of said unlawful scheme and combination the members of said association agreed that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books [the word "copyrighted" is omitted at this point] at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to them by the association as one who cut such prices.' It will be seen that, while the leading object of this portion of the agreement apparently is to maintain the retail net price of copyrighted books, it operates in fact so as to prevent the sale of books to dealers who sell books of any kind to one who retails copyrighted books at less than the net retail price. And the agreement further provides that evidence shall not be required by the bookseller or jobber in order to restrain him from selling to one who has been blacklisted, but that all that shall be required to govern his action and to prevent him from selling to such a person shall be that the name has been given to him by the association as one who cuts such net prices. It has been admitted, and must be, that the agreement may be so worked out as to deprive a dealer from selling any books whatever, thus breaking up his business.

"But it is said that is only intended as a punishment for one who refuses to be bound by the wishes of the owner of the copyrighted book as to its selling price; in other words, that the association inflicts upon him the penalty of a destruction of his business because of his refusal to abide by the rules of the association. It is, of course, of no consequence how this course of action may be described by those who invented it; for, if it be the fact that the combination which agrees to exclude others from an unprotected business violates the statute, then it matters not what excuse may be offered for it. It is the excuse, not the statute, which must give way. The eighteenth paragraph of the complaint contains what purports to be a practical construction given to this agreement by the members of the association. It states: 'That in pursuance of said unlawful combination and agreement said American Booksellers' Association and its members have continuously co-operated with and assisted the American Publishers' Association and the members thereof in establishing and maintaining prices of such books, and preventing competition in the supply and sale of the same, and still continue so to do; and plaintiffs say that in compliance with said agreement neither said associations nor any of the members thereof will sell or supply books at any price to any dealer, whether a member of said association or not, and whether such books are copyrighted or not, or are not published by said American Book Publishers' Association or its members, who resells, or is suspected of reselling, such copyrighted books at less than the arbitrary net price fixed by said unlawful combination, nor will the said association nor any of their members sell or supply any books whatever to any one who resells, or is suspected of reselling, such copyrighted books to any dealer who thereafter sells the same at less than such arbitrary net price.' Here, then, we have a practical construction of the agreement, one put upon it by the parties to it; and it is such a construction as the language employed calls for. And it discloses that the parties who are acting under the agreement assume it to be their right and their duty by virtue of it not to sell or permit to be sold books of any kind or at any price to any dealer 'who resells or is suspected of reselling copyrighted books at less than the arbitrary net price,' whether such dealer be a member of the association or not. The intended effect of this is to prevent any dealer who is even suspected of reselling copyrighted books at less than the net price from obtaining books at any price or on any terms, whether copyrighted or not. And it does not stop there, for the members of the association agree not to supply him any books at any price, whether he resells copyrighted books or not at less than the arbitrary net price, provided he is suspected of selling to any dealer who thereafter sells the same at less than such arbitrary net price. And this means, inasmuch as the members represent 95 per cent. of the publishers and 90 per cent. of the business done in the book trade, that he may be practically driven out of the business if any one chooses to suspect

that a dealer to whom he has sold books has resold them at less than the price fixed. The members of the association, therefore, have entered into an agreement which by its terms—as we read it, and as they have construed it in their everyday working under it—undertakes to interfere with the free pursuit in this state of a lawful business in which any member of the community has a right to engage, a business in which a monopoly is not secured by the federal statutes, namely, that of dealing in books which are not protected by copyrights; and hence it is in violation of chapter 690, p. 1514, Laws 1899, which provides: 'Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.'

"The order should be affirmed, with costs.

"Haight, Martin, Vann, and Werner, JJ., concur with Parker, C. J. Gray and Barrett, JJ., read dissenting opinions.

"Order affirmed."

That the judgment upon this decision was duly adopted by the New York Supreme Court and entered on its records.

(16) That thereafter, and on or about the 13th day of March, 1904, the said resolutions or agreements were amended as to article 3 so as to cover copyrighted books only, and so as to provide for the placing of the seller's name on the cut-off list of the association only under certain changed conditions. A copy of such resolutions as amended, with the words stricken out by said amendment indicated by brackets, and the words thereby added in italics, are hereto annexed and marked "Exhibit H."

Exhibit H.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"Plan as Amended to April 1st, 1904.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901.

"Amendments referring to fiction, juveniles, and other matters were adopted at later meetings.

"Special attention is called to changes in the following sections: 1, 3, 4, 5, 9, and 12.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also, at the desire of the individual publisher, any new editions, any work of fiction, or any juvenile.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that [such net] copyrighted books [and all others of their books] shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their *copyrighted* books *except at retail* [further] to no one who [known to them to] cuts such

net prices [or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided]. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale. It is further agreed by the members of the association that they will not themselves offer, nor sell their *copyrighted* books to any one who offers, protected books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net) published after April 1st, 1904, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of copyrighted fiction and copyrighted juvenile books published on the same basis as fiction. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

"V. The only exceptions to the foregoing rules shall be in cases of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33½ per cent. on fiction and juvenile books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction or juvenile books.

"VI. That the association suggests a discount on net copyrighted books of 25 per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board, the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions, *after giving the person accused of such violation an opportunity to explain his action.*

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association."

That thereafter the American Booksellers' Association passed a so-called Reform Resolution No. 2 in April, 1904, which said resolution is as follows:

Exhibit I.

"Reform Resolution No. 2.

"Whereas, the American Publishers' Association has adopted a net price system, and entered into an agreement for its maintenance, by which the members of said association will cut off the supply of all their copyrighted books to any dealer who fails to maintain the net price of any or all copyrighted books published under the net price system:

"(1) Now, therefore, be it resolved, that this, the American Booksellers' Association, in convention assembled, accept the said net price system, with the distinct understanding that it is the intention of the American Publishers' Association to include copyrighted fiction under the net price system as rapidly as possible; and

"(2) Furthermore, be it resolved, that all members of the American Booksellers' Association shall give to each of the members of the American Publishers' Association, and to all publishers who co-operate with them in the maintenance of the net price system, our most cordial support; and that to this end we agree not to buy, not to keep in stock, nor to offer for sale, after due notification, the copyrighted books of any publisher who declines to support the net price system.

"(3) Furthermore, be it resolved, that we instruct our secretary promptly to notify all members of this association that this resolution is applicable and in force with reference to any publisher who shall have made it manifest that he is unwilling to co-operate with this association, and with the members of the Publishers' Association, in the maintenance of the net price system.

"(4) Furthermore, be it resolved, that this resolution, on being ratified by two-thirds of the members of this association, voting by formal ballot, shall immediately become a law to each and all of the members of this association; and if it shall appear upon the presentment of any three members of this association that a member has purchased, put in stock, or offered for sale the copyrighted books of a publisher who has been formally denounced, such member shall be expelled from membership in this association, and all members of this association shall then and thereafter be restrained from supplying any copyrighted books to such expelled member at a discount from the usual retail price.

"(5) Furthermore, be it resolved, that all members of this association shall be restrained from furnishing any copyrighted books at less than the net or usual retail price to any dealer who shall have been denounced by the Publishers' Association for cutting the price of net copyrighted books, or for otherwise violating the net price system, and who shall have been therefor cut off by the members of the Publishers' Association from the supply of their copyrighted books.

"(6) Furthermore, be it resolved, that all members of this association shall endeavor to keep in stock and push the sale of net copyrighted books so long as they are reasonably in demand, provided such discount is allowed by the publishers to the dealers as will yield them a living profit; and they shall maintain the net prices of the same in accordance with the terms of the publishers' agreement for the maintenance of the net price system.

"1 [or we] hereby vote to rescind Reform Resolution No. 1 and to adopt Reform Resolution No. 2.

"[Signed] Name.....
"Address.....

"Dated March 10, 1904."

(17) That since May, 1901, the date that the first resolutions and agreements of the American Publishers' Association and the American Booksellers' Association and their respective members went into effect, and until April, 1904, a large majority of all the publishers, in numbers and extent of business, including the complainant here-

in, and a large majority of all the booksellers throughout the United States, consisting of about 90 per cent. both in numbers and in extent of business, have obeyed the rules and regulations of the two associations as from time to time amended. They and each of them refused to sell or sanction the sale of any books of any kind, whether copyrighted or uncopyrighted, whether published by any member of the American Publishers' Association or not, to any dealer throughout the United States who did not maintain at retail the net or restricted price at which each copyrighted book was published under the net price or restricted price system, nor would they sell or sanction the sale of any books of any kind to any one who was known or believed to sell such net or restricted copyrighted books at retail at less than the net or restricted price, nor would they sell or sanction the sale of any books of any kind to any one who sold books of any kind to a price-cutter on copyrighted books, or who was known or believed to supply a price-cutter with any books of any kind; and when any dealer or person sold any net price books or restricted price books at less than the net or restricted price, or any jobber or wholesaler supplied a price-cutter with any books of any kind, or was known or believed to so supply him, the two associations circulated and published notices warning all persons in the trade, whether members of either of such associations or not, that the book supply of such persons had been cut off pursuant to the rules of the two associations.

(18) That since April, 1904, any dealer who does not maintain the net or restricted price at retail of any copyrighted book published by any member of the Publishers' Association under the net price or restricted price system cannot purchase any copyrighted books of any kind from any of the members of either of the associations at less than the retail price, whether such copyrighted book is published by any of the members of the associations or not, and whether such copyrighted book was published under the net price system or not, or prior thereto.

(19) That the defendants were placed on the cut-off list in May, 1901, because they refused to maintain the net retail price of \$1.40 on the copyrighted book "Tarry Thou Till I Come," published by Funk & Wagnalls, but uniformly sold the same at retail at \$1.24; and since said time their name has been circulated monthly upon the list of dealers whose supplies have been cut off under the rules of the two associations, and against whom the trade at large was warned as price-cutters and as coming under the rules of the two associations as dealers to whom books should not be sold, and, furthermore, that books should not be sold to any one who in turn was known or believed to resell the same to these defendants. That since March, 1904, the rules have been amended and relaxed as above set forth, so as to permit dealings with the defendants in uncopyrighted books only. That as to all copyrighted books of any and all kinds the members of said associations are not permitted under the rules to sell to the defendants, nor to sell to any one who resells or is believed to resell to the defendants; and the cut-off lists or blacklists have been published against these defendants and

against such other dealers as have been cut off from their supply of books, copyrighted or otherwise, without any interruption or intermission from the time they were first included in the list of dealers whose supplies were cut off until the present time, without any change in the method employed prior to the passage of the last amendment, which eliminated uncopyrighted books from the rules.

(20) That such combination and agreement as hereinbefore described are now in force, and that it is intended by the members of the two associations and the two associations to continue them in force.

(21) That the complainant was, since May, 1901, a member of the American Publishers' Association, and a party to all the agreements of said association hereinbefore set forth, and obeyed and lived up to all the rules and regulations of the American Publishers' Association hereinbefore set forth, and published all its books, including "The Castaway," in accordance with the rules and regulations of the association above set forth.

(22) That the members of the said two associations, including the complainant herein, do now, and at all the times herein mentioned have, resided and carried on their business of selling books in many different states, and, in the conduct of their respective business as publishers and wholesale and retail dealers in books, the members of the said two associations, including the complainant, were and now are engaged in the business of purchasing books, copyrighted and uncopyrighted, from each other and from other persons, in many states other than the states in which the purchasers resided, or now reside, and do business; and all such books were and have been transported, in compliance with the contract of purchase, from the state where such books were purchased to the purchaser, and delivered to the purchaser in the state where he resided, or now resides in and conducts his business, and members of both of such associations, including the complainant herein, also sell and have sold books to many persons who are not members of the said associations, in states other than the ones in which the sellers reside and conduct their business, and all such books were and have been transported, in compliance with the contract of purchase, from one state to another, and then delivered to the purchaser, and all the rules, regulations, and agreements made by the said two associations and its members, including the complainant, as hereinbefore set forth, were intended to be applied and be enforced, and have been and are now applied to and enforced, against all publishers and dealers in books throughout all the states of the United States, whether such publishers and dealers were or were not members of either of such associations, and whether they purchased books in one state for transportation and delivery in another, or for delivery in the state where purchased.

(23) That the members of the said two associations, including the complainant herein, have heretofore produced, distributed, and sold, and still produce, distribute, and sell, the majority of all books purchased and dealt in throughout the state of New York and all other states and territories of the United States.

From these facts, which are conceded, it appears that the original purpose of the combination and agreement of the association of publishers, including the complainant, was (1) to maintain the net retail price of all copyrighted books published by the members of such association, or any of them, at such price per book as might be fixed by the publisher of that book, and (2) to prevent the sale at retail of any one or more of such copyrighted books by any dealer in books at retail at a less price per copy than that so fixed. (See finding 10.) Thereupon the persons, firms, and corporations in the combination, including the complainant, formed a corporation under the name "American Publishers' Association." This corporation included a large majority of all the publishers of all books, both copyrighted and uncopyrighted, in the United States. This corporation, immediately on its organization, adopted the resolution (Exhibit A), and it and its members entered into an agreement with each other, and combined together to do the acts and things, and refrain from doing the acts and things, mentioned in such resolution (Exhibit A). That subdivision or paragraph III thereof was illegal and in restraint of interstate commerce is perfectly plain. (See finding 22.) In fact, the effect of the decision of the Court of Appeals of the state of New York, quoted in the findings (finding 15), is so to declare. By paragraph or subdivision X of such resolution the combination to keep up the price of books and limit and restrain interstate commerce was to be further extended. Thereupon the American Booksellers' Association was formed. (See finding 12.) That the object and purpose as there set forth was illegal cannot be doubted. We now have the combination extended to at least 90 per cent. of the booksellers of the United States, and including, not only 90 per cent. of all booksellers, but 90 per cent. of all publishers of books. The combination as existing under those resolutions, etc., is not confined to publishers and sellers of copyright books, but includes the publishers and sellers of all books. The declared object and purpose of this combination is (1) to fix the retail price of books; (2) to maintain such retail price; (3) to refuse to furnish or sell any books to any dealer in books who does not maintain such prices—that is, who sells a book at less than the fixed price; (4) to compel all publishers and dealers in books, in practical effect at least, to come into the combination and enforce and maintain these prices, or be blacklisted and driven from the business; (5) to drive out of the business of general publishing and bookselling all who refuse or neglect to maintain these prices. The freedom of the owner of a book—any book, except those specially excepted—duly purchased and paid for to sell the same, soiled or injured, or read and no longer desired, was thus attempted to be destroyed. The right of a retail bookseller to sell to the purchaser of 50 books for his library at a less price than to the purchaser of one book must not be exercised under the pain and penalty of having his supply of books cut off and of being driven from the business and financially ruined. (See Exhibit B, finding 12.) As to what was done in restraint of interstate commerce, see finding 13.

An attempt was then made by the American Publishers' Association to eliminate the vicious provision of the written agreements and resolutions adopted by the combination by the substitution of article or subdivision III of Exhibit H. (See finding 16.) This must be read with the words included in brackets left out. The American Booksellers' Association followed, with the adoption of Exhibit I, or "Reform Resolution No. 2." In finding 17 is set out what was done up to April, 1904. What has been done by the combination since April, 1904, is set out in finding 18. As appears from finding 19, the defendants were put on the so-called cut-off list, or blacklist, in May, 1901, when the unmodified agreement or combination was being enforced. Its offense was in refusing to maintain the retail price of a copyrighted book, however. Defendants' name has not been taken from the list at any time. It is found and conceded that the complainant is living up to and enforcing the agreements, rules, and regulations aforesaid, as modified, of course, and has published and is publishing all its books, including "The Castaway," because thereof, and in accordance and compliance therewith. It follows, necessarily, from the facts recited from 1 to 23, inclusive, and is found as a further fact, that the notice in "The Castaway," on the page following the fly leaf, viz.: "The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright. The Bobbs-Merrill Company"—is an act done by the complainant, acting in combination with the said American Publishers' Association and the American Booksellers' Association, and the members thereof, in execution of the said combination and agreement, and for the purpose of enforcing same, and because of the said combination and agreement as evidenced by the acts of, and the resolutions and rules adopted and made by, such associations, and agreed to and being executed by the members of said association, including this complainant. It also follows and is found as a fact that such notice was put in such books, and that its enforcement as an alleged license agreement is attempted, by means of this action, not because the complainant reserved or intended to reserve to itself any interest in said books containing such printed notices, nor because it merely licensed or intended to license the purchasers thereof, who purchased same in the first instance from the complainant, to use or sell such books in a certain way, or on certain terms and conditions, or at certain prices, but as an attempt by complainant, as a member of said American Publishers' Association, to enforce as against this defendant the rules of such associations and combination fixing prices, in an effort to maintain them. It is part of a scheme, and the right of the complainant to maintain this action depends on the validity of that scheme or combination. Is such notice in such books sufficiently explicit in its terms to constitute a license agreement or contract, or any restriction on or modification of the absolute title thereto in the defendant? It does not purport to reserve to the complainant any interest in the book, or any right to control it, or the action of its owner in his use and disposition of it, except by possible inference.

In *Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co. et al.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, the owner of a patent for fastening buttons to shoes with metallic fasteners made and sold the machines with this notice on a metal plate, so conspicuously fastened thereto that all must see it, and so securely fastened as to constitute substantially an integral part of the machine, viz.:

"Condition of Sale. This machine is sold and purchased to use only with fasteners made by the Peninsular Novelty Company, to whom the title to said machine immediately reverts upon violation of this contract of sale."

Here is a plain, unequivocal statement, one that cannot be misconstrued or misunderstood, that there is a condition attached to the sale, viz., that the machine is to be used with fasteners of a certain make only, and that a use with other fasteners will be such a violation of the agreement as to defeat the title or right given. This was seen by the purchaser, and he took the machine on that condition, and by so doing agreed to the condition and became bound thereby. He became a mere licensee. He acquired the right to use that machine in a certain way only.

In *Cortelyou and Another and Neostyle Company v. Charles Eneu Johnson & Co.* (recently decided by this court) 138 Fed. 110, the patented rotary neostyle was sold with this notice on a metal plate firmly and conspicuously attached thereto, viz.:

"License Agreement. This machine is sold by the Neostyle Company and purchased by the user with the express understanding that it is licensed to be used only with stencil paper and ink (both of which are patented), made by the Neostyle Company New York City."

When the purchaser took this machine he assented to this condition and became bound by it, and became a licensee. He is told that he is licensed to use the machine in a certain way and with certain supplies only. Had he been licensed to sell only—that is, made an agent to sell—and empowered to sell at a certain fixed price only, it is unquestionably true that, had he violated the agreement by selling at a lower, or even a higher, price, he could have been enjoined. Having the sole power to vend his patented articles, he would undoubtedly have the right to fix the price at which they should be sold, and stop sales made by his agents and licensees in violation of the authority conferred. This is now settled as to a patent right. *Bement v. National Harrow Co.*, 186 U. S. 70, 88, 92, 93, 22 Sup. Ct. 747, 46 L. Ed. 1058. In the opinion in that case (pages 92–93, 186 U. S., page 755, 22 Sup. Ct., 46 L. Ed. 1058), we find the following:

"The contracts plainly look to the sale, and they also determine the price of the article sold, throughout the United States, as well as to the manufacture in the state of Michigan. As these contracts do, therefore, include interstate commerce within their provisions, we are brought back to the question whether the agreement between these parties with relation to these patented articles is valid within the act of Congress. It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addystone*

Pipe, etc., *Company v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions, imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. * * * The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

In *Victor Talking Machine et al. v. The Fair*, 123 Fed. 424, 61 C. A. 58, the syllabus reads:

"The owner of a patent, who manufactures and sells the patented article, may reserve to himself, as an ungranted part of his monopoly, the right to fix and control the prices at which jobbers or dealers buying from him may sell to the public, and a dealer, who buys from a jobber with knowledge of such reservation and resells in violation of it, is an infringer of the patent."

And in the opinion, after stating that the grant of a patent by its terms covers three separate or separable fields, the learned judge giving the opinion says:

"The field of sale is as much within the monopoly as the others, and so it has been decided. *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. And in *Edison Phonograph Co. v. Kaufmann* (C. C.) 105 Fed. 960, and *Same v. Pike* (C. C.) 116 Fed. 863, the holdings were that a patentee may reserve to himself, as an ungranted part of his monopoly of sale, the right to fix and control the prices at which jobbers and dealers may sell the patented article to the public, and that whoever without permission enters the reserved portion is an infringer."

In the *Victor Talking Machine Case*, supra, the notice affixed to the machine read:

"Notice. This machine, which is registered in our books No. —, is licensed by us for sale and use only when sold to the public at a price not less than \$—. No license is granted to use this machine when sold at a less price. * * * A purchase is an acceptance of these conditions. All rights revert to the undersigned in the event of any violation.

"Victor Talking Machine Co."

In the *Edison Phonograph Company Cases*, cited (see supra) by Judge Baker in the *Victor Talking Machine Case*, supra, there was a restrictive contract, and this was referred to in the following language by a notice on the box containing the instrument when sold, viz.:

"Notice to Dealers. This record is sold subject to restrictions as to the persons to whom and the prices at which it may be sold. Any violation of such restrictions makes the seller or user an infringer of the Edison patents."

A reference to the case in 116 Fed. 863, will show that the restriction was very clear and explicit. The notice in "*The Castaway*" does not suggest a restriction upon the title to the book, or that the person or persons taking the book for sale are obtaining anything short of an absolute title, and no one would suppose that the

publisher of the book would attempt or assume to fix the price at which dealers should sell after obtaining absolute title to the book from such publisher. The words, "No dealer is licensed to sell it at a less price," are notice that licensees, not absolute owners, are so restricted. The words, "and a sale at a less price will be treated as an infringement of the copyright," clearly do not even tend to make such a sale by an absolute owner of such books an infringement of the copyright.

It is a close question whether a copyright may be infringed by selling in violation of express and explicit restrictions placed on the dealer, expressly made an agent or licensee only, as to the mode of sale or the price at which same is to be sold. Act March 3, 1891, c. 565, 26 Stat. 1106 [U. S. Comp. St. 1901, p. 3406], entitled "An act to amend title sixty, chapter three, of the Revised Statutes of the United States, relating to copyrights," amends section 4952 so as to read:

"The author * * * or proprietor of any book * * * shall, upon complying with the provisions of this chapter have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same."

Section 7 of that act (26 Stat. 1109 [U. S. Comp. St. 1901, p. 3413]) amends section 4964 of the Revised Statutes so as to read as follows:

"Every person, who after the recording of the title of any book and the depositing of two copies of such book, as provided by this act, shall, contrary to the provisions of this act, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, print, publish, dramatize, translate, or import, or knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction."

This section declares what acts constitute a violation of the copyright of a book. It declares that, to constitute a violation of the copyright, the offender must have, within the term limited—that is, the life of the copyright—and without the consent of the proprietor thereof, first obtained in writing and executed in the presence of two or more witnesses, printed or published or imported, contrary to the provisions of the act, such copyrighted book, or contrary to the provisions of the act, within such time and without such consent, must have sold or exposed to sale a copy of such copyrighted book, known to have been illegally printed. In substance this section declares that it is an infringement of a copyright to print or publish the copyrighted book without the consent of the proprietor, given in writing, signed in the presence of two witnesses, or to import a copy of such book without such consent, or knowingly to sell or expose for sale a copy or copies of such copyrighted book when unlawfully printed or imported. From this it would appear that an infringement by the sale of a copyrighted book consists in the selling or exposing for sale of a copy of such book that has been unlawfully printed or imported. If this be the law, it is not an

infringement of a copyright to sell or expose for sale a copy or copies of such book, when the same was lawfully printed or lawfully imported. The result would be that it is not an infringement of the copyright of a book to sell a copy or copies thereof lawfully printed, as in this case, in violation of a mere condition imposed upon a dealer by the publisher, by which such dealer agrees not to sell below a certain price; the title to the book having been vested in such dealer by the publisher thereof, or even in cases where the absolute title had not passed to the dealer. If the publisher of the book, being the proprietor of the copyright, parts with the title to such book, either a single copy or any number of copies, and receives his pay therefor, he has voluntarily parted with all control over that or those particular books. The owner of those books is neither a licensee nor an agent. He has the absolute property therein, and the absolute ownership of an article of personal property carries with it the right to give away or sell for such consideration as the owner sees fit to impose, prescribe, or demand, so long as he violates no law. This view of the copyright laws of the United States, as amended by the act of March 3, 1891, seems to be taken by Macgillivray in his work on the Law of Copyright, p. 237, c. 4, § 2. He there says:

"Prohibited Acts and Remedies. It is an infringement, subject to the remedies stated below, to do any of the following acts in respect of a copyrighted work: In the case of books, without the consent of the proprietor, in writing, signed in the presence of two witnesses (1) to print or publish; (2) to dramatize or translate; (3) to import; (4) knowingly to sell or expose for sale copies unlawfully made or imported."

We find no suggestion that it is an infringement of the copyright of a book for the owner of the book to sell copies at a price which violates a valid contract between the publisher of the book and the dealer, and which was made at the time such dealer became the owner.

In *Harrison v. Maynard, Merrill & Co.*, 26 U. S. App. 99, 61 Fed. 689, 10 C. C. A. 17, the complainants, publishers of books and the owners of a copyrighted book, sent a quantity of the printed and unbound sheets of such book to the bindery of one Alexander for binding, and such sheets were to be stored until complainants should order bound copies. Sometimes they bound copies in advance. A fire occurred in the bindery, and both complainants and Alexander supposed the commercial value as books of all such bound or unbound sheets of such book in such bindery was destroyed. On examination complainants' agent so reported. Thereupon Alexander, without objection from complainants, sold the entire debris to one Fitzgerald, who, without moving it, sold same to some dealers in old paper. Alexander imposed no restriction or condition when he sold. Fitzgerald, who had become the owner of the debris, including the printed sheets and bound volumes, put this condition and restriction in the bill of sale:

"It is understood that all paper taken out of the building is to be utilized as paper stock, and all books to be sold as paper stock only, and not placed on the market as anything else."

Harrison, a dealer in books, visited the place and purchased of these dealers in old paper some of the volumes of the copyrighted book not destroyed, and put them on the market. He had no notice of the restriction or condition put in the bill of sale given by Fitzgerald. Complainants, owners of the copyright, brought suit to enjoin such sale by Harrison. On these facts the court (Wallace, Lacombe, and Shipman, Circuit Judges) held that, so long as the owner of a copyright retains the title to the copies of the book which he has the exclusive right to vend by virtue of the copyright, he can impose restrictions upon the manner in which and upon the persons to whom the copies are to be sold. They also held that if the agents of the owner of the copyright, intrusted with the possession of such books, violates his instructions and fraudulently sells to a person who has knowledge of the restrictions, such sale by the agent constitutes a fraud upon the owner of the copyright, and that such fraud constitutes an infringement of the copyright, with which the owner has never parted, and that such fraud—meaning, of course, such sales—can be restrained by virtue of the statutes applicable thereto. The court states that this right to enjoy the benefit of the copyright statutes results from the fact that the owner has never parted with the title to the book or the copyright, although he may have parted with the possession of the book. The court also holds that the right to restrain the sale of a particular copy of the book by virtue of such statutes has gone when the owner of the copyright and of that copy has parted with all his title to it, and has conferred an absolute title to the copy upon a purchaser, although with an agreement for a restricted use. If this is true of one particular book, it is also true of a large number of copies. The court also says, in substance, that the new purchaser cannot reprint the copy, but that, the copy having been absolutely sold to him, the ordinary incidents of ownership in personal property, among which is the right of alienation, attaches to it. The court further says:

"If he has agreed that he will not sell it for certain purposes or to certain persons, and violates his agreement and sells to an innocent purchaser, he can be punished for a violation of his agreement; but neither is guilty under the copyright statutes of an infringement. If the new purchaser participates in the fraud, he may also share in the punishment."

The court cites in support of these statements *Clemens v. Estes*, 22 Fed. 899. If this be a correct statement of the law, and this court does not doubt that it is, we recur to the simple proposition whether or not the complainant in the case now under consideration, the Bobbs-Merrill Company, retained any title in the books in question by printing on the page following the title-page the statement: "Copyright 1904. The Bobbs-Merrill Company. May." And thereunder the statement:

"The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.
The Bobbs-Merrill Company."

The defendants in this case purchased 90 per cent. of its copies of this book from dealers at wholesale at a reduction of 40 per cent. from said mentioned retail price. The other 10 per cent. of their

copies they purchased at retail, paying the full retail price therefor. The defendants knew of the statement printed in said books above quoted, and knew that it was printed in each copy of the book. The wholesale dealers from whom the defendants purchased their copies obtained such copies either from complainants direct or from other wholesale dealers at a discount from the above-mentioned retail price. Such wholesale dealers knew that the book was copyrighted, and were familiar with the said statement printed in each copy thereof. The books that came to the defendants prior to reaching them did not pass through the hands of any person or persons who were ignorant of the said notice printed therein. It is expressly found, however, and conceded, that these wholesale dealers from whom the defendants here obtained their copies were under no agreement or obligation to enforce the observance of the terms of said notice by retail dealers, or to restrict their sales of copies of such book to retail dealers who would agree to observe the said notice.

As has been stated, the notice contains no suggestion that the title of the purchaser to the book is in any way limited. The notice is that the price of the book at retail is one dollar net; and, if the words "no dealer" are to be construed as referring solely to retail dealers, then the notice is that the Bobbs-Merrill Company has not licensed any retail dealer to sell the book at retail for less than one dollar per copy. The fair meaning of this is that, in cases where the Bobbs-Merrill Company has granted a license to some retail dealer or dealers to sell the book, such licensee or licensees are limited and restricted in his or their authority; but the notice is not a suggestion or an intimation to any person that those who buy and pay for the book in the open market, or even of the Bobbs-Merrill Company, without entering into an express license agreement different from that suggested by this notice, are bound or obligated in any way to demand one dollar per copy for such book. It well may be that the Bobbs-Merrill Company has licensed or will license certain dealers to sell this book, and when it grants a license it has the right to impose conditions on its licensees; but this notice does not state or suggest that every purchaser of one of these books containing this notice becomes a licensee with a limited title, or, in fact, no title, to the book. A person cannot be both licensee and absolute owner.

Again, it is contended that the words "the price of this book" refer to the particular copy containing the notice, and that the words "no dealer is licensed to sell it" refer to the particular copy containing the notice. It is further contended that the court is bound to give this construction to this language, and that therefore the defendants, having knowledge of the notice, assented to the proposition and in effect entered into a contract or agreement with the Bobbs-Merrill Company whereby they became its agents to sell the copies at one dollar per volume, and no less, or its licensee with power to sell such books, for which it had paid the wholesale dealer the price demanded, at one dollar per copy only. This court refuses to give that construction to this notice. This court declines to hold

that the words in such notice "this book" and "it" refer to the particular copy of the book in which the notice is found. The language of the notice is a general statement, referring to the book known as "The Castaway" generally, and not to any particular copy or copies thereof, and, at best, is but a notice that licensees of the publishers are only at liberty to sell such book at one dollar per copy. The notice forms no part of a contract between the purchaser from the publisher and such publisher, nor does it limit or restrict the title of the purchaser. And this court will say here that it would be lending itself to the perpetration of a fraud upon the public should it hold differently. If the Bobbs-Merrill Company, in putting its books upon the market, desires to say to wholesalers and to retailers that it is not selling the entire title to the copies put upon the market, let it say so in plain and unambiguous terms. Let it say in its notice that the purchaser of copies of the book from either the publisher or any wholesale or retail dealer is obtaining but a limited or qualified title in the copies purchased, or that in purchasing one or more copies such purchaser becomes but a mere licensee of the publisher, without title to the copies, and with power to dispose of the same only on receiving a specified sum of money. The Circuit Court of Appeals, in *Harrison v. Maynard, Merrill & Co.*, supra, also quotes with approval the language of Judge Hammond in *Henry Bill Publishing Co. v. Smythe* (C. C.) 27 Fed. 914-925, viz.:

"The owner of the copyright may not be able to transfer the entire property in one of his copies and retain for himself an incidental power to authorize a sale of that copy, or, rather, the power of prohibition on the owner that he shall not sell it, holding that much, as a modicum of his former estate, to be protected by the copyright statute; and yet he may be entirely able, so long as he retains the ownership of a particular copy for himself, to find abundant protection under the copyright statute for his then incidental power of controlling its sale. This copyright incident of control over the sale, if I may call it so, as contradistinguished from the power of sale incident to ownership in all property—copyrighted articles, like any other—is a thing that belongs alone to the owner of the copyright itself, and as to him only so long as and to the extent that he owns the particular copies involved. Whenever he parts with that ownership, the ordinary incident of alienation attaches to the particular copy parted with in favor of the transferee, and he cannot be deprived of it. This latter incident supersedes the other—swallows it up, so to speak—and the two cannot coexist in any owner of the copy, except he be the owner at the same time of the copyright; and, in the nature of the thing, they cannot be separated, so that one may remain in the owner of the copyright as a limitation upon or denial of the other in the owner of the copy."

In *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631, decided October 17, 1901, without dissent, the court, speaking of copyrights, said:

"The law of copyright also gives privileges to authors and publishers that do not pertain to property which anybody may make and sell if he can; but even under the law of copyright, when the owner of a copyright and of a particular copy of a book to which it pertains has parted with all his title to the book, and has conferred an absolute title to it upon a purchaser, he cannot restrict the right of alienation, which is one of the incidents of ownership in personal property. *Harrison v. Maynard*, 61 Fed. 689, 10 C. C. A. 17. See, also, *Clemens v. Estes* (C. C.) 22 Fed. 899; *Meyer v. Estes*, 164 Mass. 457,

41 N. E. 683. 32 L. R. A. 283; *Waterman Co. v. Waterman*, 27 App. Div. 133, 50 N. Y. Supp. 131."

The same doctrine is plainly expressed in *Keeler v. Standard Folding Bed Company*, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848. In that case it was held that one who purchases patented articles of manufacture from one authorized to sell them at the place where sold becomes possessed of an absolute property in such articles, unrestricted in time or place. In that case the complainants were the assignees for the state of Massachusetts of certain letters patent granted to one Welch. This assignment as matter of course gave to the complainants the rights of the patentee in and for the state of Massachusetts, viz., the sole right to make, use, and sell the patented article in that state. The Welch Folding Bed Company owned the patent rights for the state of Michigan, and it of course had the same right to make, use, and vend the patented article in that state. The defendants purchased a car load of the patented articles from the Welch Folding Bed Company at Grand Rapids in the state of Michigan. It proposed to sell these articles in the state of Massachusetts, and thereafter did sell some of such articles in the state of Massachusetts, and was engaged in selling the remainder in that state at the city of Boston when the bill of complaint was filed. The Supreme Court held that the defendants, having purchased the patented articles in Michigan from the assignee of the patent for the territory included within the boundaries of the state of Michigan, had the right to sell them anywhere within the United States, including the state of Massachusetts, notwithstanding the fact that all the patent rights for the state of Massachusetts had been assigned to another person, to wit, to the complainants. The decision is based upon the proposition that where the patentee, not having parted with his rights granted by the patent, makes and vends a patented article, the purchaser can use the article in any part of the United States, and, unless restrained by contract with the patentee, can sell or dispose of the same in any part of the United States. The court says:

"It has passed outside of the monopoly, and is no longer under the peculiar protection granted to patented rights."

The court approves the language of Mr. Justice Clifford in *Good-year v. Beverly Rubber Co.*, 1 Cliff. 348-354, Fed. Cas. No. 5,557, wherein he states, in substance, that, the patentee having manufactured the article and sold it for a satisfactory compensation, the patentee, so far as that quantity of the product of his invention is concerned, has enjoyed all the rights secured to him by his letters patent, and the manufactured article, and the material of which it is composed, go to the purchaser for a valuable consideration, discharged of all the rights of the patentee previously attached to or impressed upon it by the law under which the patent was granted. The court further says:

"If, as is often the case, the patentee has divided the territory of the United States into 20 or more specified parts, must a person who has bought and paid for the patented article in one part, from a vendor having an exclusive right to make and vend therein, on removing from one part of the country

to another, pay to the local assignee for the privilege of using and selling his property, or else be subjected to an action for damages as a wrongdoer? And is there any solid distinction to be made in such a case between the right to use and the right to sell?"

The court then cites with approval several cases, and especially the language of Mr. Justice Clifford in *Mitchell v. Hawley*, 16 Wall. 544, 546, 547, 21 L. Ed. 322, as follows:

"Patentees acquire by their letters patent the exclusive right to make and use their patented inventions, and to vend to others to be used, for the period of time specified in the patent; but when they have made one or more of the things patented, and have vended the same to others to be used, they have parted to that extent with their exclusive right, as they are never entitled to but one royalty for a patented machine, and consequently a patentee, when he has himself constructed a machine and sold it without any conditions, or authorized another to construct, sell, and deliver it, or to construct, use, and operate it, without any conditions, and the consideration has been paid to him for the thing patented, the rule is well established that the patentee must be understood to have parted to that extent with all his exclusive right, and that he ceases to have any interest whatever in the patented machine so sold and delivered or authorized to be constructed and operated. Where such circumstances appear, the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee or his assigns."

At page 666, 16 Wall., 21 L. Ed. 322, the court calls attention to the case of *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141, and says that it was there held that:

"As between the owner of a patent on the one side, and a purchaser of an article made under the patent on the other, the payment of a royalty once, or, what is the same thing, the purchase of the article from one authorized by the patentee to sell it, emancipates such article from any further subjection to the patent throughout the entire life of the patent, even if the latter should be by law subsequently extended beyond the term existing at the time of the sale; and in respect of the time of enjoyment, by those decisions the right of the purchaser, his assigns, or legal representatives is clearly established to be entirely free from any further claim of the patentee or any assignee."

The court then says:

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws."

In the case now before this court it appears that the publisher of the book "The Castaway" printed and sold these copies. It put them upon the market. It received its price therefor, and reserved no right to demand any further compensation. The defendants purchased in the open market and paid the price demanded. It is conceded that the wholesalers of whom the defendants purchased were under no contract or obligation to impose any condition upon the defendants, and they did not. There is no privity of contract between the defendants and the complainants. There is no sug-

gestion in the notice that the retail dealer who buys the copies of the book in the open market enters into any contractual relation with the publishers. It is not stated that the copy of the book is sold on condition that the purchaser will abide by and enforce the price arrangement. The notice is assertive in its terms. It is a dictum. It says that the price of the book at retail is one dollar net. The plain meaning of this language is that if the signer of the notice sells a copy of the book, or the book in question, containing the notice, at retail, the price is one dollar. The notice also asserts that the Bobbs-Merrill Company has not licensed any retail dealer to sell at a less price. It does not say or suggest that the Bobbs-Merrill Company has not sold millions of copies of the book for the trade, parting with the title absolutely and unconditionally. This court is aware that the Keeler Case, cited above, is a patent, and not a copyright case; but the principle is the same.

In a supplemental brief filed by the counsel for the complainant, he states that he does not consider the notice published in the book as in the nature of a license. He says:

"In my opinion, the putting of the book upon the market and selling it by the owner of the copyright constitutes the license; and this notice published in the book is a limitation and qualification of that license. If the book is put out without any notice, the license is unqualified, and the sale is absolute; but my contention is that the owner of the copyright has the authority to restrict the license, and, being published in this way, the restriction attaches to the property, and is a charge and limitation upon the rights of all parties purchasing the book for resale."

This is a claim that the owner of a copyright for a book, who prints the book and sells it for a consideration, gives to the purchaser a license, and does not sell and convey a piece of personal property absolutely. The contention here is that any notice printed in a book and brought to the attention of the purchaser is a restriction of that license to that extent, and may be enforced, and that a violation of the obligation imposed by the notice is an infringement of the copyright which may be restrained by the federal courts. This doctrine, it seems to this court, is contrary to the adjudicated cases. I do not think this contention can be sustained upon principle. Clearly it is opposed to public policy. The purchaser of an article not patented may duplicate it if he can. The purchaser of an article made under a patent right may not duplicate it, but he may use the article purchased and sell the same as his own in any way or for any price he sees fit. The purchaser of a book not copyrighted may duplicate it—make copies or a reprint. The purchaser of a copyrighted book may not make or print or publish a copy, as this would be an infringement of the copyright; but this restriction in no way interferes with the absolute ownership of the particular copy of the book. The owner of an article made under a patent right or of a book printed under a copyright is in no sense a licensee of the patentee or of the owner of the copyright.

"License," with reference to real estate, is a permission or authority to do a particular act or a series of acts on the land of another without possessing any estate therein. So, with reference

to personal property, "license" implies and carries the power to do some act upon or in reference to or to do something with the property of another. Herein it differs from an easement. The word "easement" always implies an interest in the land. See Words & Phrases, vol. 5, tit. "License."

What is the Present Combination and Its Object, or Purpose?

1. The American Publishers' Association has adopted a net price system for all copyright books published or controlled by any member or members of the association and made an agreement to maintain it. By this agreement the members thereof are to cut off all supply of their copyrighted books to any dealer who fails to maintain the net price of such books as fixed by such association, or, what is the same thing, by its members. In short, this combination fixes the price of copyrighted books published by its members, and the price at which such books are to be sold, both at wholesale and at retail, and agrees not to furnish or sell any of these books to any dealer who fails to maintain such price; that is, demand and exact from the purchaser the price so fixed.

2. Another association, the American Booksellers' Association, assents to this, agrees to co-operate and be bound by such system and arrangement and to aid and assist in carrying it into effect, and to this end agrees not to buy, or keep in stock, or offer for sale, the copyrighted book of any publisher who refuses to join the combination and enforce this price system and demand and exact of the customer this price fixed by the combination. Two-thirds of the members of this association govern. If any member fails to live up to the agreement, etc., he may be expelled, and he is not to have books, and all members are "restrained" from supplying books, etc. (See subdivisions 4 and 5 of Exhibit I.) The objects are: (1) To compel the would-be owners and readers of copyrighted books to purchase their books of the members of this combination, made up of two combinations embracing at least 90 per cent. of all publishers and dealers in copyrighted books, at an arbitrary price fixed by the combination, regardless of the actual value of the book as determined by a demand therefor established in a free and open market or the condition of the books. (2) To compel all publishers of and dealers in copyrighted books to come into the combination, submit to and be controlled by it, and sell books at prices fixed by it, regardless of the value of the books, etc., or of the exigencies of the trade and situation of the seller, or be deprived of the privilege of purchasing, owning, and selling such books. In short, such as refuse to come in are to be crippled, or perhaps ruined, in their business. As the combination extends throughout the United States by the very terms of the agreement, interstate commerce is necessarily restrained. A judgment for the complainants in this action will restrain interstate commerce.

If this suit is one to restrain the infringement of a copyright, granted to the complainant and now owned by it, by the doing of any act that constitutes infringement of that right, and defendant has infringed, it is entirely immaterial that the combination

described exists, or that complainant is a member thereof, or that its objects are those described. It is no defense to such a trespass upon the complainant's rights that it has violated and is violating the Sherman anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), or some statute of the state of New York. In *General Electric Co. v. Wise*, 119 Fed. 922-924, this court so held, citing cases. This court there said:

"It is difficult to understand how or why a violation of the Sherman anti-trust law by this complainant, if there has been such a violation, confers any right on the defendant to infringe this patent. That act points out the penalties for its violation, and it is not understood that such law denies the grantees of patents the protection of the law because they may be violating some statute. However that may be, the evidence falls far short of establishing such a violation by this complainant. The testimony on that subject is squarely contradicted. An individual cannot confiscate the property or property right of a corporation on the ground it has violated that act. *Soda Fountain Co. v. Green* (C. C.) 69 Fed. 333; *Columbia Wire Co. v. Freeman Wire Co.* (C. C.) 71 Fed. 302; *Bement v. Harrow Co.*, 186 U. S. 70, 88-91, 22 Sup. Ct. 747, 46 L. Ed. 1058. *Harrow Co. v. Quick* (C. C.) 67 Fed. 131, cannot be accepted as authority on this question."

See, also, *Strait v. National Harrow Co.* (C. C.) 51 Fed. 819.

But if the complainant has turned over to the combination the fixing of prices, and has entered into the combination described, and becomes a party to the agreement for the purposes described, and is now, through this suit, attempting, as this court holds it is, to enforce such combination agreement in whole or in part, and such agreement is unlawful, because in violation of the act referred to, then this action cannot be maintained. The complainant confessedly is a party to the combination and the agreement, and cannot, if it be illegal, have a standing in a court of equity to enforce any part of it, directly or indirectly. When a complainant comes into court, asking equity, it must come with clean hands, so far as the transaction involved is concerned. If a party, person, or corporation, in attempting to violate the rights of the public and the rights of those persons who will not join in the attempted violation of law, suffers some injury to his property or property rights, which are being used by his consent by those who are thus violating the law, in perpetrating such violation, at the hands of one who is lawfully resisting such attempted injury, he or it cannot, while continuing the illegal acts, have an injunction to enjoin the resisting acts resulting in such injury. Each owner of the copyright of a book has a monopoly of that particular book. Copyrights, like patents, are assignable, and hence a person or a corporation may lawfully become the owner of any number of copyrights or of all the copyrights of books issued by the United States, and it is immaterial that the purpose is to monopolize the whole business of publishing and selling copyrighted books. In such case such person or corporation would hold and control all the monopolies for such copyrights of books, and he or it could print and sell, or print and not sell, or refuse to print at all, or refuse to allow others to print or publish. Should he or it print or publish one or more copies of these books, such person or corporation could appoint agents to sell and prescribe and limit their powers. He or it could

license one or more persons to sell, and prescribe the terms and conditions of such sale, and limit the price at which same should be sold. Assume that such person or corporation has fixed the price at which such book shall be sold at retail by such agents and licensees, and may restrain a disposition of such books in violation of the conditions, we have no combination or conspiracy. One man cannot combine or conspire. It takes two or more to make a combination or a conspiracy. So an agreement by all holders of copyrights to assign same to one person or corporation is but a sale of their own, and they may take pay in cash, horses, scrap iron, or licenses to sell the copyrighted book, provided they actually sell their copyrights. If the agreement be a mere pretense, however, a mere cover for a combination to violate some statute, then such agreement to sell their copyrights would be void, and the whole combination would be illegal and void. So one person may purchase and own all the hay, oats, or potatoes existing in the country. If he becomes such owner, he may fix the price at which he will sell. Here there is no conspiracy or illegal combination. But if the several owners of such produce combine, and agree that they will fix prices, interfere with and limit interstate commerce, drive all other dealers and owners of similar property who will not join them in their purposes out of business, and deprive them, if possible, of their right to purchase and ship produce from state to state as a part of interstate commerce, we undoubtedly have an illegal combination, and no member of such a conspiracy can enforce in a court of equity any contract or agreement made in execution, in whole or part, of such a conspiracy. It is evident that one may do, in fixing and enforcing prices, and in exacting tribute from the people and restraining interstate commerce, what two or more cannot do in pursuance of an agreement or combination. A corporation, on becoming the owner of several patents or of several copyrights, may do all acts under each that the person to whom such rights were originally granted might have done. Having become the owner, it is entitled to the benefits and privileges of the monopolies granted. But all this affords no sanction or support whatever to the doctrine that the several owners of distinct patents, each having a monopoly of his particular patent, or the several owners of distinct copyrights, each having a monopoly of his particular copyright, may combine and conspire as to their patented articles, or as to their copyrights or books published under and protected thereby, to restrain interstate commerce in articles made or produced thereunder. A right or privilege to form such a combination or conspiracy is not embraced or included within the monopoly granted. The monopoly of one patentee cannot be extended and made more of a monopoly by that of another. The grant of an exclusive right to make and vend a certain machine does not include a license to combine and conspire with another having a like exclusive right to restrain trade and commerce between the states in those articles, if made and put on the market, or to conspire not to put them on the market. The right to elect not to make or sell is necessarily included. The right to combine

and conspire is not. In any event the so-called Sherman law forbids any and all combinations in restraint of such commerce.

In the case of copyrighted books it is evident that, if the publisher of one or two should demand and exact of the purchaser at retail a grossly unreasonable price, he would sell but few, if any, copies. Others would supply the market, for readers would forego that book, or those books, and find reading matter elsewhere. But when all publishers of and dealers in copyrighted books—and nearly all new books are now copyrighted—combine to exact a fixed, arbitrary price, etc., the readers of books become powerless, if they would read at all, not because of the monopoly granted or sanctioned by the government in granting the copyright, but because of the new monopoly (the conspiracy of monopolists), created by the agreement and combination of these monopolists—one that is forbidden and denounced by Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies." Section 1 of that act reads:

"Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce amongst the several states, or with foreign nations, is hereby declared to be illegal."

It is not necessary that the effect necessarily be to restrain trade or commerce. It is sufficient if the combination may have that effect. It seems to this court impossible to hold that this section of the act does not apply to a combination of patentees to restrain trade and commerce in patented articles made under their patents as much as to such a combination made by dealers in other articles of commerce.

In 1 Page on Contracts, p. 698, § 445, after a statement regarding the law as to "Monopoly Contracts concerning Patents," it is said:

"But if the owners of distinct patents combine to prevent competition in business, and to control the price of the patented article, such combinations and all contracts for such purposes are as invalid as if the articles were not patented."

The following cases are cited to sustain the statement: *National Harrow Co. v. Hench*, 83 Fed. 36, 27 C. C. A. 349, 55 U. S. App. 53, 39 L. R. A. 299; *National Harrow Co. v. Quick* (C. C.) 67 Fed. 130; *Vulcan Powder Co. v. Powder Co.*, 96 Cal. 510, 30 Pac. 1113, 31 Am. St. Rep. 242; *Gamewell, etc., Co. v. Crane*, 160 Mass. 50, 35 N. E. 99, 22 L. R. A. 673, 39 Am. St. Rep. 458.

In 1 State and Federal Control of Persons and Property (Tiedeman) 412-413, it is said:

"But the mere fact that the subject-matter of the monopolistic combination may be patent rights, covering machines employed in the same art or industry, will not protect the combination from the penal provisions of the anti-trust laws. If a corporation or association is formed among manufacturers and patentees of certain articles of kindred character, in order to control the trade and prices of such articles, the combination is nevertheless illegal, although the exclusive manufacture of the goods is guaranteed by letters patent from the United States government."

At the time of that writing (1900) the author was not aware of the decision in *Bement v. National Harrow Co.*, 186 U. S. 70, 22

Sup. Ct. 747, 46 L. Ed. 1058, which modifies some of the cases cited by him, but not in respect to the general doctrine stated.

In *Bement v. Harrow Co.*, supra, the court, at page 94, 186 U. S., page 756, 22 Sup. Ct. (46 L. Ed. 1058), plainly intimates that the several owners of several patents may not combine to restrain commerce in their patented articles. It is unnecessary to cite many cases. If *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, and *Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, are to be respected as law and followed in cases where there is no hue and cry against railroads, this combination is illegal as in restraint of interstate commerce. If anything can be found in the prevailing opinion in *John D. Park & Sons Co. v. Wholesale Druggists' Association et al.*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, supporting the contention of the complainant here, it is sufficient to say that this court does not agree with the prevailing opinion or decision in that case, but does agree with the dissenting opinions of Martin, J., and Cullen, C. J., with whom Vann, J., concurred.

The defendants have not infringed and are not threatening to infringe complainant's copyright, nor have they violated any contract. The complainant is seeking to enforce against defendants an unlawful combination agreement, to which such defendants are not parties, and by which they have not consented to be bound to prevent defendants selling books of which they are the absolute owners. The same result on a similar state of facts as to the effect of such notice was reached by the court in *Bobbs-Merrill Co. v. Snellenburg*, 131 Fed. 530.

The defendants are entitled to a decree dismissing the complaint, with costs.

SCRIBNER et al. v. STRAUS et al.

CHARLES SCRIBNER'S SONS v. SAME.

(Circuit Court, S. D. New York. July 11, 1905.)

Nos. 8,583, 8,936.

1. COPYRIGHTS—BOOKS—SALE—RIGHTS OF PURCHASERS.

Where defendants purchased copyrighted books, some from complainants at retail, for which full retail prices were paid, which defendants sold at retail at a loss, and other books were purchased of dealers who had purchased from complainants and paid the full price demanded, and there was no notice given by complainant either to defendant or to the dealers, restricting or limiting the title conveyed, defendants legally acquired the full title to the books purchased, and were not liable for infringement of copyright by reason of the sale of the books at a less price than that fixed by complainant under an alleged restriction, fixing the price at which the books should be sold at retail, of which defendants had notice.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, §§ 41, 47.]

2. SAME—RESTRICTION OF SALES.

The following, contained in catalogues and bills for books sold rendered to the purchasers for sale at retail: "Copyrighted net books published

after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association"—does not constitute a limitation or restriction of the title to the books.

In Equity.

Suits to restrain defendants from infringing complainants' copyrights for books by selling copyrighted books at retail, without a license from complainants, at a lower price than fixed, and not maintaining retail prices, as provided by the regulations of the American Publishers' Association; also to restrain defendants from contributory infringement of such copyrights by inducing wholesale dealers and jobbers in such books to violate their agreements with complainants as to the sale of copyright books. The defendants deny infringement in any sense, deny that complainants have proved a cause of action, and allege that complainants parted with title to all books the defendants have purchased and sold, and that, being their property, they had the right to sell them at such price as they saw fit to fix.

Stephen H. Olin and Olin, Clark & Phelps, for complainants.

Spiegelberg & Wise (John G. Carlisle and Edmond E. Wise, of counsel), for defendants.

RAY, District Judge (after stating the facts as above). In the first action, No. 8,583, the alleged limitation on the right to sell books at retail at less than a fixed price expired before the final hearing; hence no injunction, and only an accounting, could be granted in that case. The parties to that suit all reside in the state of New York. There is no diversity of citizenship. In the second suit, No. 8,936, the limited time had not expired, and, as defendants had incorporated under the laws of New Jersey before bringing the action, there exists in such action diversity of citizenship. If there is no infringement of a copyright shown in such first action, No. 8,583, it must be dismissed. In the second action, if defendants are violating complainants' rights, and a cause of action is shown, and the amount involved is sufficient, the action may be sustained, even if infringement of a copyright is not shown.

In this action the complainants not only allege infringement of their copyrights, but allege that they have valid contracts for the sale of their copyrighted books with certain parties, which are or were being carried out by them, and that defendants wrongfully, etc., have induced and are inducing such parties to violate such contracts by false representations and other acts, to the great injury of the complainants' business. They set forth certain facts tending to show grounds for equitable relief and an injunction. The complainant is the owner of a large number of copyrights, and is a publisher. It publishes and puts on the market its copyrighted books, but asserts that it puts them on the market under certain limitations and restrictions, which attach to the books and the right to sell in the hands of all persons having notice of such restriction. The complainants are members of an association known as the "American Publishers' Association." This association has made certain rules as to the purchase and sale by publishers and

dealers of copyrighted books. These rules are attached to the complaint and set out in full in the opinion of this court in the case of the Bobbs-Merrill Company against these same defendants (just decided), 139 Fed. 155. In that case, while the facts were somewhat different, the questions of law involved here were extensively discussed.

Paragraph 3 of those rules provides as follows:

"That the members of the association agree that such net copyrighted books, and all others of their books, shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided."

The complainants, in their attempt to live up to these rules of this association, and to enforce them against others and these defendants, and to maintain the fixed retail price of books sold in the retail trade, and to exclude from the business of selling their publications, or the publications of any other publisher of books (copyrighted publications), those who will not observe such rules, have fixed the retail price of their copyrighted books and adopted the following method of selling, viz.: For stock orders a salesman in most instances goes to a dealer and takes his order, or the dealer orders by mail, or, if a New York City dealer is purchasing, he sends a messenger. As to notifying dealers, purchasers, of the rules as to net prices and discount on fiction, fixed by the rules of such association, the complainants print a notice on their catalogues and on their billheads, reading as follows:

On catalogues:

Charles Scribner's Sons' Catalogue of Publications.

All Books sent Postpaid except where Postage is Indicated.

Note to the Trade:

Copyrighted Net books published after May 1st, 1901, and copyrighted fiction published after February 1st, 1902, are sold on condition that prices be maintained, as provided by the Regulations of The American Publishers' Association. On such books the month of publication is given except where the book is announced as In Press.

Books starred are mostly Educational and are subject to a slightly different discount to the Trade than other Net books.

On billheads:

All claims for Allowance must be made within five days after receipt of Goods
—Not Responsible for Books ordered sent by Mail, or sent out to be Packed.

153-157 Fifth Avenue

Between 21st & 22nd Streets.

New York.....190

M.....

Folio.....

Bought of Charles Scribner's Sons

Publishers, Importers and Booksellers.

Terms: Net Cash. Payable with Exchange on New York.

Sent per.....

Copyrighted Net books published after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association.

In complainants' evidence we find this on this subject:

Q. "Is any other method taken to bring the rules of the association to the notice of purchasers in the wholesale department?" A. "Not by Charles Scribner's Sons."

As to new customers the witness says:

Q. "When a new firm comes to deal with Charles Scribner's Sons that is unknown to you, what do you do?" A. "We get what information we can as to their standing and whether or not they will be willing to maintain the rules of the association by referring the matter to the association for investigation, or sometimes by sending them this blank which has been presented."

Q. "Can you say whether or not these rules are, in one way or another, brought to the attention of every purchaser from the wholesale department?" A. "No, sir." Q. "They are not brought to their notice?" A. "Except in the way I have described, by the bill heads and the catalogues, and, in case of a new purchaser, by correspondence and sending that notice in some cases."

Q. "Have any sales been made by Charles Scribner's Sons, since the adoption of those rules in their wholesale department, except subject to those rules?" A. "No, sir." Q. "They are not brought to their notice?" A. "Except in the way I have described, by the bill heads and the catalogues, and, in case of a new purchaser, by correspondence and sending that notice in some cases."

It is conceded that defendants knew of the rules and of the custom of the complainants. Defendants did not purchase any books of complainants. They had a purchasing agent, who purchased them where he could get them, paying therefor in cash.

In the Bobbs-Merrill Case, just decided and above referred to, this court has held, following the Circuit Court of Appeals in the Second Circuit in *Harrison v. Maynard, Merrill & Co.*, 26 U. S. App. 99, 61 Fed 689, 10 C. C. A. 17, that, so long as the publisher of a copyrighted book (such publisher owning the copyright) retains the title to the copies which he has the exclusive right to vend by virtue of the copyright, he can impose restrictions upon the manner in which and the persons to whom the copies can be sold. If agents or licensees, intrusted with the possession of such books, not having title, violate their instructions and sell to a person who has knowledge of the restricted power, such sale of such copyrighted book is an infringement and may be restrained. This right results from the fact that the owner of the copyright and copyrighted book has not parted with the title to the book or to the copyright. The right to restrain the sale is gone, however, when the owner of the copyright and of the copy or copies in question parts with his title to such copy or copies and confers an absolute title on the purchaser, even if such sale be accompanied with an agreement for a restricted use or for a sale at a fixed price.

We come, then, in these cases, to the question whether the complainants in either case retained title to the books, or any of them, that passed to the possession of the defendants and which they have been and are engaged in selling. It seems clear that they did not. They conferred no conditional or defeasible title, but an absolute title. Some books the defendants purchased direct of the complainants at retail and paid the full retail price. They sold same at retail at a loss. This they had the right to do. They were the absolute owners. The others were purchased of dealers who had

purchased of the complainants and paid the full price demanded. There was no notice on each book, and it does not appear that these dealers had seen the catalogues, or that they had a bill of sale containing the notice. But, however this may be, the notice does not retain the title, or restrict or limit the title conveyed. If so, the complainants could have replevied the books when they found they were being sold in violation of instructions given their licensees intrusted with the books. It may be, and it may not be, that the dealers from whom the defendants took title knew of the conditions of the notice when they purchased of the complainants. If they did, they impliedly agreed that in selling the books which they then purchased of complainants they would maintain prices. If so, the relation was contractual, and the remedy of complainants is for a breach of that contract, if they can find the person or firm who violated it. The notice is not a license agreement, as in the *Neostyle Case* (recently decided by this court) 138 Fed. 110, and others there cited. *Cortelyou et al. v. Charles Eneu Johnson Co. (C. C.)* 138 Fed. 110. Reference is made to the opinion of this court in the *Bobbs-Merrill Case* for a full statement of the law. In this case the notice does not purport to restrict title, or create an agency, or establish a license agreement. There is no evidence that will justify a finding that defendants have unlawfully or improperly induced any person to violate their contract, if any, with complainants.

In each suit the defendants are entitled to a decree dismissing the complaint, with costs.

COMPUTING SCALE CO. v. MOORE et al.

(Circuit Court, W. D. Virginia. July 17, 1905.)

1. PLEADING—VERIFICATION OF PLEAS IN EQUITY.

Under equity rule 31, a joint plea should ordinarily be verified by all of the defendants in whose behalf it is filed.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 621, 623.]

2. SAME—WAIVER.

Setting a plea down for argument is a waiver of objections for want of proper verification.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 672.]

3. SAME.

When a plea in equity is not properly verified, complainant should disregard the plea and take decree pro confesso.

4. SAME—PLEA IN ABATEMENT.

A plea in abatement must give opponent a "better writ."

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 227.]

5. SAME.

A plea in equity must not be uncertain or evasive. It must not tender an issue on an immaterial allegation in the bill.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 400, 403.]

(Syllabus by the Court.)

In Equity.

Church & Church and H. C. Gilmer, for complainant.

Wysor & Gardner, for defendants.

MCDOWELL, District Judge. Slight reference only need be made to the first bill, exhibited against the Pulaski Grocery Company, alleged to be a corporation, or to the plea thereto, or to the decree entered March 17, 1905. That decree was signed as an agreed decree, and it does not represent a determination by me of any question. The decree above mentioned allowed an amended bill to be filed, and required complainant to pay the costs "accrued to this date." The costs taxed by the clerk do not include an attorney's fee, and a motion has been made that the taxation be corrected. Regardless of what might be proper under other circumstances, I am of opinion to deny this motion. The plea is incomplete and evasive. In whose behalf it was filed, does not appear. It purports to be the plea of the Pulaski Grocery Company, and consists of nothing but a denial of the existence of a corporation of that name. Information which should have been furnished was withheld, with the purpose apparently of delaying the complainant. Under these circumstances, I do not perceive the propriety of allowing to the person or firm filing the plea the taxable attorney fee.

The amended bill, which may, and I think should be, treated as an original bill, is exhibited against Roland R. Moore, Jr., and eight other individuals, who are alleged to be partners doing business under the firm name of the Pulaski Grocery Company, for infringement of patent rights. This bill was filed March 25, 1905; process, returnable to May rules, was executed March 31st on each of the defendants; and at May rules there was filed a plea. This paper is signed and certified by counsel, purports to be the plea of all the defendants, but is verified by only one of them. It reads as follows:

"In the United States Circuit Court for the Western District of Virginia.

"To the Honorable Judges of said Court:

"Roland R. Moore, Jr., Ballard P. Miller, King E. Harman, Geo. H. Miller, Addison L. Jordan, James W. Walker, James R. K. Bell, James W. Miller, and Emmett F. Miller, Copartners Doing Business under the Firm Name and Style of the Pulaski Grocery Company, Defendants, Ads. The Computing Scale Company, Complainants.

"The Plea of Defendants to the Bill in Equity Exhibited Against Them in this Court by the Said Complainant. In Chancery.

"Defendants, by protestation—not confessing or acknowledging all or any part of the matters and things in said bill contained to be true in any wise as set forth—for plea nevertheless say that there was not at the time of the institution of said suit, that there is not now, and that there never was any such a copartnership as is set out above, and as is alleged in the said bill, and this defendants are ready to verify: Wherefore defendants plead to said bill and to the jurisdiction of this court, and pray the judgment of the court whether defendants should be compelled to make further or other answer to said bill, and pray to be hence dismissed, with their reasonable costs in this behalf most wrongfully expended.

Wysor & Gardner, P. D.

"State of Virginia, County of Pulaski, to wit: Emmett Miller on his oath says that he is the same Emmett Miller on whom process in the suit set out

in the foregoing plea was served, and that the allegation of the said plea is true; and affiant further says that at the time of the institution of the said suit there was not, that there is not now, and that there never was any such copartnership as Roland R. Moore, Jr., Ballard P. Miller, King E. Harman, Geo. H. Miller, Addison L. Jordan, James W. Walker, James R. K. Bell, James W. Miller, and Emmett Miller, doing business under the firm name and style of the Pulaski Grocery Company at Pulaski City, Pulaski county, Virginia, and that said plea is not interposed for delay. E. F. Miller.

"Subscribed and sworn to before me by the said Emmett Miller in the said county of Pulaski, this the 29 day of April 1905. J. F. Wysor,

"Notary Public for Pulaski County, Virginia."

Counsel for both sides appeared in chambers on the 14th of July to argue the sufficiency of this plea. Upon inquiry in the clerk's office, it appeared that there had been no rule entered in the order book setting the plea down for argument. But it does appear that on May 22d counsel for complainant wrote to the clerk to set the plea down for argument. The evident intent was that the order setting the plea down for argument should be entered at June rules. Consequently, even if the appearance here of counsel for defendants does not waive the informality, the absence of the entry in the order book is a mere misprision by the clerk, and one which has not prejudiced the defendants. As reasonable notice in pais of the date for the hearing was received by counsel for defendants, and as counsel appeared, there is, I think, no doubt as to the propriety of now making the proper order. Equity rule 3; 1 Bates, Fed. Eq. Pr. §§ 27-29.

Counsel for complainant, having reached the conclusion that the plea can be treated only as the plea of the defendant Emmett Miller, on July 14th (not a rule day), but before argument, directed the clerk to enter the decree pro confesso against the remaining defendants.

Whether or not the plea here is sufficiently verified is a question on which I have found very little authority. Equity rule 31 applies in terms to cases of a single defendant, and to cases where several defendants file separate pleas. I am inclined to think that under this rule a joint plea should ordinarily be verified by all of the defendants in whose behalf it is filed. When it is unduly expensive or inconvenient, or when it is impracticable, to procure the verification of all the defendants, and such fact is made to appear, I think there is no doubt as to the power of the court to allow a joint plea to be verified by less than all of the defendants. 1 Dan. Ch. Pr. (4th Am. Ed.) pp. 688, 689; 2 Dan. Ch. Pr. (4th Am. Ed.) 1822. There are also authorities to the effect that where the defendants are united in interest a joint pleading in behalf of such defendants need be verified by only one of them. Re Simmons, Fed. Cas. No. 12,864; 22 Ency. Pl. & Pr. 1034. See, also, *Marion Co. v. Cummer*, 60 Fed. 873, 878, 9 C. C. A. 279, which, however, has a very doubtful bearing on the point in hand. In the case at bar no extraordinary circumstance is made to appear, excusing verification by all of the defendants; and, as the plea (in so far as any certainty can be ascribed to it) may have been intended to deny that any of the defendants are members of the alleged partnership, or to deny that

the one who verifies it is a member of such partnership, it seems to me to follow that the plea is not sufficiently verified.

The letter of May 22d from complainant's counsel has, I think properly, been treated as setting the plea down for argument. If counsel for defendants have made a technical mistake in not having the plea fully verified, counsel for complainant have made a similar mistake in having the plea (hence the plea of all the defendants) set down for argument. While it is said in Daniel's Chancery Practice (1st London Ed.) p. 216; *Id.* (4th Am. Ed.) p. 688—that objection to the omission of verification of a plea in equity which should be verified cannot be waived, the great weight of authority in the federal courts is to the contrary. *Goodyear v. Toby*, Fed. Cas. No. 5,585; *Cook v. Sterling Electric Co.* (C. C.) 118 Fed. 45, 47; *Kellner v. Mut. Ins. Co.* (C. C.) 43 Fed. 623, 626; *Vacuum Oil Co. v. Eagle Co.* (C. C.) 122 Fed. 105; *Griswold v. Bacheller* (C. C.) 77 Fed. 857; 2 Beach, Mod. Eq. § 325.

Setting the plea down for argument waived the objection to its form. And I think that the subsequent effort of complainant's counsel to take the decree pro confesso is ineffectual. Under the circumstances here, I think the technically proper course for complainant (and the one which doubtless the learned counsel for complainant would have followed, had they taken the precaution to obtain a copy of the plea before ordering it set down for argument), would have been to disregard the plea, at least as to all the defendants except the one who verified it, and to take the decree pro confesso as to such defendants. *Nat. Bank v. Ins. Co.*, 104 U. S. 54, 76, 26 L. Ed. 693; *Sheffield v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; *Amer. Co. v. Union* (C. C.) 90 Fed. 598. But the effort to take the decree pro confesso came too late. In my opinion it would be more proper to now allow the plea to be fully verified than to allow the complainant to disregard and obviate its waiver of the objection. The best solution of these questions that occurs to me is to hold that the plea be treated as if in good form.

The sufficiency of the plea in point of law can, I think, be very briefly disposed of. It is incomplete, uncertain, and evasive. From reading it, we are left in total ignorance of the fact intended to be relied on. Whether the pleader intended to deny that any of the defendants are members of the firm, or allege a mistake in the name of the firm or of some one or more of the parties defendant, or to allege that some of the defendants are not members of the firm, or that the firm consists in part of some or all of the defendants and of other persons, or to deny that the firm does business at the place alleged, cannot be learned from the plea. On the argument it was stated that the fact intended to be asserted is that one of the defendants is not a member of the partnership. In a suit against several individuals, all alleged to be members of a partnership, where the liability of some one defendant depends upon his sustaining the relation of partner, I can understand that a plea by such defendant alleging that he is not a partner would present a proper issue. Such a plea would be in bar, and it could, as it seems to me, only properly be filed by the defendant who is not a member

of the firm. The plea here was, I think, intended as a plea in abatement. Waiving all other questions, it is clearly defective, in that it does not give the complainant "a better writ." Steph. Pl. (Heard) p. 431; 4 Minor, Insts. (3d Ed.) 759. But whether considered as a plea in abatement or as a plea in bar—and even if it had properly set out the fact relied on—I think it presents matter which is neither in abatement nor in bar. The defendants are sued for the commission of a tort. The averment that the defendants are partners should perhaps be considered as mere descriptio personæ, but in any event it is in this suit an immaterial allegation, and one which cannot be properly singled out for denial by plea. If by any possibility the fact that some one of the defendants is not a member of the partnership can be of materiality, such fact can be asserted by answer, and no right of such defendant will be lost by a refusal to require complainant to take issue on the plea.

An order will be entered overruling the plea, and allowing the defendants to answer on or before August rules next.

In re FROEHLICH RUBBER REFINING CO.

(District Court, E. D. Pennsylvania. June 12, 1905.)

No. 1,857.

BANKRUPTCY—RECLAMATION OF PROPERTY BY SELLER—CONSTRUCTION OF CONTRACT.

Certain electric motors were at different times delivered by petitioner to the bankrupt, a manufacturing company, under contracts providing that they should be used on trial for two months; that, if unsatisfactory for the purpose contracted for, they should be returned within five days thereafter and a sum paid for their rental; that, if satisfactory, they should be purchased by the company and paid for within stated times thereafter. All the motors remained in possession of the company until after the institution of the bankruptcy proceedings, and passed into possession of its receiver; no offer to return them, nor demand for their return, having been made. As to some, the time for their return had expired, as well as the time within which payment was to have been made, and bills for the price had been rendered by petitioner, but had not been paid. As to others, the time for trial had not expired when the bankruptcy intervened and demand for their return was made. *Held*, that title to the machines did not pass on their delivery under the contracts, but that it vested in the bankrupt when the time for their return expired, the failure to return them being an election to purchase which was acquiesced in by petitioner, and that it was entitled to recover possession only of those machines as to which such time for election had not expired.

In Bankruptcy. On certificate from referee.

The following are the opinion, findings, and order of Referee in Bankruptcy D. W. Amram:

The Froehlich Rubber Refining Company was adjudicated a bankrupt on March 4, 1904, upon creditors' petition filed against it on January 23, 1904. At the time of the filing of the petition in bankruptcy the bankrupt was in possession, *inter alia*, of the following articles: One electric motor of 75 horse power; one electric motor of 20 horse power; two electric motors of 5 horse power each; electric wiring for all of the said motors; five automatic

starters attached to the said motors; seven transformers; seven electric meters. On February 17, 1904, the Manufacturers' Electric Company filed its petition in the District Court, alleging that the said above-described articles were the property of the petitioner, and not the property of the bankrupt, that the petitioner had received notice that this property was to be sold on February 18, 1904, and that demand had been made on the receiver for the delivery of this property, but the receiver had failed to consent to the delivery of the said property to the petitioner. Wherefore the petitioner prayed for an order to restrain the receiver from selling or offering for sale the property above described. On February 17, 1904, the court entered an order, upon consideration of the foregoing petition, that the receiver "deliver the several articles particularly mentioned in the said petition to the said Manufacturers' Electric Company, upon the entering of security by said Manufacturers' Electric Company for the value of said articles, conditioned to abide further order of the court with reference to the title to said property"; and the court further ordered "that the said petition be referred to the referee to whom this cause may hereafter be referred, to take testimony and examine into the facts alleged in said petition, and make such order as may be proper." On the same day, to wit, February 17, 1904, the Manufacturers' Electric Company delivered its bond for \$5,000 to the receiver, conditioned that, "if the above-bonded the Manufacturers' Electric Company fail to maintain its title to the goods or chattels mentioned in the schedule hereto annexed, marked Exhibit A, and shall pay to the Equitable Trust Company, receiver as aforesaid, or to its successors, or to the trustee in bankruptcy of the estate of Froehlich Rubber Refining Company, bankrupt, if such trustee shall hereafter be appointed in the place and stead of the receiver, the value of said goods and chattels, then this obligation to be void and of no effect; otherwise, to be and remain in full force and virtue." The articles mentioned in Exhibit A are the articles above described. On the 8th day of June, 1904, the Philadelphia Electric Company filed a petition praying for rule on the trustee to show cause why the petitioner should not be permitted to intervene as claimant of title to the above-described property. This petition was referred to the referee in the cause "for his consideration and action thereon."

It was agreed by counsel representing the Manufacturers' Electric Company, the Philadelphia Electric Company, and the receiver and trustee in bankruptcy, that the title to the articles in question, if found to be in the Manufacturers' Electric Company, has passed to the Philadelphia Electric Company under an agreement dated December 5, 1903, between the said Manufacturers' Electric Company and Philadelphia Electric Company. Testimony was taken before the referee on behalf of the petitioner, as well as on behalf of the receiver and trustee in bankruptcy, from which it appears that the articles in question were delivered by the Manufacturers' Electric Company to the bankrupt under six several agreements, which were offered in evidence, marked, respectively, Exhibits A, B, C, D, E, and F.

I shall first consider the question of title to the 20 horse power motor. This motor was delivered by the Manufacturers' Electric Company to the bankrupt under a "contract and agreement" of which the following is a copy:

"The Manufacturers' Electric Company, American and Somerset Streets, Philadelphia, Pa,

"This contract and agreement, by and between the Manufacturers' Electric Company, of Philadelphia, hereinafter called 'the company,' and the Froehlich Rubber Refining Co., hereinafter called 'the consumer,' witnesseth: that the consumer has requested the company to supply electrical current for one motor of 20 H. P., at the premises, situated 3444 Trenton Ave.; and as the said consumer has not purchased said motor, but is desirous of having the use of the same for a period of one month—

"The consumer agrees: (1) To pay the cost of hauling of the motor to his premises. (2) To pay for the erection and interior connections to said motor, to the point where the service connection will be made, and the inspection of same by the Philadelphia Fire Underwriters' Association. (3) To use the motor for the purpose above set forth for a period of two calendar months from date current is turned on. (4) To purchase said motor, paying therefor

the sum of \$548.95 within 30 days after expiration of 60 days trial, provided the motor proves satisfactory for the purpose contracted for. (5) To return the motor to the company in as good electrical and mechanical condition as when received, within 5 days after expiration, reasonable wear and tear excepted, provided said motor proves unsatisfactory for the purpose contracted for. (6) To pay for the use of the said motor during the two calendar months from date current is turned on the sum of \$20.00, which includes clause 1 and 2, and for the current consumed during said period at the regular rates of the company. These payments to be made at the office of the Manufacturers' Electric Company, as above stated.

"And the company agrees, upon the purchase of said motor by the consumer, to credit the rental paid for said calendar month as part of the purchase money.

"In witness whereof, the respective parties have affixed their hands and seals this 10th day of September 1903.

"[Signed] The Froehlich Rubber Refining Co.

"[Signed] Jesse Froehlich, Secy.

"Witness:

"[Signed] H. H. Perkins.

"For Mfrs. Co.

"[Signed] H. H. Perkins.

"Exhibit B.

"4/27/04."

(It was agreed by counsel for the respective parties that, wherever in the printed agreement the words "one month" appeared, it should be read "two months.")

The ultimate purpose of this contract was to sell the 20 horse power motor to the bankrupt for the price of \$548.95. For the purpose of enabling the bankrupt to determine whether or not it would buy the motor, it was agreed that the bankrupt could have the use of the motor on trial for 2 months, or 60 days, from the date that the current is turned on. If the motor was not purchased by the bankrupt, but returned to the Manufacturers' Electric Company, the bankrupt agreed to pay \$20 for its use during these 2 calendar months, and for the cost of hauling the motor to the premises of the bankrupt, and the cost of erecting and connecting the motor on the said premises. If, however, the bankrupt purchased the motor, this charge of \$20 was not to be paid, or, if paid, was to be credited on account of the purchase money. The bankrupt agreed that, if the motor proved "unsatisfactory for the purpose contracted for," it would return the motor within 5 days after expiration of the 60 days' trial, and further agreed that, if the motor proved "satisfactory for the purpose contracted for," it would purchase the said motor, paying therefor the sum of \$548.95 within 30 days after the expiration of the 60 days' trial. The motor was delivered in accordance with this agreement, and the current turned on, on September 18, 1903. This motor supplied the power for running the elevator and certain machinery in the rubber goods factory of the bankrupts. It commenced operation on September 18, and was used until December 24, 1903. Between December 24, 1903, and January 23, 1904, the date of the filing of the petition in bankruptcy, the factory was practically at a standstill. It ran altogether only six days during that period. The 20 horse power motor was not used at all after December 24th. From the records of the Manufacturers' Electric Company it appears that from September 18th to December 24th this motor ran altogether 2,775 kilowatt hours, equivalent to 186 working hours.

Much testimony was taken for the purpose of proving whether or not the motor worked satisfactorily. The substance of all this testimony is that the motor was mechanically satisfactory, but, in view of the fact that it was furnishing 20 horse power for the purpose of running machinery which only required 13 horse power, it was not an economical appliance. There was also testimony that it ran too hot, and that its momentum was too great, both of which faults were apparently due to the fact that the motor supplied too much power for the work that it was doing, and that the unused power manifested itself in the excessive momentum and in heat. The 60 days' trial

expired on November 18, 1903, and, if the motor was unsatisfactory, it was the duty of the bankrupt under its contract to return it within 5 days thereafter, to wit, on or before November 23, 1903; but the bankrupt did not express any dissatisfaction with the motor, and kept the same and continued to use it until December 24th. According to the testimony of Mr. Russell, called on behalf of the Manufacturers' Electric Company, two of the officers of the bankrupt corporation complained to him that the motor was not running economically; but this complaint was made after December 10, 1903. The 30 days after the expiration of the period of trial expired on December 18, 1903, and on or about December 29, 1903, the Manufacturers' Electric Company sent a bill to the bankrupt, charging it with the amount of the contract price of the motor. In January, 1904, the secretary and another representative of the Manufacturers' Electric Company called on Mr. Jesse Froehlich, vice president of the bankrupt corporation, and demanded payment for the motor, and also of the bills for the current supply to the motor between September 18th and December 24th, the latter amounting to \$149.52, and stated that unless the bills were paid the current would be cut off at a certain date thereafter; and in fact the current was cut off on January 19, 1904, but the motor was permitted to remain in the possession of the bankrupt, and no effort was made on behalf of the Manufacturers' Electric Company to reclaim it until February 17, 1904, on the day before it was to be sold by the receiver in bankruptcy.

This evidence, together with other evidence in the case, satisfies me that the Manufacturers' Electric Company had no intention of retaining title to the motor, but considered that the motor had been sold to the bankrupt. At some time after it was discovered that the motor was not running economically, the agent of the Manufacturers' Electric Company suggested that his company would be willing to take back this 20 horse power motor and replace it by three smaller motors—a 7½ horse power motor for the elevator, a 3 horse power motor for the sewing machines, and a 3 or 4 horse power motor for the machines on the first floor; but no action was taken on his suggestion, and the motor remained in possession of the bankrupt as theretofore. The Manufacturers' Electric Company knew that the motor was not being used after December 24th, and that the bills for the current supply had not been paid, without taking any step to protect its alleged title to the motor, either by demanding its return or by taking it through proper legal proceedings; but this thought evidently did not occur to the Manufacturers' Electric Company, because it considered the motor sold, and it was interested only in securing the purchase price. If suit had been brought for the purchase money, a defense by the Froehlich Rubber Refining Company on the ground that the motor was not satisfactory would have proved unavailing, in view of the fact that it continued to keep the motor and had given no notice whatever of its unsatisfactoriness to the Manufacturers' Electric Company; and the same evidence which would have sufficed to sustain the claim of the Manufacturers' Electric Company for the purchase price of the motor now suffices to establish the title of the Froehlich Rubber Refining Company.

Evidence was introduced on behalf of the Manufacturers' Electric Company to the effect that at a meeting of the board of directors of the bankrupt on December 26, 1903, Jesse Froehlich, vice president of the bankrupt corporation, reported that the motors supplied were not satisfactory; but it appears that no action was taken by the board on this report, and it may seriously be questioned whether any action by the board at that time would have relieved it of its indebtedness. The reason for nonpayment of the bill for the motor and for the current supply sufficiently appears. The Froehlich Rubber Refining Company during the year 1903 found itself in financial difficulties. On December 24, 1903, it was obliged practically to close its factory, and an attempt was made to reorganize the corporation upon a sounder financial basis. On January 1, 1904, its balance in bank was about \$400 or \$500, and the money that subsequently was received by it was used to pay off creditors who were pressing for payment. The statement, made by Mr. Jesse Froehlich at the meeting of the board of directors, to the effect that the motor was not satisfactory, may, in view of all the facts in the case, be readily explained as an attempt by him to offer some reason to his board of directors for the nonsuc-

cess of the business; for it cannot be denied that, if the motor had been really unsatisfactory in any serious sense, it would not have been permitted to remain on the premises of the bankrupt beyond the day on which that fact was discovered. The complaint which was made about the uneconomical running of the motor was not taken seriously by any one, either by the persons making it or by the Manufacturers' Electric Company.

The value of the motor on February 7, 1904, was \$470.

It now becomes necessary to consider the nature of the agreement under which this motor was delivered to the bankrupt. It is an agreement for the transfer of property as a bailment, with the option on the part of the bailee to purchase it. The delivery of the property to the bankrupt was not such delivery as passed title. *Goss Printing Press Co. v. Jordan*, 171 Pa. 474, 32 Atl. 1031. It was necessary that the property should be placed on the premises occupied by the bankrupt, in order that the trial might be made, the satisfactory conclusion of which was a condition precedent to the determination on the part of the bankrupt as to whether or not it would exercise its option to purchase. Hence, during the 60 days in which the motor was in possession of the bankrupt on trial, the title to the motor was in the Manufacturers' Electric Company. At the expiration of the 60 days it became the duty of the bankrupt to determine whether it would exercise its option to purchase. Whether the motor was satisfactory or unsatisfactory was a fact to be determined by the bankrupt alone, and its decision was in no way controllable by the will of the Manufacturers' Electric Company. *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207. No matter how unsatisfactory the motor might actually be, it must be held to be entirely satisfactory if the bankrupt so determined; and, if the bankrupt chose to fulfill the condition of sale as set forth in the agreement, the Manufacturers' Electric Company could not refuse to consummate the sale on the ground that it was not willing to sell a motor which was unsatisfactory, even though the purchaser was willing to take it. *Hickman v. Shimp*, 109 Pa. 16. The bankrupt agreed that, if the motor was not satisfactory, it would be returned to the company within 5 days after the expiration of the 60 days' trial. The specified time for the test having expired, the bankrupt was obliged, if it intended to return the motor, to do so within the time fixed. Mere complaint was not sufficient to relieve it. It was bound to return the motor in accordance with the agreement, or else must be presumed to have intended to keep it and convert the contract into one of sale. *Butler v. School District*, 149 Pa. 351, 24 Atl. 308. The testimony in this case shows that the motor was never returned to the Manufacturers' Electric Company. The bankrupt, therefore, having failed to return the motor within 5 days after expiration of the 60 days' trial, in accordance with clause 5, became bound by its agreement, under clause 4, to pay for the motor the sum of \$548.95 within 30 days after the expiration of the 60 days' trial. The words "within 30 days after the expiration of the 60 days' trial" in clause 4 seem to refer to the time of payment, and not to the date on which the option of purchase was to be exercised; for otherwise clause 5 becomes meaningless. Under clause 5 it became the duty of the bankrupt to return the motor within 5 days after the expiration of the trial, if it was not satisfactory. If, therefore, the bankrupt is obliged to return the motor at the end of the fifth day after the trial, and at the same time is not obliged to purchase it until the thirtieth day after the trial, there is a period of 25 days which has not been provided for at all under this agreement. It seems, therefore, that, in order to give effect to both clauses of the agreement, the above interpretation must be followed, and that the option to purchase must be presumed to have been exercised on the fifth day after the trial and evidenced by the nonreturn of the motor, and that the additional 25 days were given for payment of the purchase money.

Another interpretation, however, is possible, under which clause 5 must be held to be made void by clause 4. Under clause 5, the bankrupt agreed to return the motor within 5 days after expiration of the trial. Although it failed to return the motor, it still had 25 additional days within which to exercise its option to purchase under clause 4. If it chose to purchase, it could do so only by tendering the purchase money, as under this view of the contract the payment of the purchase money was a condition precedent to

the passing of the title. It would, then, be a bailment of the possession, with an agreement for a future purchase, conditioned on the prepayment of the price (*Rowe v. Sharp*, 51 Pa. 26; *Rose v. Story*, 1 Pa. 190, 44 Am. Dec. 121), and clause 4 must be read as an agreement on the part of the bankrupt to purchase said motor by paying therefor the sum of \$548.95 within 30 days after expiration of 60 days' trial. Therefore, on or before the thirtieth day after the expiration of the trial, it became the duty of the bankrupt, if it desired to keep the motor, to tender the purchase money, whereby the sale would be consummated and the title would pass. Its failure to pay the purchase money gave to the Manufacturers' Electric Company the right to demand either the return of the motor or the payment of the purchase money. It could choose to consider the transaction either a continuing bailment or a sale, but was bound by its election. In fact, however, according to the testimony, nothing was done by the Manufacturers' Electric Company, and, although the 30 days after the expiration of the trial expired on December 18, 1903, the motor continued in possession of the bankrupt, and no demand for it was made until shortly before it was advertised for sale on February 18, 1904.

Assuming that title to the motor did not pass by reason of the fact that the payment of the purchase money was a condition precedent which was not fulfilled, and that the Manufacturers' Electric Company had the right to retake its motor, the further question arises as to whether the Manufacturers' Electric Company waived its right to insist upon strict performance of the condition precedent. It became the duty of the Manufacturers' Electric Company, within a reasonable time after December 18, 1903, to demand possession of its motor, if it intended to insist upon its right of property thereto. This it failed to do. In the case of *Leatherbury v. Connor*, 54 N. J. Law, 172, 23 Atl. 684, 33 Am. St. Rep. 672, goods were sold and delivered on condition that a chattel mortgage should be executed by the vendee on the following Monday. The vendee failed to keep his promise, and the vendor did not insist on return of his goods, but allowed them to remain in vendee's possession. In a month the vendee became insolvent and went into a receiver's hands. The vendor replevied; but it was held that it was the vendor's duty to pursue his right to recover possession with diligence, to follow the buyer at once and not suffer his vigilance to abate. Vendor's acquiescence in possession of vendee for one month was a waiver of performance of the condition precedent and a waiver of his title to the goods. The Manufacturers' Electric Company allowed the motor to remain in the possession of the bankrupt until the petition in bankruptcy was filed, and even for more than three weeks thereafter, before it took any step to maintain its right of property. It sent a bill for the purchase price, and its agents demanded payment thereof. On January 19, 1904, it discontinued the supply of electric current for its motor, because the bills for the current used had not been paid; but it allowed the motor to remain in the possession of the bankrupt. A sale for cash is a sale on condition ("do ut des"), which may be waived by leaving the goods in vendee's possession. *Bowen v. Burk*, 13 Pa. 146; *Backentoss v. Speicher*, 31 Pa. 324.

Has the Manufacturers' Electric Company manifested an intention or willingness to waive the condition and consider the delivery unconditional and the sale absolute, without having received payment? This is a question of fact, and I find that the Manufacturers' Electric Company did nothing to maintain its title to the motor, but, on the contrary, that by its action it considered the motor sold, and that its only interest was in securing the purchase money due. Therefore I am of the opinion that, under either interpretation of the effect of clauses 4 and 5 of the contract, the title to the motor is in the bankrupt, and not in the petitioner.

I shall next consider the question of title to the 75 horse power motor. This motor was delivered to the bankrupt under a "contract and agreement" of which the following is a copy:

"The Manufacturers' Electric Company, American and Somerset Streets, Philadelphia, Pa.

"This contract and agreement, by and between the Manufacturers' Electric Company, of Philadelphia, hereinafter called 'the company,' and the Froehlich

Rubber Refining Co., hereinafter called 'the consumer,' witnesseth: That the consumer has requested the company to supply electrical current for one motor of 75 H. P., at the premises, situated 3444 Trenton avenue; and, as the said consumer has not purchased said motor, but is desirous of having the use of the same for a period of one month—

"The consumer agrees: (1) To pay the cost of hauling of the motor to his premises. (2) To pay for the erection and interior connections to said motor, to the point where the service connection will be made, and the inspection of same by the Philadelphia Fire Underwriters' Association. (3) To use the motor for the purpose above set forth, for a period of two calendar months, from October 15th, 1903. (4) To purchase said motor, paying therefor the sum of one thousand three hundred and ninety-three dollars (\$1,393) on the 25th day of Dec. 1903, provided the motor proves satisfactory for the purpose contracted for. (5) To return the motor to the company in as good electrical and mechanical condition as when received on the 21st day of Dec. 1903, reasonable wear and tear excepted, provided said motor proves unsatisfactory for the purpose contracted for. (6) To pay for the use of the said motor during the two calendar months from Oct. 15th, 1903, to Dec. 15th, 1903, the sum of seventy-five dollars, and for the current consumed during said period at the regular rates of the company. These payments to be made at the office of the Manufacturers' Electric Company, on Dec. 25th, 1903.

"And the company agrees, upon the purchase of said motor, to credit the rental paid for said calendar month as part of the purchase money.

"In witness whereof, the respective parties have affixed their hands and seals this 27th day of September 1903.

"The Froehlich Rubber Refining Co.
"Jesse Froehlich, Secy.

"Witness:
"C. J. Russell."

This motor was delivered on October 22, and started on November 10, 1903. The two months within which the motor was in possession of the bankrupt on trial expired December 15, 1903. In accordance with the terms of the contract it became the duty of the bankrupt, if the motor proved unsatisfactory, to return it on December 21st. and, if it proved satisfactory, to purchase it, paying \$1,393 on December 25, 1903. The motor was never returned to the Manufacturers' Electric Company.

The records of the Manufacturers' Electric Company show that from November 10, to December 24, 1903, this motor ran 3,100 kilowatt hours, equivalent to 56 working hours, and that the charge for the current consumed was \$155.62. It appears that this motor furnished power for running two rubber mixing rolls, whose total resistance was about 33 horse power; hence, as in the case of the 20 horse power motor, its use was uneconomical. It was seriously out of order at one time by reason of an accident by which the gearing was broken, but it appears that this was not the fault of the motor itself but was the result of some extraneous cause. As in the case of the 20 horse power motor, it was suggested by the agent of the Manufacturers' Electric Company that either a heavier load should be put on this motor or that it should be replaced by a smaller motor; but nothing was done as a result of this suggestion. No objection was made by the bankrupt before December 25, 1903, and thereafter the objections were in the form of complaint by two of the officers of the bankrupt corporation. The Manufacturers' Electric Company permitted the motor to remain in the possession of the bankrupt, and did nothing whatever for the purpose of maintaining their right to reclaim it. As in the case of the 20 horse power motor, Mr. Jesse Froehlich complained of its unsatisfactoriness at a meeting of the directors of the bankrupt corporation, and stated that he was going to return both motors, in order to reduce the indebtedness of the bankrupt; but no action was taken on his statement, nor were the motors returned. On or about December 29, 1903, a bill was sent to the bankrupt for the purchase price of the motor by the Manufacturers' Electric Company. The other testimony relating to this motor is practically similar to that relating to the 20 horse power motor. The value of this motor and two starting boxes is \$1,000.

The conclusions of law reached by me as to the 20 horse power motor apply likewise to this motor, and, excepting the difference in dates between the two contracts, the contract under which the 75 horse power motor was delivered is the same as that under which the 20 horse power motor was delivered. I am therefore of the opinion, for the reasons hereinbefore given, that the title to the 75 horse power motor is in the bankrupt, and not in the petitioner.

The two 5 horse power motors were delivered under a "contract and agreement" of which the following is a copy:

"The Manufacturers' Electric Company, American and Somerset Streets, Philadelphia, Pa.

"This contract and agreement, by and between the Manufacturers' Electric Company, of Philadelphia, hereinafter called 'the company,' and the Froehlich Rubber Refining Co., hereinafter called 'the consumer,' Witnesseth: That the consumer has requested the company to supply electrical current for two motors of 5 H. P. each, at the premises, situated 3444 Trenton Ave.; and, as the said consumer has not purchased said motor, but is desirous of having the use of the same for a period of one month—

"The consumer agrees: (1) To pay the cost of hauling of the motor to his premises. (2) To pay for the erection and interior connections to said motor, to the point where the service connection will be made, and the inspection of same by the Philadelphia Fire Underwriters' Association. (3) To use the motor for the purpose above set forth, for a period of two calendar months, from Dec. 17th, 1903. (4) To purchase said motor, paying therefor the sum of four hundred and ninety-two dollars (\$492.00) on Feby. 22d, 1904, provided the motor proves satisfactory for the purpose contracted for. (5) To return the said motor to the company in as good electrical and mechanical condition as when received on the 22d day of Feby., 1904, reasonable wear and tear excepted, provided said motor proves unsatisfactory for the purpose contracted for. (6) To pay for the use of said motor during the two calendar months from December 17th, 1903, to Feby. 22d, 1904, the sum of ten dollars, and for the current consumed during said period at the regular rates of the Manufacturers' Electric Company, on the 22d Feby., 1904.

"And the company agrees, upon the purchase of said motor by the consumer, to credit the rental paid for said calendar month as part of the purchase money.

"In witness whereof, the respective parties have affixed their hands and seals this 19th day of Jan, 1904.

"Froehlich Rubber Refr. Co., per M. Froehlich.

"Witness:

"Wm. J. Lochart."

The period of two months from December 17, 1903, within which these motors were to be used on trial by the bankrupt, would have expired on February 17, 1904. Before this date, however, and before any conclusion was reached by the Froehlich Rubber Refining Company, the petition in bankruptcy was filed against it, and the Manufacturers' Electric Company presented its petition asking for the delivery of the motors as its property. The testimony shows that these motors were not used at all by the bankrupt corporation, and that they were of the value of \$206 each. In accordance with the opinion hereinbefore expressed as to the effect of the contract under which these motors were delivered, it follows that no title to the 5 horse power motors ever passed to the Froehlich Rubber Refining Company, and I therefore find that the title to these motors is in the Manufacturers' Electric Company.

The electric wiring, seven transformers, and seven electric meters claimed by the Manufacturers' Electric Company were delivered to the bankrupt under so-called power contracts (Exhibits A, C, and E), under which the bankrupt agreed that the Manufacturers' Electric Company should install its meters and that the current used should be paid for as registered for by them, and it further agreed "that the meters, transformers, and cut-outs located on the street side of the meter will remain the property of the company, and may be removed by it when service is discontinued for any reason." There was no

other testimony offered either by the claimant or the trustee in bankruptcy bearing upon the title to these articles. In view of the positive expressed agreement above quoted, it is clear that no title to the wiring, the transformers, and the meters ever passed to the bankrupt, and I therefore find that the title to these articles is in the Manufacturers' Electric Company.

And now, March 22, 1905, in accordance with the foregoing opinions and findings, it is ordered that the Manufacturers' Electric Company shall forthwith pay to the trustee in bankruptcy of the Froehlich Rubber Refining Company the sum of \$1,470, being the value as found by the referee of one electric 20 horse power motor and one electric 75 horse power motor belonging to the bankrupt estate, and delivered to the Manufacturers' Electric Company in accordance with the order of the District Court made February 17, 1904. And it is furthermore ordered that the title of the Manufacturers' Electric Company to two electric 5 horse power motors, electric wiring, seven transformers, and seven electric meters be, and the same is hereby, confirmed.

Henry N. Wessel, for trustee.

R. Stuart Smith and Morgan & Lewis, for Manufacturers' Electric Company.

HOLLAND, District Judge. The question certified to the court by the referee in this case raises the question of ownership of two electric motors claimed by the Manufacturers' Electric Company from the receiver of this bankrupt. The property, by order of this court, was placed in the possession of the claimant and a bond substituted therefor. The referee finds the property, at the time the petition in bankruptcy was filed and at the time of adjudication, belonged to the bankrupt, and therefore passed to the receiver, the value of which he finds to be \$1,470, and directs that this amount be paid by the claimant to the trustee for this machinery. The other machinery mentioned in the report he finds to be the property of the claimant, and affirms its possession and ownership in the same. The findings of fact by the referee are stated in detail, and we think warranted by the evidence submitted. We also agree with the referee in his conclusions of law, which are fully set forth in the report.

The order of the referee, made March 22, 1905, on the claimant, to pay to the trustee \$1,470, is therefore hereby affirmed.

In re VIRGINIA HARDWOOD MFG. CO.

(District Court, W. D. Arkansas, Fort Smith Division. July 17, 1905.)

1. BANKRUPTCY—PREFERENCES—VACATION—INSOLVENCY—NOTICE.

Under Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], defining a preference, and providing that if a bankrupt shall have given a preference, and the person receiving it shall have had reasonable cause to believe that it was so intended, it shall be voidable by the trustee, etc., it is not necessary, in order to entitle the trustee to recover a preference, that the preferred creditor should have in fact believed, when he took the preference, that the debtor was insolvent, or that he had reasonable cause so to believe at that time, but it is sufficient that the facts and circumstances with reference to the debtors' financial condition brought home to the creditor were such as would put an ordinarily prudent business man on inquiry, which, if pursued, would lead to knowledge of the debtor's insolvency.

2. SAME—EVIDENCE.

In a suit by a bankrupt's trustee to recover preference, evidence *held* to establish that a preferred creditor at the time the mortgage constituting the preference was executed had reasonable cause to believe that the debtor was insolvent and that the mortgage was intended as a preference.

In Bankruptcy. On review, upon petition of W. R. Abbott, of the action of Referee L. H. Southmayd in disallowing his claim, upon objections of W. J. Fleming, trustee, as a preferred claim against the Virginia Hardwood Manufacturing Company, bankrupt.

Brizzolara & Fitzhugh, for petitioner.

C. E. Warner and A. A. McDonald, for trustee in bankruptcy.

ROGERS, District Judge. The claim of W. R. Abbott is based upon a judgment of foreclosure of a mortgage in the state court, and no objection is made as to the form of the proof, or as to the amount of the judgment. The objections of the trustee are as follows:

(1) That the mortgage given by the bankrupt herein was given within four months preceding date of filing petition to secure the payment of an antecedent or subsisting debt, said bankrupt being insolvent at the time of the execution and delivery of said mortgage, and same is therefore void as to creditors, and a preference.

(2) That said mortgage was executed and delivered by the bankrupt while insolvent, and within four months of date of filing petition, and was so executed and delivered for the purpose of hindering, delaying, and defrauding creditors, and is therefore void, and a preference, under the bankruptcy law.

(3) That said mortgage is invalid, and therefore void, and a fraud as to other creditors, for the reason that the same was not legally executed and delivered, and for the further reason that same was withheld from record.

Section 60, pars. "a," "b," of the bankrupt law, approved July 1, 1898 (30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3445]), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 416]), is as follows:

(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

(b) If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

The mortgage in controversy was executed on the 26th of January, 1905, and withheld from record until the 13th of February, 1905. A petition in bankruptcy was filed against the bankrupt on the 5th of April, 1905, and on the 17th of May, 1905, it was ad-

judicated a bankrupt upon a trial before the court, in which the American National Bank, of which the present claimant is president, resisted the adjudication on the ground that the bankrupt was not insolvent at the time the mortgage was executed or at the time the petition was filed. The judgment on which this claim is based was recovered on the 8th day of May, 1905, three days after the petition in bankruptcy was filed. It must be taken, therefore, as res adjudicata that the bankrupt was insolvent when the mortgage was executed. The question of the insolvency, therefore, of the bankrupt, is eliminated, or practically not in controversy. The question to be determined is whether under section 60, pars. "a," "b," of the bankrupt law, supra, the mortgage in this case is voidable because a preference. Paragraphs "a" and "b" of section 60 were construed by the Supreme Court of the United States in *Pirie v. Chicago Title and Trust Company*, 182 U. S. 446, 21 Sup. Ct. 909, 45 L. Ed. 1171, as follows:

"Subdivisions 'a' and 'b' are concerned with a preference given by a debtor to his creditor. Subdivision 'a' defines what shall constitute it, and subdivision 'b' states a consequence of it—gives a remedy against it. The former defines it to be a transfer of property which will enable him to whom the transfer is made to obtain a greater percentage of his debt than other creditors. The latter provides a consequence to be that the transfer may be avoided by the trustee, and the property or its value recovered, provided, however, that the preference was given four months before the filing of the petition in bankruptcy or before the adjudication, and the creditor had reason to believe a preference was intended."

At the argument reliance was placed on sections 57g, 67e, of the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 560, 564 [U. S. Comp. St. 1901, pp. 3443, 3449]). It may be well to say that in the same case those sections are construed, and the question disposed of, so far as this case is concerned. See pages 445 and 449 of 182 U. S., pages 909, 910 of 21 Sup. Ct. (45 L. Ed. 1171). It will not be necessary to notice these sections further. The question presented in this case therefore must depend upon the construction to be placed on section 60, pars. "a," "b," as applied to the facts of this case. Under section 67b, by the very terms of the act, where a creditor who received a preference under the act "had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." This language has been repeatedly construed by the courts, and it may be noticed that they hold that the question is not what the creditor in fact believed when he took the preference, nor yet what he had reasonable cause to believe at that time, "but it is enough to constitute a reasonable cause to believe him insolvent that the facts and circumstances with reference to the debtor's financial condition which are brought home to the creditor are such as would put an ordinarily prudent man upon inquiry, which, if pursued, would lead to knowledge of insolvency. In *re Eggert*, 4 Am. Bankr. Rep. 449, 102 Fed. 735, 43 C. C. A. 1; In *re Beerman* (D. C.) 7 Am. Bankr. Rep. 431, 112 Fed. 663. Cases under state insolvency statutes are not strictly in point, because the language of the statutes may not be the same as the federal bank-

ruptcy act; and yet the following cases, and those cited in the opinions therein, are suggestive illustrations of what is sufficient to put a creditor upon inquiry as to the probable insolvency of his debtor: *Matthews v. Chaboya*, 111 Cal. 435, 44 Pac. 169; *Read v. Moody*, 60 Vt. 668, 15 Atl. 345; *Chipman v. McClellen*, 159 Mass. 363, 34 N. E. 379; *Holcombe v. Ehrmantraut*, 46 Minn. 397, 49 N. W. 191." *Bardes v. First National Bank*, 12 Am. Bankr. Rep. 775, 98 N. W. 285. In *Hackney v. Raymond Bros. Clarke Co.*, 10 Am. Bankr. Rep. 217, 94 N. W. 822, in reviewing the cases on this point, it is said:

"Whether a creditor had reasonable cause to believe his debtor insolvent within the purview of section 60 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), is a question of fact. In *re Eggert*, 4 Am. Bankr. Rep. 449, 102 Fed. 735, 43 C. C. A. 1. In determining this question it is not necessary to find that the creditor actually knew or believed that the debtor was insolvent. He is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's condition which were brought home to him, might fairly be expected to disclose. In *re Eggert*, supra. But a mere knowledge that the debtor has other liabilities, or of circumstances which could operate no further than to create a suspicion of possible insolvency, is not always sufficient. In the *Eggert Case* the Circuit Court of Appeals says: 'The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor shall have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose.'"

Benedict v. Deshell, 11 Am. Bankr. Rep. 20, 68 N. E. 999; In *re Eggert*, 4 Am. Bankr. Rep. 447, 102 Fed. 735, 43 C. C. A. 1; *George W. Crooks, Trustee, etc., v. People's Bank of Malone*, 3 Am. Bankr. Rep. 238, 61 N. Y. S. 604; *Western Tie & Timber Company v. Brown*, 12 Am. Bankr. Rep. 114, 129 Fed. 728, 64 C. C. A. 256; In *re Carl F. and Ernest A. Ebbert*, 1 Am. Bankr. Rep. 340; In *re Philip Jacobs*, 1 Am. Bankr. Rep. 518.

In a note to this last case, supported by many citations, the author states the principle thus:

"The question for determination, if an action is brought to invalidate the transfer, is not whether the transferee had actual knowledge, or even actual belief, of the intent to give a preference, but whether the transferee, as a business man, acting with ordinary prudence, sagacity, and discretion, had reasonable cause to believe that the debtor was insolvent, and that by the transfer he intended to give an advantage to one creditor over the others."

A review of the decided cases does not disclose any conflict as to the correct interpretation of section 60, pars. "a," "b," nor was there any contention at the argument that the principles announced above are not sound. The real controversy grows out of the application of these principles to the facts in the case. I therefore turn my attention to the evidence to ascertain whether the claimant, at the time his mortgage was executed, either knew, or had reasonable cause to believe, that the bankrupt was insolvent, and that in

taking his mortgage he knew, or had reasonable cause to believe, that it was intended thereby to give a preference.

The Virginia Hardwood Manufacturing Company is a New York corporation. It had been doing business in Virginia. Its Virginia plant was removed to Ft. Smith early in 1904. Mr. Abbott, the claimant (who was then and is now the president of the American National Bank), testifies that his bank began business with the corporation in February, 1904, and continued business with it until it went into the hands of a receiver some time in the spring of 1905. Its plant consisted of some secondhand machinery which the company estimated at \$21,000. From the very first the claimant became conversant with its business. He says himself that before the bankrupt opened an account with the American National Bank (of which he was president) it made arrangements therefor with him, and that he advised himself, as far as he was able to do so, of its condition and prospects, with a view of determining whether the bank wanted its account; that his inquiries were not confined to the statements of its officers, but were extended to whatever other information he could get. From the very first the chairman of the discount board of the bank, and its vice president, Mr. Boone, was opposed to opening an account with the company. He so testifies, but says that Mr. Abbott favored it, and as the result the entire dealing with the company was turned over to Abbott. Abbott himself swears that the first credit given to the corporation by the bank was \$10,000, and that he was the indorser. The bankrupt was not then known at Ft. Smith. It was a new concern there, and it may be fairly assumed had no credit then, and would not have gotten the first loan of \$10,000 had not Abbott indorsed for it; and it may be also fairly assumed that it was for this reason the dealings of the bank with the bankrupt were turned over to Abbott to control and manage. On the 26th of January, 1905, a line of credit had been extended to the company for about \$50,000, and Abbott was indorser on all the paper. Mr. Boone, chairman of the discount board of the bank, swears that no loans to the bankrupt came to him for approval until about the time the mortgage was given on January 26, 1905; that he had occasionally inquired of the account of the bankrupt, and the cashier, Mr. Ball, had advised him that Abbott was guarantying everything, until the credit extended reached a certain amount (presumably, judging from his evidence, when the amount had reached about \$50,000), when he and another member of the discount board of the bank told the bankrupt's officers that the line of credit "had to stop right then and there." They no doubt had concluded at that time that the bank, Abbott, and the bankrupt had all reached a limit on the credits to that concern. Boone then says the next thing he knew "Abbott had taken this mortgage and taken the notes of these people in lieu of the bank notes for the debt." I infer that he means by this language that Abbott relieved the bank of the bankrupt's paper on which he was indorser by substituting his own, or assuming the bankrupt's debt; and, in order to secure himself, took the mortgage in controversy, which covers their entire plant and nearly all their assets. It is

apposite to the conditions existing at the time the mortgage was given to notice the testimony of the claimant, Mr. Abbott, who, in explaining why the mortgage was given, swears: "I was away nearly all the fore part of January, 1905, and while I was gone the bank let the Virginia Hardwood Manufacturing Company have something more than ten thousand dollars more than I had authorized, and when I came back and found out that they had let them have it then I asked for the mortgage." So it appears that Mr. Abbott had himself limited the credit of the bankrupt in the early part of January, 1905, at a sum \$10,000 less than the debt was on January 26th, when the mortgage was taken, and because of the unauthorized loan of \$10,000 by the bank in his absence (he being the indorser) he asked for the mortgage. But he swears more. He says the bankrupt was, a day or two before the mortgage was given, asking for additional credit. "I decided if they would give me a mortgage that we would go on and try to help them. * * * They represented that they could pay ten thousand dollars in 20 days by the sale of certain lumber to the Drew Hardwood Company in St. Louis, and that they would allow Mr. Fleming to go there and O. K. all checks for me that I might wish, so that I might know they were spending this money properly." In another place he swears that: "I told them when they gave that mortgage that I would put a man in charge of it to represent me—Mr. Fleming—which I did, so I would know what was going on, and I would follow them along a month or so, and see what they were doing, and see if they were earning any money." The mortgage was taken under the following circumstances: The bankrupt had overdrawn more than \$10,000 beyond what Mr. Abbott had authorized, and for which he was indorser. He therefore asked for a mortgage, and to put a man in the plant to check up its business and represent him. Moreover, on January 1, 1905, the bankrupt had furnished Abbott and the bank what purported to be a statement of assets and liabilities, which showed that the company owed \$13,518.78 to other creditors than the bank, which is a sum far in excess of their assets not covered by the mortgage, and Abbott was advised at the time the mortgage was given that no relative change between assets and liabilities had occurred since the statement was made out. It is true this statement showed an excess of assets over liabilities of nearly \$45,000. That this statement of assets was padded and false there can be no doubt, and that it was known to McNeill and Hodder, the president and secretary of the bankrupt, there can be no doubt. As to whether Abbott knew it was false at that time will now be considered. He knew that his mortgage covered so much of the assets that what was left was totally insufficient to pay the other creditors listed on the statement. If he really believed that the bankrupt had (as the statement shows) assets amounting to \$104,288.80, and that he was taking practically all of it, and excluding creditors (as the statement shows) who held claims aggregating \$13,518.78, he knew that he was getting security far in excess of his claim, and that the effect of it was to hinder and delay the other creditors. He must also be held to have known

that such a transaction of itself invited attack, and imperiled the validity of his mortgage, and tended to defeat the very object he wished to attain, viz., valid security for his debt.

In *Savings Bank v. Jewelry Company et al.*, 12 Am. Bankr. Rep. 785, 99 N. W. 123, the court said:

"That the execution by a debtor of a mortgage covering all his property, in favor of one of several existing creditors, is evidence of an intention to prefer such creditor, may well be supposed. But such is not conclusive upon the question. A preference such as offends the bankruptcy act must be one likely in its results to defeat the collection by other creditors of their claims. Essential to such a preference, therefore, is insolvency; because if the debtor was solvent the execution of the mortgage would not, in all likelihood, operate to defeat the other creditors of the mortgagor. Knowledge or a reasonable cause to believe that a preference is intended involves, therefore, knowledge or a reasonable cause to believe that insolvency exists as a matter of fact."

The same rule is true where a single creditor, with a knowledge of the insolvency of its debtor, takes a mortgage upon substantially all of its assets with the knowledge at the time (as will appear later) that there were outstanding creditors of nearly \$40,000, which was the situation in the case at bar when this mortgage was taken. *Pollock v. Jones*, 10 Am. Bankr. Rep. 616, 124 Fed. 163, 61 C. C. A. 555.

In this connection it must not be forgotten that Abbott swears that he knew that the statement was intended to show the cost of the assets. He also swears that he took the mortgage to secure his debt, because a good many statements regarding their business that they (Hodder and McNeill) had recently made to him proved to be false, and states one instance in regard to what they represented about the purchase of an iron safe in which to keep their books and papers, as required by their insurance policies. Thus it appears that he did not rely absolutely upon statements made by Hodder and McNeill. On the other hand, both Hodder and McNeill, the secretary and president of the company, who were its active and sole managers, swear that from the first they consulted Abbott about what they did, and that he was conversant with the condition of the company all the time. Hodder swears as follows:

"Q. You did talk to Mr. Abbott about the condition of the company, did you? A. Yes, very often. Q. Did you represent that the corporation was in good condition? A. I don't think I did. I don't think I represented anything to Mr. Abbott. He knew as well as I did, and knew every transaction himself. We consulted with him on every subject from the first day we came here. He had really more interest than anybody. Q. I ask you how many times did you consult with Mr. Abbott about the condition of this corporation during the fall and winter of 1904? A. Very nearly every day."

Mr. Abbott was asked:

"Q. What opportunities, if any, did you have for knowing the condition of that business, and who was looking after it? A. Of their business? Q. Yes, sir. A. I had their statements for it, and personal observation."

Abbott does not deny any of these statements in reference to his familiarity with the condition of the business of the Virginia Hardwood Manufacturing Company. For the purposes of this case it stands admitted that he was just as familiar with its condition as McNeill and Hodder. Moreover, there appear in the statement it-

self three items—real estate, buildings, and machinery—aggregating \$85,453.09, the value of which Mr. Abbott was just as capable of fixing as Hodder and McNeill; and he must have known that these three items were very greatly overvalued. It ought not to be forgotten in this connection that McNeill testifies that this statement was gotten up for a dual purpose. He says there was a plan on foot to organize another company, with the expectation of selling to them the properties of the Virginia Hardwood Manufacturing Company, and that one of the objects of the statement was that it might be used in making the sale. He says that when the statement was requested Mr. Abbott told him to boost the Virginia Hardware Manufacturing Company (hereafter called "Virginia Company") so that the assets of the Virginia Company would be recognized to their full value in the assets of the new company, and that this company afterwards transpired to be the Ft. Smith Hardwood Manufacturing Company (hereafter called the "Arkansas Company"), in which Mr. Abbott was a stockholder; and that Abbott always maintained that in making that sale he wanted to get the Virginia Company full value. This statement is not denied by Mr. Abbott. I conclude, therefore, that Mr. Abbott was not deceived by the nature or character of this statement, and that, as testified to by McNeill and Hodder, he knew as much about the values of the properties of the Virginia Company as McNeill and Hodder themselves. It must not be forgotten that it was agreed between Abbott, Hodder, and McNeill, before the mortgage was executed, that it should not go upon record at that time. They differ as to the reasons why the mortgage should not be placed on record. Hodder swears that the bank telephoned to the factory for either he or McNeill to come in, and he called on Mr. Abbott at the bank, and that Abbott claimed that the bank inspectors were coming the next day, and that the bank had loaned more money to the Virginia Company than they were authorized to loan under the national banking laws, and he did not want to get into any trouble about it, and after some further conversation asked for the mortgage. Hodder says he told him he would confer with McNeill, and supposed it would be all right; that Abbott said he would not record the mortgage, and he said it would be a protection to us (the Virginia Company) against any other creditors, if they should make trouble for us; that the whole thing would be a matter of form, and was to save the bank on account of the inspector. Abbott denies that he said he would take the mortgage for the purpose of keeping other creditors off, or for the purpose of keeping other creditors from jumping on the bankrupt, and says that he withheld the mortgage from record in order that he might not destroy the bankrupt's negotiations with the Arkansas Company during that time. McNeill swears that he objected to giving the mortgage because it would affect the credit of the company, and Abbott said, "No, it would not be brought out, because, if this mortgage is given, it will not be recorded except in the event of your being pounced upon by other creditors." Both McNeill and Hodder testify that Abbott insisted that the mortgage should be given and completed that night, and

that they went to Mr. Brizzolara's office for that purpose, and that the mortgage was prepared and executed that night. Abbott does not deny this, and it will be remembered that at this very time, according to Abbott's own statement, negotiations were pending between the Virginia Company and the Arkansas Company for the sale of the Virginia Company's plant, which he did not want to disturb, and for that reason he claims that he withheld the mortgage from record. The reasons assigned for withholding the mortgage from record are not inconsistent, are both plausible, and the conclusion reached is that they are both true. Abbott wanted the mortgage because there was a chance, at least, that it might be the means of his saving his debt. He did not want it to appear, doubtless, to the examiner, that he had loaned to one concern \$50,000 of the bank's money; and he did not want the mortgage to go upon record because negotiations were pending for the sale of the Virginia Company's plant to the Arkansas Company. One thing is certain: Abbott was more interested in the Virginia Company than everybody else concerned. That company owed him more than it did all the other creditors, and he held in trust, as will be seen later, all of its capital stock, and had a mortgage on substantially all of its assets. He practically owned the company, although the stock stood on the books of the company in the name of Hodder. Abbott says he was also a stockholder in the Arkansas Company, which was negotiating for the purchase of the Virginia Company's plant and properties. He says he suggested to Hodder and McNeill to sell the Virginia Company's properties to the Arkansas Company, and that Hodder asked him to represent him (Hodder) in making the sale, and that he was conducting the negotiations for Hodder for the sale of the Virginia Company's plant and properties to the Arkansas Company. The real fact is the Virginia Company's plant and properties practically belonged to Abbott, and he was negotiating the sale primarily for himself. He was therefore directly interested, both as seller and buyer. If he was not familiar with the condition and property of the seller, he was in no situation to serve the Virginia Company and himself faithfully and successfully; if he was familiar with it, he knew it was insolvent, and that the statement rendered by the Virginia Company on the 1st day of January, 1905, was grossly incorrect. Whatever may be said about that, surely Abbott occupied an important vantage ground to serve his own interest. If he made the sale for a sum large enough to pay off the debts of the Virginia Company, including his own, the effect would be to save the \$50,800 loaned to the Virginia Hardwood Manufacturing Company by the bank, which he had assumed, and at the same time he became a stockholder of the Arkansas Company on equal terms with his brother stockholders. He says he influenced the stockholders of the Arkansas Company, after their first offer of \$78,000 was made and rejected, to renew it by making an offer of \$75,000, to which he added a discount of his own debt of \$3,000, in order to effect the sale. He could well afford to lose the \$3,000 if he could save the \$50,800 which the Virginia Company owed him. But if he was unfamiliar with the

Virginia Company's plant and properties he was acting unfairly in inducing his brother stockholders to make an offer of that sum for it. He owed his associates the best of faith. If he was familiar with the Virginia Company's plant and properties, he must have known that they were not worth \$78,000. The trouble was Mr. Abbott occupied a confidential relation with both the buyer and seller. He was trying to serve two masters. We are told, upon the highest authority, that no man can serve two masters. His motive was to save himself. It was a strong motive, and a great temptation. The struggle was to avoid the loss incident to the bankruptcy of the Virginia Company, which would inevitably result in an attack upon his mortgage, which was practically the only security he held for the debt of \$50,800. It is believed that no one can carefully read and analyze the testimony in this case without reaching the irresistible conclusion that Mr. Abbott knew as much about the plant and properties of the Virginia Company as its officers, and, knowing it, he must have known that the company was insolvent when he took the mortgage. To conclude otherwise is to decide that throughout this transaction he was acting in the most reckless and incompetent manner in the management of both his personal affairs and the affairs of both companies. But the motive then to make the sale and save his debt was no greater than the temptation now to uphold the validity of the mortgage by making it appear that he did not know or believe that the bankrupt was insolvent when the mortgage was given.

So far the discussion has proceeded upon the theory that the only creditors of the bankrupt were those tabulated in the statement of January 1, 1905, furnished to Abbott by the officers of the Virginia Company. But there is another claim against the Virginia Company brought to light in such a way as to make it more significant than the mere existence of the claim itself. In the summer of 1904, Hodder and McNeill quarreled over a claim of Hodder's against the Virginia Company for \$25,000. From their statements there was no dispute as to the amount of the claim, for it was evidenced by promissory notes. The controversy was whether Hodder should hold the claim against the company and compel its payment before McNeill should have certain stocks of the Virginia Company held by Hodder under an agreement previously made between McNeill and himself. They referred this matter of dispute between them for settlement to their mutual friend, Mr. Abbott, who decided it in favor of Hodder. Both Hodder and McNeill say it was a debt of the Virginia Company. Abbott says they represented to him it was McNeill's debt to Hodder, and not the company's debt. Abbott further says he never heard of this Hodder debt against the company till March, 1905. McNeill and Hodder say he was told of it repeatedly before and after the arbitration referred to. However that may be, when Abbott decided the matter they agreed upon a settlement of it, and agreed that the settlement should be reduced to writing. The terms having been agreed on in the American National Bank, Abbott called Ball, the cashier, and stated the terms thereof to him in the presence of both Hodder and

McNeill, and directed the cashier to go with them to Mr. Brizzolara's office and have it put in shape and signed by the parties. Ball, accompanied by Hodder and McNeill, went to the office of Mr. Brizzolara, who is an attorney, and Ball stated the terms of the settlement to him in the presence of both Hodder and McNeill. While there Hodder and McNeill got into another heated wrangle. Ball says he took Brizzolara into another room and stated the terms to him again and left. The instrument was drawn by Brizzolara and executed that day by Hodder and McNeill. They both say that Brizzolara did that. When the paper was executed it was taken over to the bank and given to Ball, who took charge of its custody. Ball and Abbott both say they never read the paper. Abbott says that he never acted under it, although it was provided in it, as will be seen later, that he should be a trustee. He says that he did not know it was in the bank until March, 1905, when the differences sprang up between the bank and himself and Hodder and McNeill. The cashier, Ball, knew, however, that it was there all the time. Hodder swears that a few days after it was executed he called on Abbott for a copy of it, and a typewritten copy was made out in the bank and given to him, which copy he produced in evidence on the trial. Abbott denies that Hodder ever called on him for a copy, or that he knew it was in the bank. That instrument is as follows:

"Whereas the Virginia Hardwood Manufacturing Company, a corporation organized under the laws of New York, is indebted to the American National Bank in the sum of seventeen thousand five hundred forty nine and $\frac{79}{100}$ dollars evidenced by its several promissory notes as follows, to wit: \$600.00 due July 11th 04; \$2000.00 due July 14th 04; \$1500.00 due September 15th 4; \$1000.00 due Aug 24th 4; \$3000.00 due Aug 31st 04; \$2500.00 due July 26th. 04; \$3500.00 due Sep 15th 04; \$3449.79 due Oct 21 04, which notes amount in the aggregate to the sum of seventeen thousand five hundred & forty nine $\frac{79}{100}$ dollars.

"And whereas some of the aforesaid notes are now past due and it is desired to renew the same.

"And whereas the American National Bank has required further and other security for the renewal of the same, and further security upon any and all other notes now in the hands of the aforesaid bank being demanded, and

"Whereas W. R. Abbott, to secure the renewal of the notes past due, and to further secure any and all other notes now in the hands of the aforesaid bank of the said corporation, W. R. Abbott has become an accommodation endorser thereon.

"Now, for and in consideration of the aforesaid W. R. Abbott endorsing each and every one of the aforesaid notes, we, John Hodder, of New York city, New York, and Angus McNeill, of Fort Smith, Arkansas, do hereby agree, bind and obligate ourselves to assign and deliver unto the said W. R. Abbott all the stock belonging to us of the aforesaid Virginia Hardwood Manufacturing Company, as security, and to protect the aforesaid W. R. Abbott and the American National Bank of Fort Smith, Arkansas, in the prompt and due payment of each and every note aforesaid.

"And the aforesaid parties also agree, bind and obligate themselves to assign and deliver to the American National Bank as collateral security for the due and prompt payment of any and all sums that may be due and owing to the American National Bank one half of the capital stock of the Fort Smith Hardwood Manufacturing Company, which shall amount and be of the sum of \$75000.00, a corporation which is to be incorporated under the laws of the state of Arkansas on or before the first day of September, 1904, in lieu of and in place of the stock aforesaid of the Virginia Hardwood Manufacturing Com-

pany, so assigned and delivered by the said John Hodder and Angus McNeill.

"The aforesaid stock of the Virginia Hardwood Manufacturing Co. so assigned and transferred as aforesaid, in addition to its being collateral security for any and all indebtedness that may be due and owing the American National Bank shall also be and remain in the hands of the said W. R. Abbott as trustee in trust for the use and benefit of John Hodder, to secure the prompt payment of any and all indebtedness due him and Miss Jane Hodder on certain demand notes of the Virginia Hardwood Manufacturing Co. after any and all indebtedness due the American National Bank shall have been fully paid and satisfied.

"And it is distinctly understood by all parties hereto that the indebtedness to the American National Bank on the one-half of the capital stock of the Fort Smith Hardwood Manufacturing Company shall at no time exceed the sum of twenty thousand dollars without the written consent of both John Hodder and Angus McNeill.

"It is further agreed and stipulated that none of the stock of the Fort Smith Hardwood Manufacturing Company unsold which is held in the treasury shall be sold except for cash only, which shall be used in the business of said corporation and in payment of its indebtedness to the American National Bank, which indebtedness shall not exceed twenty thousand dollars unless as herein otherwise provided.

"In Witness Whereof we have hereunto set our hands this the 23rd day of July, 1904.

Angus McNeill.

"John Hodder."

It will be observed that the first "whereas" in this instrument is a recitation of the fact that the Virginia Company was indebted to the bank in the sum of \$17,549.79, evidenced by certain notes, which are described. The second "whereas" recites the fact that those notes are now past due, and that the Virginia Company desire to renew. The third "whereas" recites that the American National Bank require "further and other security" for the renewal of the same, and further security on any other notes of the Virginia Company now held by the bank. The fourth "whereas" recites that to secure the renewal of the notes past due, "and to further secure any and all other notes" of the Virginia Company now in the hands of the bank, that Abbott had become the accommodation indorser. It will be remembered that when this instrument of writing was drawn, according to Mr. Abbott's testimony, he was already indorser upon all the indebtedness of the Virginia Company to the bank. Indeed, he was indorser from the time they made the first loan of \$10,000. The third "whereas" makes it appear that, notwithstanding that fact, when debts were past due and were to be renewed the bank was at that time demanding further and other security for the renewal of the notes. So that as early as July 23, 1904, the bank was seeking other security than the indorsement of Abbott, and this with the knowledge of Abbott—indeed, at his instance, because it will be remembered that neither Abbott nor Ball denies that they authorized the provisions to which I have just referred to be inserted in this instrument of writing. The fifth paragraph of this writing provides a remedy, which is that in consideration of the conditions theretofore referred to that Hodder and McNeill bound and obligated themselves to assign and deliver to Abbott all the stock belonging to the Virginia Company as security to protect Abbott and the American National Bank in the payment of the notes previously described in the instrument and

any other moneys that might be advanced by the bank. The sixth paragraph of this instrument provides for the organization of a new company, to be known as the Ft. Smith Hardwood Manufacturing Company (which, as we shall see, was subsequently done); and it further provides that when that is done the stock shall be assigned and delivered to the American National Bank as collateral security for the payment of any sum due and owing to the American National Bank by the Virginia Company in lieu of and in place of the stock of the Virginia Company so assigned and delivered by Hodder and McNeill. This sixth paragraph, it will be seen, referred wholly to a company thereafter to be organized. The seventh paragraph is the one to which special attention is now called. It provides:

"The aforesaid stock of the Virginia Hardwood Manufacturing Company so assigned and transferred as aforesaid, in addition to its being collateral security for any and all indebtedness that may be due and owing the American National Bank shall also be and remain in the hands of the said W. R. Abbott as trustee in trust for the use and benefit of John Hodder, to secure the prompt payment of any and all indebtedness due him and Miss Jane Hodder on certain demand notes of the Virginia Hardwood Manufacturing Company, after any and all indebtedness due the American National Bank shall have been fully paid and satisfied."

Ball and Abbott both testify that the latter part of this provision, providing that Abbott should hold this stock in trust to secure the indebtedness due John Hodder and Jane Hodder evidenced by certain demand notes of the Virginia Company, was not authorized by them to be inserted in this instrument, and Abbott swears that he never heard that John Hodder and Jane Hodder had any claim against the Virginia Company. How did it happen, then, that this clause was inserted in this instrument? The proof is positive and uncontradicted that neither Hodder nor McNeill directed it to be done. Ball says that he did not direct it to be done. If the testimony of Hodder and McNeill and Ball and Abbott on this point be true, it must therefore have been inserted without authority by either Mr. Brizzolara or his stenographer. No one else had anything to do with the preparation of that instrument. It is a significant fact that neither the stenographer, nor Brizzolara, who prepared the instrument of writing, were called as witnesses by Mr. Abbott. It was in his power to have called these witnesses, and, if this provision was inserted in that instrument without the authority of any one by Brizzolara or his stenographer, it could have been shown. But is it reasonable that an attorney who is not shown to have known anything about the terms which had been agreed upon as to the settlement between McNeill and Hodder except what he had received from Ball, would, of his own accord, have inserted into this instrument of writing a provision adjusting the differences between Hodder and McNeill in exact accordance with what both McNeill and Hodder now say was the settlement made by Abbott? How is it possible he could have done so without having information from some one? If he did not receive it from Ball, who did he receive it from? It stands admitted that he did not receive it from McNeill and Hodder. His stenographer would have known

no more of it than he did. Abbott says that he instructed Ball what to put into the instrument of writing, and Ball says he gave the terms to Brizzolara. The only person who could explain it, so far as the proof shows, is Brizzolara or his stenographer. Nor could this transaction have escaped the attention of either Brizzolara or his stenographer, because at the very time that Ball was instructing Brizzolara as to what to put in the instrument, McNeill and Hodder were in a heated wrangle in the office about this very matter. The heated wrangle itself would have called attention to what was going on in the office. Such attention as would not have been readily forgotten by any of the parties present. Ball did not forget it. He refers to it. But there is another feature of this matter which cannot escape attention. Primarily this instrument of writing was prepared to secure Abbott and the American National Bank. Abbott was primarily a trustee for the bank, and secondarily a trustee for John Hodder and his sister. The stock transferred to Abbott, in other words, was to be held first to secure the bank, and after the bank was paid then to secure John Hodder and Jane Hodder. There is no denial of the fact by anybody that the whole of this instrument, as it relates to the security of the American National Bank, was correctly prepared. There is no denial of the fact by anybody that this instrument of writing grew out of the differences between Hodder and McNeill as to this \$25,000 debt, and that this instrument of writing is the result of that controversy and the arbitration made by Mr. Abbott. Now, if you eliminate the latter part of paragraph 6, relating to Abbott's trusteeship for John Hodder and Miss Jane Hodder, then there is not a line, nor a word, nor a sentence, or even a suggestion in the instrument that there had ever been any controversy at all between Hodder and McNeill of any kind. In the absence of that controversy, this instrument of writing would never have had an existence, although, as stated, it is drawn primarily so as to protect Abbott and the bank. Why should the instrument of writing have been prepared at all, if to be totally eliminated from it is the very matter which brought it into existence? The very reason of the existence of this instrument was the adjustment and settlement of the difference between McNeill and Hodder; but yet, it is now contended that the only paragraph in the instrument of writing which settled that difference was put there without authority of anybody. It cannot be true. It is said that this instrument of writing was never executed, and that Abbott knew nothing of this provision. It will be remembered that this instrument of writing, as stated, was primarily intended to secure the very debt now in controversy; that is to say, the \$17,549.79 then due the bank, and subsequent advances made or to be made. This instrument, therefore, came into existence, and was brought to the attention of Abbott, Ball, and Brizzolara. At the time it was drawn it is shown that John Hodder and Jane Hodder had an indebtedness of \$25,000 against the Virginia Company. On the 11th of August—some 20 days after this instrument of writing was drawn—Hodder took to the bank and delivered to Ball the stock provided for in the sixth paragraph of the instrument of writ-

ing referred to, and the receipt he took is absolutely identical in its provisions with the sixth paragraph. That provision describes that Hodder and McNeill obligated themselves to deliver to Abbott all the stock belonging to the Virginia Hardwood Manufacturing Company, and the receipt reads:

Fort Smith, Aug. 11th, 1904.

Received for W. R. Abbott the following certificates of stock of the Virginia Hardwood Manufacturing Company

# 1 John Hodder	8 shares
# 2 Angus McNeill	1 share.
# 8 John Hodder	46 shares.
# 5 John Hodder	43 shares

as per agreement signed by John Hodder and A. McNeill.

P. A. Ball. Cashr.

What is meant by the words "as per agreement signed by John Hodder and A. McNeill"? They cannot mean anything except "as provided for in a certain agreement signed by Hodder and McNeill." That stock was received by Ball, the cashier, and preserved among the files of the bank, and remained there until the controversy between these parties began in the spring of 1905. Abbott and Ball say that the words "as per agreement signed by John Hodder and A. McNeill" referred to the instrument of writing which is in evidence of August 10th; but that instrument of writing was simply a personal guaranty of McNeill and John Hodder for the payment of the indebtedness of the Virginia Hardwood Manufacturing Company, and is a guaranty, not to Abbott, but to the bank, and makes no reference whatever to any stock of any character. The contention fails, because the guaranty of August 10th has no relevancy whatever to the delivery of the stock described in the receipt. It follows, therefore, as the result, that as far back as July 23, 1904, Abbott himself and Ball, the president and cashier of the American National Bank, had notice of the fact that Hodder and his sister had a claim of \$25,000 against the Virginia Company. It is said that this instrument of writing, unless it was read by Abbott, was no notice to the bank; but the position is not tenable. As stated, the instrument itself shows on its face that primarily it was intended to secure Abbott and the bank. It was drawn by Brizzolara under the directions of Ball, who had received his directions from Abbott. When executed by Hodder and McNeill, it was returned by Brizzolara to the bank, and in pursuance of it the stock was subsequently delivered to the bank, and both retained by them until this controversy began. Brizzolara must be held to have been Abbott's attorney. As stated, the very debt to be secured by this paper was a part of the debt now in controversy, as well as any other indebtedness which might subsequently accrue. The very fact, therefore, that John Hodder and his sister claimed this indebtedness was brought to the attention of the bank's attorney, the bank's president, and the bank's cashier while engaged in securing this very debt, for which Abbott was the security by indorsement, and therefore was clearly within the scope of their agency. The knowledge of Brizzolara was the knowledge of the bank, the knowledge of Ball was the knowl-

edge of the bank, and the knowledge of Abbott was the knowledge of himself and of the bank; and it makes no difference in law really as to whether Ball or Abbott ever saw the paper at all. It was delivered to the bank to protect the bank in its loan to the Virginia Company, for which Abbott was the indorser, and they cannot be heard to say now that they did not read it, and did not know its contents. *Babbitt v. Kelley*, 9 Am. Bankr. Rep. 335, 70 S. W. 384; *Curtice v. Crawford County Bank*, 118 Fed. 390, 56 C. C. A. 174. This paper therefore discloses the two facts that as early as July 23, 1904, the bank was demanding security other than the indorsement of Abbott, and with the knowledge of Abbott; and, secondly, that the bank, Abbott, Ball, and Abbott's attorney all knew that at that time Hodder and his sister had a claim against the Virginia Company of \$25,000. Knowing this, they were bound to know that when this mortgage was taken the Virginia Company was insolvent when it brought its secondhand machinery (estimated by its officers to be worth \$21,000) to Ft. Smith, for it then owed the Hodder debt of \$25,000. The testimony conclusively shows that the indebtedness of the company steadily increased from the time the plant was landed here until the mortgage was given, and Mr. Abbott (of all persons except its officers) was more familiar and conversant with that fact than any other person, so far as the proof shows.

It must be held, therefore, that when Abbott called upon Brizzolara, his attorney, to draw the mortgage of January 26, 1905, Abbott knew this mortgage was covering nearly all of the assets of the Virginia Company, and that that company at that time was indebted to other creditors in the sum of about \$25,000 due the Hodders, plus the aggregate of the other creditors shown by the statement of January 1, 1905, to wit, \$13,518.78, making in the aggregate over \$38,000, for the payment of which only nominal assets of the Virginia Company remained. Knowing the Virginia Company was insolvent at the time he took the mortgage, and knowing that the mortgage covered substantially all the Virginia Company's assets, and knowing that the company owed other creditors over \$38,000, the conclusion is irresistible that he must have known that the mortgage, if enforced, must necessarily operate to give him a preference over other creditors; and therefore, since one must be held to have intended that which was the natural and logical result of his acts, he must have known that the mortgage was intended to give him a preference over other creditors.

The decision of the referee in this case is affirmed, and the claim of Abbott is allowed as an unsecured claim. It is so ordered.

UNITED STATES v. SWIFT.

(Circuit Court of Appeals, First Circuit. June 15, 1905.)

No. 570.

1. UNITED STATES—ACTIONS AGAINST—JURISDICTION.

The jurisdiction of suits against the United States, conferred on the Circuit Courts by section 2 of the Tucker act (Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 753]), extends to all suits of the class described in which the amount claimed in good faith exceeds \$1,000, although a smaller amount may be recovered.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 1111.]

2. SAME.

The second clause of section 2 of the Tucker act, as amended in 1898 (Act June 27, 1898, c. 503, 30 Stat. 494 [U. S. Comp. St. 1901, p. 753]), which withholds from the jurisdiction conferred on the Circuit and District Courts by said section suits brought against the United States to recover "fees, salary or compensation for official services of officers of the United States," does not apply to a suit to recover disbursements made by a marshal in paying for the services of court bailiffs. *U. S. v. McCabe*, 129 Fed. 708, 64 C. C. A. 236, applied.

3. FEDERAL COURTS—APPOINTMENT OF BAILIFFS—LIMITATION OF NUMBER.

Neither Rev. St. § 715 [U. S. Comp. St. 1901, p. 579], authorizing the appointment of bailiffs, not exceeding five, by Circuit and District Courts, nor the provisions of appropriation acts making appropriation for payment of bailiffs in such courts, not exceeding three in each court, limits the power of a judge when holding both courts at the same time, so as to render the appointment of six bailiffs unauthorized.

4. MARSHALS—CONTINGENT EXPENSES.

The provision of Rev. St. § 830 [U. S. Comp. St. 1901, p. 639], that marshals shall be paid their expenses necessarily incurred for fuel, lights, and "other contingencies that may accrue in holding the courts" within their districts, is sufficient to entitle a marshal to reimbursement for the expense of extra bailiffs ordered by the court to take charge of a jury impaneled in a capital case, and the cost of meals furnished officers in charge of witnesses in custody in the same case. *U. S. v. Hill*, 7 Sup. Ct. 510, 120 U. S. 169, 30 L. Ed. 627, applied.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. United States Marshals, § 18.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 128 Fed. 763.

Melvin O. Adams, U. S. Atty., and William H. Garland, Asst. U. S. Atty.

William F. Wharton, for appellee.

Before PUTNAM and LOWELL, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This case was brought in the Circuit Court of the United States under what is known as the "Tucker Act," approved on March 3, 1887, chapter 359, 24 Stat. 505, as amended by the act approved on June 27, 1898, chapter 503, 30 Stat. 494 [U. S. Comp. St. 1901, p. 752].

The seventh section of the act of 1887 provides that it shall be the duty of the court to cause a written opinion to be filed setting

forth its specific findings of facts and its conclusions of law. It provides, however, that, if the suit be in equity or admiralty, "the court shall proceed with the same according to the rules of such courts." In the case at bar there is an agreed statement of facts, which is in truth a statement of ultimate facts, so far as it goes; and there is also a careful opinion of the learned judge who presided in the Circuit Court, somewhat elaborating and adding to the agreed statement. Under the statute, that opinion is not to be regarded as the usual opinion of the trial judge, but it must be accepted as a part of the record; and, although the statute makes no specific provision for an agreed statement, we may assume, though we do not decide, that, by analogy to other statutes directing findings of facts by the trial court, this agreed statement must also be regarded as a part of the record. We are justified in these propositions, because the case has been submitted to us by both parties, on the strength of both the statement of facts and the opinion, without any question.

This proceeding comes before us on appeal; but, so far as the Circuit Courts and District Courts are concerned, the section of the Tucker act to which we have referred, and also section 9, carefully distinguished equity and admiralty, and this case, which relates to common-law rights, should more properly have been brought before us on a writ of error. Both this and the form of making up the record were considered and explained in *Chase v. United States*, 155 U. S. 489, 500, 15 Sup. Ct. 174, 39 L. Ed. 284, and in *United States v. Ady*, 76 Fed. 359, 22 C. C. A. 223. However, as no question is made by the parties on this account, and as, apparently, there seems to be some question whether the aggrieved party may not proceed in a case of this character by either writ of error or appeal, as he may elect, and as the period for suing out a writ of error in this case has expired, the practical result would be the same whether we dismiss or affirm on the merits, one of which we must do. Therefore we pass by all these questions of formalities.

The United States object to the jurisdiction of the Circuit Court on two grounds: First, because the second section of the Tucker act does not give the Circuit Courts jurisdiction where the amount of the claim is less than \$1,000; and, second, because the second section of the amendatory act of 1898, already referred to, reads as follows:

"The jurisdiction hereby conferred upon the said Circuit and District Courts shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States, or brought for such purposes by persons claiming as such officers or as assignees or legal representatives thereof."

As to the first branch of this jurisdictional objection, the United States seem to rest on the fact that, while the demands covered in the original petition amounted to \$1,225.59, the sum awarded by the Circuit Court was only \$377.59; but, according to the settled construction of other statutes which have fixed the jurisdiction of federal courts in accordance with specific amounts in suit, it is the

amount in good faith claimed which establishes the jurisdiction, and not the amount actually recovered. *Schunk v. Moline Company*, 147 U. S. 500, 505, 13 Sup. Ct. 416, 37 L. Ed. 255. There are exceptional cases of a very peculiar character, where, on the very face of the record, it is evident that there is no claim which can be substantiated equaling the jurisdictional amount, which can hardly apply at bar. Here the demand was reduced below the jurisdictional amount of \$1,000 by the disallowance of one item of \$848, as to which it is evident from the opinion of the Circuit Court there was a clearly bona fide claim, and which was rejected only after a somewhat protracted examination of facts and law.

As to the second branch of the jurisdictional question, it must be said it relates more to the merits than to the jurisdiction as such. However that may be, the second section of the act of 1898, relied on by the United States and already quoted, is clearly not applicable to this case. It is maintained by the petitioner that this proceeding is not to recover fees qua fees, but amounts paid by the marshal to other persons who demanded that he should make such payments. It is not, however, necessary that we should consider whether the statute of 1898 would bar this indirect method of giving the Circuit Courts and District Courts jurisdiction for the recovery of fees, because the second section of the act of 1898 refers only to the emolument of "officers of the United States," or persons claiming to be such officers. All the so-called fees in question here were paid to so-called bailiffs of the Circuit Courts and the District Courts. Bailiffs are never sworn in accordance with the statute, and are not "officers of the United States." Section 715 of the Revised Statutes [U. S. Comp. St. 1901, p. 579], authorizing their appointment, describes them as "persons." The ordinary use of the expression "officers of the court" covers them. This was fully explained by us in *United States v. McCabe*, 129 Fed. 708, 64 C. C. A. 236. The disbursements were ordinary payments to persons employed, and not in any sense official fees.

In *United States v. Aldrich*, decided by us on September 29, 1893, 58 Fed. 688, 7 C. C. A. 431, we referred to the fact that it did not always follow that, because a certain appropriation act provided that moneys thereby appropriated should not be applied in certain payments, the persons claiming payments were not entitled to recover where the right to them is supported by general legislation. It is true, cases may arise where, notwithstanding the general legal right, there may be no appropriation, so that a disbursing officer who had made disbursements might be liable on his official bond or otherwise. This question, however, did not arise in *United States v. Aldrich*. Also, in the present case, no issue can arise based upon the proposition that the petitioner had disbursed money contrary to the provisions of the statutes of appropriations, because he paid the money in dispute into the treasury, and now proceeds only to recover back what is due him as a matter of legal right. Of course, the judgment when recovered will be subject to the constitutional provision that it cannot be paid unless an appropriation therefor has already been made or hereafter may be made. There-

fore we proceed to determine only the absolute rights of the parties.

On the merits, we agree entirely with the conclusions of the learned judge of the Circuit Court. The demands in dispute relate to payment of three bailiffs for each court—that is, the Circuit Court and the District Court—when each court is said to have been held at the same place, at the same time, by the same judge; to payment of an additional guard, called in the account a bailiff, for two Sundays, in connection with the care and oversight of a jury impaneled in a capital case then on trial; and the cost of meals furnished officers in charge of witnesses who were in custody in the same capital case, having failed to give the recognizances required by law, and who were therefore fed at the cost of the United States without dispute as to the propriety of that expense, and over whom it was necessary that a guard should be constantly kept.

The statute authorizing the employment of sundry persons who are elsewhere called bailiffs is section 715 of the Revised Statutes, as follows:

“Sec. 715. The Circuit and District Courts may appoint criers for their courts, to be allowed the sum of two dollars per day; and the marshals may appoint such a number of persons, not exceeding five, as the judges of their respective courts may determine, to attend upon the grand and other juries, and for other necessary purposes, who shall be allowed for their services the sum of two dollars per day, to be paid by and included in the accounts of the marshal, out of any money of the United States in his hands. Such compensation shall be paid only for actual attendance, and, when both courts are in session at the same time, only for attendance on one court.”

The provisions of the appropriation act of March 2, 1895, c. 189, 28 Stat. 958 [U. S. Comp. St. 1901, p. 580], which is supposed by the United States to reach this case, is as follows:

“For pay of bailiffs and criers, not exceeding three bailiffs and one crier in each court, except in the Southern District of New York,” etc.

Like phraseology has been so often repeated in the various appropriation acts that the treasury has come to regard this as amending the Revised Statutes, and limiting section 715 to three bailiffs for each court. This has been so often re-enacted that it may, as thus claimed, fall within the exceptional rule of *United States v. Perry*, 50 Fed. 743, 1 C. C. A. 648, cited by us in *United States v. Aldrich*, *supra*. Even if this were so, it would still follow that each Circuit Court and each District Court is entitled to three bailiffs, making a total of six; and no provision of statute cripples the discretion of the courts on this topic, or imposes the limitation claimed by the United States, or any other kind of limitation. This disposes of the first item in dispute.

The second and third items in dispute resolve themselves into a single proposition, except that the third item, which relates to payment for meals, does not at all come within the claim made by the United States that the act of June 27, 1898, c. 503, 30 Stat. 494 [U. S. Comp. St. 1901, p. 752], already referred to, deprives the Circuit Courts of jurisdiction over payments made for the services of bailiffs. Both items arose during the financial year covered by

the appropriation act of June 4, 1897, c. 2, 30 Stat. 11, 58 [U. S. Comp. St. 1901, p. 3768]. That act contains the following provision:

"For payment of such miscellaneous expenses as may be authorized by the Attorney-General, for the United States courts and their officers, including the furnishing and collecting of evidence where the United States is or may be a party in interest, and moving the records, two hundred thousand dollars."

But claims for payments to an additional guard or bailiff, and for the cost of meals, are not rested on this statute, but on the Revised Statutes, as follows:

"Sec. 830 [U. S. Comp. St. 1901, p. 638]. There shall be paid to the marshal * * * his expenses necessarily incurred for fuel, lights and other contingencies that may accrue in holding the courts within this district," etc.

This provision originated in the act of February 26, 1853, c. 80, § 2, 10 Stat. 165. So far as it affects this case, the phraseology of that statute, with a single exception which we will refer to later, conforms exactly to section 830 of the Revised Statutes. Previous to the act of 1853, the marshal's expenditures of this character were allowed without question and without statute, as being fundamentally necessary to the independent exercise of their functions by the judicial tribunals of the United States, and this statute was rather declaratory of the law than a new enactment.

This provision of section 830 has never been expressly repealed. Nevertheless, in view of many renewed prohibitions of the appropriation acts like that which we have cited from the act of June 7, 1897, c. 2, 30 Stat. 58, the department of justice has assumed to a certain extent jurisdiction over all kinds of incidental expenses involving the administration of justice by the federal courts, and this assumption has been supported by the treasury. On the one hand, this position of the department is not clearly unjustifiable; and, on the other, inasmuch as the provision cited has never been specifically repealed, it is possible to hold that the miscellaneous expenses referred to in the appropriation acts are of a different class from the expenses involved in the contingencies provided for by the Revised Statutes. "Contingencies" has the sound of emergencies, and that there should be a power in the court to provide for them instantly on the spot is reasonable, so that it may well be said Congress did not intend by anything contained in the appropriation acts to take away this necessary provision for exceptional cases. Under the undisputed circumstances of this case, the equity is so strongly in favor of the petitioner, and there is so much doubt as to the condition of legislation, that, following our usual rule with reference to adjudications of courts of appeals in other circuits, we are peculiarly bound to adopt the conclusions of that court for the Eighth Circuit in *Campbell v. United States*, 65 Fed. 777, 779, 13 C. C. A. 128, and of that court for the Third Circuit in *United States v. Dill*, 86 Fed. 79, 83, 29 C. C. A. 586, each of which holds the provision which we have cited from section 830 of the Revised Statutes as still in force, and each of which supported the contention of the marshal, claiming reimbursement for expenses involved in

meeting contingencies such as that section contemplated. We may refer also to *United States v. Jones*, 193 U. S. 528, 530, 24 Sup. Ct. 561, 48 L. Ed. 776. Following these authorities, the facts on this record show that the expenditures in dispute were made to meet clear, instant, and pressing emergencies, and require that we should affirm the conclusions of the Circuit Court.

We may add that this result is further supported by the fact stated to us, and not disputed, that expenditures of the character to which the third item in question relates have always been allowed, by a long-established practice, until the issue was presented as shown on the present record. Therefore, aside from the propriety of our following the decisions of the two Circuit Courts of Appeals which we have cited, the case would seem to fall within *United States v. Hill*, 120 U. S. 169, 7 Sup. Ct. 510, 30 L. Ed. 627, where almost conclusive weight was given to a long-continued uniform practice of the departments with reference to the accounts of disbursing officers. Indeed, unless the rule of *United States v. Hill* is liberally followed, disbursing officers and their sureties can never rest in peace, but will be subject to suffering at the hands of the United States the grossest injustice where, relying on a long line of precedents, disbursements made in good faith are involved. The results which have come from the disregard by the departments of this wholesome rule have been intolerable.

We said there was one difference between the phraseology of section 830 of the Revised Statutes and the act of 1853, in which it originated. This comes from the fact that, in revising the statutes, the word "this" was inserted before the word "district" in lieu of the word "the." It must be held that this was a mere slip, otherwise the statute would in this particular be nonsense. Under the act of June 27, 1866, c. 140, 14 Stat. 74, providing for the revision of 1874, commissioners were required to suggest changes in the statutes, and did, in fact, explain them with the notes found in their report. What is now section 830 of the Revised Statutes appeared in their report at page 468, § 294. There the word "this" was substituted for the word "the" in the original act of 1853. This was no change, but only the use of a more appropriate word. The same phraseology is found in Durant's revision, and ran into the first edition of the Revised Statutes. The word "this" first appears in the edition of 1878, and is apparently a mistake in printing. We must accept this as settled by the fact that the decisions in *Campbell v. United States*, *supra*, and *United States v. Dill*, *ubi supra*, grew out of a condition of facts which originated after the Revised Statutes were enacted.

United States v. Mason, decided by us on February 24, 1904, 129 Fed. 742, 64 C. C. A. 270, does not touch this case, as it relates to the disbursements of a clerk of the District Court, to which section 830 of the Revised Statutes has no relation. The result is that, as we have said, we concur with the conclusions of the Circuit Court.

The judgment of the Circuit Court is affirmed.

THE E. T. WILLIAMS.

(Circuit Court of Appeals, Second Circuit. June 23, 1905.)

No. 205.

TOWAGE—INSUFFICIENT POWER OF TUG—LIABILITY FOR LOSS OF TOW.

A tug which took two scows to the dumping ground off New York, but was unable, for want of sufficient power, to bring them back against adverse winds after they were dumped, whereby one was lost, and the owner put to expense in rescuing the other, *held* in fault, and liable for the resulting loss, on the ground that the master was imprudent in undertaking the service under the weather conditions existing when he started; being himself without experience in the work, and the tug not having been previously used in such towing.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Towage, §§ 11-22.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon an appeal from a decree of District Court, Southern District of New York, holding the tug responsible for total loss of dumper No. 9, and for salvage on dumper No. 8, both lost by the tug through parting of towing hawser in heavy weather after dumping beyond the lightship. The opinion of the District Court will be found in 126 Fed. 871.

John F. Foley, for appellant.

La Roy S. Gove, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The cause was tried in court before the district judge, and, although it is a close one as to conditions of wind and sea at the crucial periods, we do not feel that we can disturb his finding as to the main issue. In view of the circumstances that the captain of the tug had never followed the sea outside, but was experienced only in steamboating around the harbor, and that the tug herself, employed in this service on an emergency, was not shown to have been well fitted for such heavy weather, we concur in the conclusion that it was imprudent in him to take the dumpers out to the lightship on the calculation that he could bring them back against a 30-mile wind. The wind was undoubtedly much higher when the towing hawser parted, but during the four hours immediately after dumping it seems to have been lighter than it was when he went down, and within the limit which he calculated he could come back against with a flood tide. We have not overlooked the argument as to different conditions between the roof of the Equitable Building where the wind records are kept and the open ocean, 16 miles away, nor the fact that many other captains of tugs went down in what the record shows to have been nearly a 30-mile blow, calculating that no material increase was indicated before they could return. Had the captain had larger experience with the boat—he was only in command a few days—or if the evidence showed that the boat herself had successfully dealt with conditions such as she encountered within the four hours after dumping, we might

have reached a different conclusion; but, on the case as it stands, we are not persuaded to disturb the finding of the District Judge that in going down she should have expected to meet conditions with which she was not powerful enough to contend.

In one particular, however, we do not concur. After the towing line parted, the Williams turned back to rescue the crews of the dumper. They were taken aboard by a heavy line; each man jumping overboard, since the conditions of wind and sea made it impossible to get near enough to the drifting dumpers to save them otherwise. Subsequently, when the tug Ivins, which had been sent to rescue the flotilla, came down, it sent a line aboard No. 8 by its mate, Cassidy, the single volunteer for a highly dangerous service; the weather being severe, and the dumpers coated with ice. It was thought that this would secure both tugs, which were supposed to be still connected by an 80-fathom hawser. That hawser had been cut, and in consequence only No. 8 was saved; No. 9 drifting out to sea and becoming a total loss. The district judge found that:

"Before those on No. 9 left her, the hawsers between the dumpers were cut by the men on No. 9 under orders from the master of the tug."

The evidence on this branch of the case is as follows:

Jacobson, one of the men on No. 9, called by libelant, testified on the direct:

"Q. What became of that? A. That hawser parted. Q. Was it parted, or did you cut it? A. I guess it parted. I have forgotten about that. Q. Don't you know you cut it? A. No; I don't recollect that. Q. Didn't you make a statement that you cut it? A. I don't know. Q. Wasn't it true, if you did say that? A. I guess it was. If you put it in the statement, it was true. Q. Don't you know you told me you cut that hawser; the captain of the tug told you to do it? A. I guess I did. Q. But you don't remember you cut that hawser? A. Yes."

On cross-examination he was asked if he had not made an affidavit that the hawser between the two dumpers parted, to which he replied: "Either parted or I cut it. I have forgotten all about that now." On redirect he "remembered that I had an axe, but don't remember what I did with it." The affidavit referred to, made soon after the accident, was put in evidence. It stated that right after the parting of the towing hawser "the hawser between the two tugs parted," and makes no reference to any cutting. The other man on No. 9, called by libelant, testified that the hawser between the two dumpers "parted or was cut. That I couldn't tell exactly. Q. Don't you know it was cut? A. I don't know if it was cut. I don't know that. Q. Did you have an axe? A. No, sir. Q. Did you see your captain have an axe? A. No, sir. Q. You saw no axe in use at all? A. No, sir." Neither of these witnesses testified to any order from the Williams to cut the hawser from No. 9. The captain of the tug testified that he thought the hawser between the tugs parted when he was going up to rescue the men on the second tug; that he could not say whether it was cut or not; and stated positively that he did not request anybody on board the dumpers to cut it, nor did he have anything to say to any man on either dumper with reference to it. The mate of the tug testified to the same effect.

Cassidy, the volunteer from the rescuing tug, Ivins, who boarded No. 8, testified that he found the bridle on No. 8, to which the hawser between the two dumpers was attached, "cut off right aft of the chocks; both bridles cut off; no hawser there." No one was called from No. 8. The proof does not warrant a finding that the coupling hawser was cut on No. 9, and there is not a scintilla of evidence that it was cut on either dumper by the orders or on the suggestion of any one on the Williams.

The decree of the District Court is affirmed, with interest and costs of this appeal.

LIND v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. May 24, 1905.)

No. 210.

COLLISION—TOW AND ANCHORED STEAMER—NEGLIGENT NAVIGATION BY TUG.

A tug passing down New York Bay with a tow of 33 boats, on a clear night, and with an ebb tide, *held* solely in fault for allowing her tow to come into collision with a steamship anchored within the regulation anchorage grounds, with proper lights set and burning.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding the respondent solely at fault for a collision which occurred in New York Bay to the southward and eastward of the Statue of Liberty between the steamer Nordkap and a tow in charge of respondent's tug Media.

Henry G. Ward, for appellant.

Wilhelmus Mynderse, for appellee.

Before LACOMBE and TOWNSEND, Circuit Judges.

PER CURIAM. The Nordkap was anchored well within the limits of anchorage ground, with her proper lights set and burning. We are not persuaded by the testimony as to floating ice that the collision was the result of inevitable accident, and agree with the District Judge in the conclusion that the Media has not rebutted the presumption of fault which arises from the circumstance that on a clear night she so conducted her navigation that her tow of 33 boats was brought down on the ebb tide against the bow of the steamer anchored properly where the regulations required her to lie. As to the suggestion that the seaman who was standing anchor watch was in fault for not letting the anchor chain run, we think the situation was not like that in the cases relied on (*The Richmond*, 63 Fed. 1020, 12 C. C. A. 1; *The Ogemaw* [D. C.] 32 Fed. 919). The steamer was not anchored in a specially dangerous place. There was not enough in the circumstance that a tug was crossing her bows, three lengths off, to call for action; and by the time it became apparent that a multitudinous tow was without warning being

swung down upon her, whether through tidal action alone or because of the presence of moving ice, the collision was so imminent that we are not prepared to hold the watch in fault for not undertaking to pay out more chain.

The suggestion that the crack in the tail shaft developed because of a hidden flaw is entirely hypothetical. It would seem that examination might have demonstrated whether such a flaw existed; and in the absence of such proof we are not persuaded that the shaft was defective. The condition of the propeller blades seems to be inconsistent with any theory of improper use of the engines in the effort to get the ship off, and we concur in the conclusion as to the assessment of damages.

The decree of the District Court is affirmed, with interest and costs.

ALBIS CO. v. MUNSON.

(Circuit Court of Appeals, Second Circuit. June 10, 1905.)

No. 227.

SHIPPING—CHARTER HIRE—LOSS OF TIME WAITING FOR DOCKING.

Under a time charter providing that the vessel should be docked and cleaned at least once every six months if the charterer thought necessary, hire to be suspended until she was again in proper condition for service, but requiring the charterer to send her at his own cost to a United States port where there were docking facilities, and to pay for all time lost in shifting ports, he was liable for a month's time lost while waiting for the repairing of a dock, during which time she was subject to his orders and could have been ordered by him to another port.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 130 Fed. 32.

Charles S. Haight, for appellant.

J. Parker Kirlin, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The careful opinion of Judge Adams in the court below dispenses with any necessity for an extended statement of the views of this court. We adopt his findings of fact, and concur in the legal conclusions reached by him.

The charter originally relieved the charterer from paying hire while the steamship was being docked for cleaning and painting her bottom, and until she was again in a proper state for service, and allowed him to require her to be docked once in six months; but, as it was subsequently changed, it provided that the charterer should send the steamer to a United States port where there were facilities for docking, and, in case she should be obliged to shift ports in order to dock, the charterer should pay for all time lost on shifting ports, all coal consumed, and all port charges.

We construe these later provisions as intended to protect the shipowner against any unfair exercise of the privilege of the charterer to have the ship docked, by requiring the latter to send her to a port where the ordinary facilities for docking such a steamer should be available at the time or within a reasonable time, and, if found not available, to send her to some other port where there should be available facilities, and bear the expense of sending her there. Their effect is to cause the charterer to remain liable for the ship's hire until he sends her to a port where docking facilities are available; but when she is sent to a proper port, the charterer's liability for hire is suspended, and it is for the owner to make necessary arrangements to have her docked. The charterer sent the steamship to Mobile. She reached that place on December 5th. The dock was out of condition when the steamer reached Mobile, and also when she was ordered by the charterer to go there. Upon information that the dock would be in order shortly, the steamer was allowed to remain at Mobile; but on December 12th, when an effort was made to dock her, it was found that the condition of the dock rendered it impossible, and it became apparent that the dock would not be in condition to receive the steamer before the end of the month, and doubtful whether it would be then. On December 31st it became obvious that any further delay of the vessel would be useless, and on January 4th her owner ordered her to, and she sailed for, New Orleans, reaching that port late the next day, and was docked there on January 6th.

During the time the steamer was at Mobile the charterer was insisting that the steamer was on the owner's time, and the owner was insisting that she was on the charterer's time, and frequent communications passed between them, in which the owner asked for instructions, and the charterer refused to give them.

When the charterer learned that the dock at Mobile was out of repair, he should have sent the steamship promptly to another port, unless he preferred to remain liable for the hire, or to wait for the repair of the dock at Mobile and meanwhile remain liable for the hire. The master being under the orders and directions of the charterer, and it being the charterer's duty to furnish the master from time to time all requisite instructions and sailing directions, the owner was not under any obligation to select a new port of docking. It is true that the owner was at liberty to send her to another port, but this was because the charterer in effect authorized the owner to take possession of her until she should be docked.

The general rule is familiar that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as, with reasonable endeavor and expense, he could not have prevented. It is urged that this rule required the owner to take steps to minimize the loss likely to accrue by reason of the delay in having the vessel sent to New Orleans or some other port where there were proper docking facilities. But this was a loss which would accrue to the charterer, and not to the owner; and to apply the rule to the pres-

ent case would have required the owner to do what at any time and every day the charterer could have done himself, and should have done.

The decree is affirmed, with interest and costs.

THE CHAUNCEY M. DEPEW.

(Circuit Court of Appeals, Second Circuit. May 17, 1905.)

No. 202.

COLLISION—VESSEL LYING AT END OF PIER—NEW YORK STATUTE.

Libellant's canal boat was lying outside of others at the end of a pier in East river, in violation of Laws N. Y. 1897, p. 314, c. 378, § 879, which prohibits vessels from obstructing the waters of the harbor by lying at the exterior end of wharves in the North or East rivers, and provides that "any vessel * * * so lying shall not be entitled to claim or demand damages for any injury caused by any vessel entering or leaving any adjacent pier." While so lying, respondent tug brought a barge to the end of the pier to be warped into the adjoining slip, and, through negligence in handling, brought her into collision with the canal boat. *Held* that, while the statute did not govern the right of recovery in a court of admiralty, the regulation was one which it was competent for the state to make, and its violation was a fault on the part of the canal boat which contributed to the collision and rendered her liable for one-half the damages.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding the tug solely in fault for damages sustained by libellant's canal boat William S. Deyo in consequence of a collision with the barge Sharon, which the Depew was endeavoring to place in the slip on the south side of the pier at the foot of Ninety-First street, East river. The opinion of the District Court is reported in 130 Fed. 59.

A. G. Thacher, for appellant.

La Roy S. Gove, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The Deyo was the fourth or outside vessel moored at the end of the pier at the foot of Ninety-First street. These craft lay parallel to the end of the pier, one outside of the other. None of them projected beyond the lower line of said pier, but all of them came out to said line, and all projected beyond the upper line of the pier. The tug had three barges in tow, two (the Sharon outside) on her starboard side and one on the port. The destination of the Sharon was the lower side of the Ninety-First Street Pier, where she was to unload into another barge already there. There are shoals off the entrance to the slip on the lower side of the pier, and the usual method of entering, especially on a flood tide, is to head upstream, then round to so that the tow points downstream, bringing the starboard barge alongside of the

end of the pier. A line is then run from the barge to the pier, the tug drops back, places its bow against the stern of the barge, and goes slowly ahead, thus turning the barge on the corner of the pier, and swinging her into the slip by her line. The story of the claimant is that this turning or pivoting maneuver was employed by the Depew to enable the Sharon to enter the slip below the Ninety-First Street Pier, the turn being made on the corner of the canal boat instead of on the corner of the pier. There is great conflict in the testimony as to whether the Deyo was headed up or down, but the District Judge who saw and heard the witnesses found that she was headed up, with her starboard side exposed. Claimant contends that the Depew slowly approached the four boats moored at the end of the pier, that a line was run to the barge already moored on the lower side of the pier, and that the tug then pushed the Sharon carefully around the corner of the Deyo. The District Judge, however, reached a different conclusion. The testimony of the surveyors showed that the damage was near the bow, planks driven in on the starboard side and out on the port, and the District Judge concluded that the tug had carelessly brought the Sharon into collision with the canal boat some distance above the place where it was necessary to bring the vessels into contact in order to make the turn. But in whatever way they were brought into contact, we are satisfied from the record that the tug did not sufficiently reduce speed, but brought the Sharon so violently into contact with the Deyo as to cause damage which more careful execution of the maneuver she sought to execute would have avoided. We do not find the tug in fault for undertaking to make the turn on the corner of the canal boat instead of on the corner of the pier. Under the statute hereinafter referred to, the risk of injury from such a maneuver, carefully conducted, was one which the canal boat assumed when she improperly placed herself at the end of the dock in water which was prohibited to her as a berth. But the privileged vessel, although thus obstructed and embarrassed, was none the less under an obligation to exercise reasonable care when undertaking to use the corner of the canal boat as a fulcrum instead of the corner of the dock. And that fault is sufficiently covered in the libel by charges of carelessness in "not avoiding" the Deyo, and in "not stopping and backing in time to avoid collision." We concur in the conclusion that the Depew was in fault.

It is contended that she is relieved from all liability for the consequences of that fault by the provisions of chapter 378, p. 314, Laws 1897, § 879, which reads as follows:

"It shall not be lawful for any vessel, canal boat, barge, lighter or tug to obstruct the waters of the harbor by lying at the exterior end of the wharves in the waters of the North and East river except at their own risk of injury from vessels entering or leaving any adjacent dock or pier; and any vessel, canal boat, barge, lighter or tug so lying shall not be entitled to claim or demand damages for any injury caused by any vessel entering or leaving any adjacent pier."

The District Judge held that this statute did not apply, because "the Sharon was bound, for a brief time at least, for the end of the

pier." We are unable to concur in this conclusion; the Sharon was bound for the slip adjacent to the pier, although, to effect an entrance, it was necessary first to bring her side up to the lower corner of the pier end. The statute has been several times considered (see cases cited in the opinion of the District Court), but in all of them the colliding vessel was not bound either in or out of an immediately adjacent slip. In *The Dean Richmond*, 107 Fed. 1001, 47 C. C. A. 138, we held that the statute was not to be extended to cover cases which are not clearly within its terms, and commented on the circumstance that it was very loosely expressed. Although broad language is used in the second clause of the section, we are not prepared to attribute to the Legislature any attempt to regulate procedure in the federal courts, or to alter or modify the principles upon which those courts administer their admiralty jurisdiction. All that was intended was a prohibition against prosecuting the claim or demand for injury, caused by the moving vessel, in the courts of the state. Whether the conduct of a particular vessel has been rightful or wrongful may well be determined by reference to the local statute regulating its operations, but it is not to be assumed that the State Legislature undertook to interfere with the federal admiralty courts in the exercise of their peculiar jurisdiction. Referring to this very statute, we held in *The Dean Richmond*, supra, that "it was undoubtedly competent for the Legislature to prohibit such a use of the piers, in the interests of the general convenience and expediency." The Deyo lay at the end of the pier in flagrant violation of the terms of this statute. That she was an obstruction to navigation is manifest. "The purpose of the present statute would seem to be to remove all controversy * * * in respect to the extent of the obstruction caused by the manner in which the vessel is moored." *The Dean Richmond*, supra. She occupied water which in this particular case was required in order to allow the Sharon to be warped around the corner of the pier in the usual and proper manner. She was lying where she had no right to lie, increasing the difficulties of all boats trying to enter or leave the adjacent slips, and was herself in fault. Moreover, her fault contributed to the collision, whichever way it came about. Had she been elsewhere than in the prohibited place, the Sharon might have been brought up against the solid end of the pier with impunity, and could have been warped around the corner in water which the statute reserved for her uses, without injury to the Deyo, to herself, or to any other vessel.

Since both vessels were in fault, the damages should be divided. The decree of the District Court is reversed, with costs of this court in favor of the Depew against the Deyo, and cause remanded with instructions to enter decree in favor of the Deyo against the Depew for one-half the damages, without costs.

BLAKESLEE et al. v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court of Appeals, Second Circuit. June 23, 1905.)

No. 206.

SHIPPING—INJURY OF BARGE AT WHARF—LIABILITY OF CHARTERER.

Evidence considered, and *held* insufficient to establish the claim of libellant that an injury to his barge, which was under charter to respondent, and was damaged by being struck by some moving vessel while at its docks, was caused by one of respondent's tugs; there being no direct credible testimony to identify the vessel causing the injury, which occurred in the night.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal to review a decree of the District Court, Southern District of New York, holding the respondent liable for damages sustained by the barge Katie (owned by Blakeslee) and her captain, Gunderson, who lost his personal effects when she sank in consequence of injuries sustained during the night of January 27-28, 1903. The decision in the District Court is reported in 132 Fed. 153.

F. M. Brown, for appellant.

La Roy S. Gove, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The Katie was old and somewhat weak, but she had just been repaired, and we concur in the finding of the district judge that her condition was fairly good, and sufficient to encounter the ordinary contacts of harbor towage. The injuries she sustained warranted the conclusion that she had been subjected to an unusually severe blow. On January 27th, about 6 p. m., or a little after, the barge was taken in tow at Atlantic Basin, Brooklyn, by respondent's tug No. 13. She was then in sound condition. On January 28th, after 11 a. m., she was taken in tow at West Shore Docks, Weehawken, by respondent's tug No. 12. At that time her stem was knocked to one side, and there was a hole in her bow above the water line. It is conceded that no tugs other than respondent's moved her from place to place in the interim. She was under charter to respondent, and used only in its service, but that circumstance is not sufficient to establish the liability of respondent, which was not an insurer. There must be some evidence warranting a finding of negligence in her care or management. Undoubtedly the Katie received a severe blow that night from something, floating or stationary, and the only witness who testifies to the circumstances under which that blow was received is the co-libellant, Gunderson, who was on board of her all the time. All of his testimony was taken by deposition. So we are not embarrassed in weighing it by the conclusions of the district judge, who neither saw nor heard him. His statements as to the events of the night are so discordant that it is charitable to assume he was at the time

in such a mental condition as to confuse his observation, and make his recollections less persuasive than they would otherwise be. On January 29th, the day after the accident, he signed a protest, in which he stated that the barge arrived at West Shore Docks about 10 p. m. on January 27th; that during the night, around 1 o'clock, a New York Central tug shifted her to the next pier to load freight; that before he had time to get on deck the barge received a very heavy blow; that either the tug ran into the barge herself, or she ran into another barge; that when he came on deck he asked the tugman what they were trying to do with the barge, but received no satisfaction; that it was too dark to ascertain the damage received; that between 3 and 4 a. m. a cargo of shooks was loaded on her, and about 7 a. m. he found she was making water; that about 11 a. m. the tug came to tow him to destination, at Pier 16, East river, but when off Pier 4, East river, the water gained so fast, cargo was taken into another boat, and she was taken to Stanton street, sinking just off the dry dock there.

The libel (filed July 8, 1903) averred that during the night a tug-boat operated by respondent came into the slip of the West Shore Railroad at Weehawken, the barge Katie at the time lying on the north side of said slip, with her bow pointing in, and stern out (therefore with her starboard side to the pier), said tug having called to take the said boat (Katie) in tow, but that the tug was so carelessly managed and navigated that she struck the stem of the barge a very violent blow, doing serious damage; that said tug (the one that did the damage) thereupon took said barge in tow, and towed her to the foot of Thirty-Third street, North river (a dock belonging to respondent), where, after being landed, said barge commenced to leak; and that subsequently she was taken to Pier 4, East river, and thence to Stanton street. The protest, as put in evidence, has no jurat, and the libel was verified by the co-libellant, Blakeslee, but inasmuch as no one but Gunderson is indicated as having at any time given any narrative of what happened at 1 or 2 a. m., there can be little doubt that both the documents embody statements as to the events made by him.

Testifying upon deposition (November 10, 1903), Gunderson gave the following account of the occurrences of the night: The Katie was taken in tow at Atlantic Basin by one of respondent's tugs at about 6:30 p. m., and towed to a pier at Thirty-Ninth street, which does not belong to respondent, where she arrived about 10 p. m., and was made fast, close to the bulkhead. Thereupon he went to bed, or, rather, turned in with his clothes on, and was awakened after midnight by a severe shock. Getting up, he found himself at the West Shore Pier in Weehawken, with a tug alongside on his port side, the Katie's starboard side next the dock, and a deck hand from the tug making her fast. This time he fixes as between 1 and 2 a. m. The barge had struck against the dock with such violence that a lamp and other things in his cabin were knocked over. There was an exchange of remarks between the deck hand and himself. He did not discover the damage then, but at 7 a. m. he found that the Katie's stem was knocked from the starboard clean over to the

port side, and that she was leaking. Subsequently, about 11 a. m., they started to tow her to Pier 16, East river, but went first to Pier 4, East river, and then to Stanton street, where she sank. The witness may have been confused as to which was the respondent's New York pier, Thirty-Ninth or Thirty-Third street or Thirty-Second street (both the latter belonging to respondent), but on direct and cross examination he stoutly adhered to his story that he was first made fast (about 10 p. m.) to the New York pier, whichever it was—he describes his berth there relatively to surrounding objects quite particularly—and remained there some hours before he was removed to the West Shore Pier. He asserted with equal positiveness that the tug which brought him across the river did not herself run into the Katie, being lashed to her port side, but drove her violently into the pier, thus knocking her stem to port. Upon the trial, after Gunderson's deposition was put in, the libel was amended so as to charge that the respondent first towed the Katie from Atlantic Basin to the New York Central Dock at foot of Thirty-Ninth street (it may fairly be assumed that Thirty-Third street or Thirty-Second street is meant), and that during the same night one of respondent's tugs towed her to the West Shore Dock, and, "in landing said barge at said dock, drove the stem of said barge so violently against the said dock as to cant the stem of said barge to port, and causing her serious damages. * * * Said collision occurred between 1 and 2 a. m."

Gunderson testified in rebuttal, also on deposition, April 11, 1904. He then said that when he left the Atlantic Basin, between 6 and 7 p. m., the Katie was the only craft the tug had in tow, and he turned in about Governor's Island. Could not say whether, on the way up, they stopped at Pier 4, or not, but when he next came out of the cabin they were at Thirty-Second street, where the Katie was being landed, the tug on her port side, and no other barge, canal boat, or vessel in tow of the same tug. He said: "I am not going to take my oath that she landed there. She positively landed there for orders, and that is all I can say." He would not swear that she stayed there (at Thirty-Second street. He no longer asserted a landing at Thirty-Ninth street) more than half an hour, because he turned in again very quick, and went to sleep, not hearing anything till the shock that upset the lamp, etc. That when he came out there the tug which was landing him at the West Shore had no other craft in tow; the tug was not made fast to any boat but the Katie.

Despite the variances and contradictions in his testimony, and the evidence as to conflicting statements made by him, there would be enough in it, if it stood alone, to warrant the conclusion that the injury which the barge received that night was due to mishandling by one of respondent's tugs. But there is proof in the case of such a character as to cast still more discredit upon Gunderson's narrative. The respondent operates a large number of tugs, and has very many barges and similar boats, owned or chartered as the Katie was, which it is constantly towing. Naturally so large a busi-

ness has to be conducted under an organized system. Orders are sent from the office of the chief tug dispatcher to the captains of the different tugs, directing each one to go at such a time to such or such piers, there to take in tow designated boats and move them to designated places. Each day there is turned in to the office the written report of the tugboat captain, giving a brief statement of the movements of his tug in execution of the orders received. These reports or daily logs are filed. The various men in charge of the docks controlled by respondent also send in reports of the arrival and departure of boats from their respective docks. One report is a check on the other. If a captain should report that he took a tow from one pier at 9 a. m. and landed it at another pier at 10 a. m., the dock reports, showing that he called at the first pier at 2 p. m. and reached the second pier at 5 p. m., would be likely to get him into trouble. Of course, any narrative he might insert in his report as to the circumstances of any accident which may have occurred would be of little weight, being colored, presumably, to excuse himself; but as contemporary records merely of movements from place to place, recorded without any idea that such a recital has any bearing on catastrophes occurring at some other time or place, they are, when properly authenticated, highly persuasive. These records were put in evidence—the blotter showing the orders given to the tugs, and the daily logs showing the captains' reports of what they had done in response to such orders. This is what they show: Tug 13 reported at Pier 4, East river (one of respondent's piers), for orders, at 5:40 p. m. January 27th. She was ordered to bring the Katie from Pinto's Stores, Atlantic Basin, and the barge Tivoli from South Central Pier, to Pier 4, East River. The record shows that she arrived back at Pier 4 with both barges at 6:50 p. m. The captain of Tug 13 corroborated this statement; remembering the circumstance that he had to wait for the captain of the Tivoli to come back from up the street, so that he was on the eve of leaving there and coming away and picking up the Katie alone, when the barge captain came along. Orders were then given to Tug 3 to take from Pier 4 the barges Katie and Rochester to West Shore, and the barge Tivoli to 65, North river. The report of No. 3 shows that she left Pier 4 at 7:05 p. m. with the three barges, that she landed the Katie and Rochester at West Shore at 8:25 p. m., and the Tivoli at 65 at 8:50 p. m. Taylor, captain of Tug 3, verified his report, and testified that he had the Rochester on his starboard side, with the Katie outside of her, and the Tivoli on his port side; that he landed the two at West Shore between 8 and 9 p. m., still fastened together—the Katie's starboard side to the dock—and then took the Tivoli across the river to 65. The report of the West Shore Dock dispatcher showed that the Katie arrived there at 8:25 p. m. The report from the piers Thirty-First to Thirty-Third street does not show any landing of the Katie there that night, and the dispatcher at Thirty-Third street testified to the same effect. The records show that Tug 12 picked up the Katie at West Shore at 11:45 the next morning, as to which and the subsequent transactions there is no dispute.

Upon this evidence we are satisfied that the story of the captain of the Katie that she was removed from a pier at Thirty-Ninth or Thirty-Third or Thirty-Second street after midnight, and then brought to the West Shore Pier, is wholly inaccurate. It is suggested, however, that she may have sustained her injuries when she was landed there at 8:25 p. m. Taylor, the captain, who landed her, and his mate (about the admissibility of whose testimony there is some controversy), both testify that they landed her carefully, but it is not necessary to discuss their testimony. There is conclusive proof that the Katie was not injured by having her bow driven forcibly against the pier. Every one agrees that she was landed with her starboard side to the dock, and a violent contact with it would have driven her stem from starboard to port. This is what Gunderson says was the condition of things, but his testimony, in view of its many inconsistencies, has little weight. Shewan, the shipwright and dry dock owner at whose place she was repaired, says that the heel of the stem was slewed over from starboard to port. But his attention was called rather to the extent of her injuries and the repairs required than to the direction in which the stem was displaced. He says he "didn't examine the stem very carefully." On the other hand, the three surveyors, one representing the owner, one the underwriter, and one the respondent, who examined her with the express purpose of ascertaining what had happened (two of them were called for libelant), all agree in the positive assertion that her stem was knocked over from port to starboard. In view of this testimony, we cannot escape from the conclusion that she sustained her injuries while she was tied up at the dock, some time during the night, and at the hour, whenever it was, that the shock overturned the lamp and waked her captain, and that the injuries were inflicted by some blow on her port bow, delivered by some moving vessel. But there is not enough in the record to show that a tug of the respondent's inflicted such blow. The West Shore Piers are in the control of respondent, and its tugs are constantly taking vessels to and from them, but the waters of the adjacent slips are not so shut off from general navigation that it must be assumed that all vessels found to be moving within them are to be held to be the respondent's tugs or tows. The slips are navigable waters, and, of course, free for any one to enter and depart from, using proper care. The assistant dispatcher at those piers testified that, "according to what barges are in there and what they bring there," outside tugs, not owned or chartered by respondent, do occasionally enter the slips. It seems clear on the proof that the damage to libelant's craft was not caused by the three tugs of respondent which are shown to have handled her that night and morning. Possibly some other of respondent's tugs may have collided with her while she lay tied up to the pier. Possibly some tug came between midnight and 2 o'clock (which is the time Gunderson fixes) to remove the Rochester, which was left at 8:25 p. m. lashed to the Katie's port side, and in doing so carelessly drove the Rochester against the Katie. But no one is called from the Rochester to tell what happened when she was moved, nor is there any

"order" or "daily log" or "dock report" of respondent put in evidence, showing what tug moved her and when, or whether she was merely warped by her own lines further down the pier. We have not overlooked the circumstance that Gunderson says he recognized a man on the tug as one whom he knew to have been in the employ of the New York Central Railroad, but he was referring to the tug which landed him at West Shore. In the absence of any evidence tending to show even the presence of one of respondent's tugs in the vicinity of the Katie at the time she was injured, we cannot find that respondent is responsible for the damage merely because the Katie lay at one of respondent's piers, and was under charter to respondent at the time.

The decree is reversed, with costs, and instructions to dismiss the libel, with costs.

In re SPALDING.

(Circuit Court of Appeals, Second Circuit. June 10, 1905.)

No. 240.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—APPOINTMENT OF RECEIVER.

The provision of Bankr. Act July 1, 1898, c. 541, § 3a, subd. 4, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], as amended in 1903 (32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410]), making it an act of bankruptcy on the part of a debtor where "because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States," does not make the appointment of a receiver on the application of creditors an act of bankruptcy unless it was made on the ground of insolvency.

2. SAME.

A state court of New York appointed a receiver for the property of a defendant on application of a judgment creditor on the ground, as recited in the order, that the defendant had conveyed property and was threatening to make further conveyances of property in fraud of the plaintiff's rights. *Held*, that such recital of the ground for the appointment was conclusive, and that the appointment did not constitute an act of bankruptcy on the part of the defendant as one made under the laws of the state "because of insolvency," within the meaning of Bankr. Act July 1, 1898, c. 541, § 3a, subd. 4, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], as amended in 1903 (32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410]), there being in fact no statute of the state conferring power on a court to appoint a receiver for the property of an individual on the ground of insolvency.

3. SAME—ABATEMENT OF PROCEEDINGS—DEATH OF BANKRUPT.

Proceedings in bankruptcy do not abate by the death of the alleged bankrupt after the filing of the petition and before adjudication.

[Ed. Note—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, § 298; vol. 6, Cent. Dig. Bankruptcy, § 134.]

Appeal from the District Court of the United States for the Southern District of New York.

See 134 Fed. 507.

Selden Bacon, for appellants.

Emanuel J. Myers, for respondents.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from an adjudication of bankruptcy, and is brought by a creditor who interposed an answer to the petition and contested the proceeding and by the executor of Spalding. The acts of bankruptcy upon which the adjudication was based were the appointment and putting in charge of a receiver of the property of the alleged bankrupt by the Supreme Court of the state of New York. The petition for the adjudication alleged the commission of several other acts of bankruptcy of Spalding, but none of the averments in respect thereto were sufficient in form and substance. The referee in bankruptcy by whom the proceeding was heard found that they had not been proved. His findings in this respect were not overruled by the District Court, and we have not been able to find in the record sufficient evidence to support the averments.

We are unable to agree with the court below that the proofs establish the commission by Spalding of the acts of bankruptcy particularly referred to. These acts of bankruptcy are those enumerated by subdivision a (4) of section 3 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]). Section 3 provides that acts of bankruptcy by a person "shall consist of his having * * * a (4), made a general assignment for the benefit of his creditors; or being insolvent applied for a receiver or trustee for his property; or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."

Until the amendments of 1903 to the bankrupt act the appointment of a receiver of the property of an insolvent, whether an individual or a corporation, was not of itself an act of bankruptcy; and this was so whether the appointment was made upon the application of the insolvent or upon the application of creditors. The making of a general assignment for the benefit of creditors was an act of bankruptcy by the terms of subdivision a (4), and upon the theory that the appointment of a receiver was equivalent in its results to a general assignment made by the insolvent to a trustee the jurisdiction of the bankruptcy courts had been sought occasionally by creditors who petitioned for an adjudication of bankruptcy alleging such appointment to have been a general assignment for the benefit of creditors; but it was decided that section 3 did not include as one of the enumerated acts of bankruptcy the appointment by a court of a receiver or trustee of the property of an insolvent, and that the "general assignment" of subdivision a (4) meant the ordinary common-law general assignment made voluntarily by the grantor, and those which in many of the states, being regulated by statute, are known as "statutory general assignments." *Re Empire Metallic Bedstead Company*, 98 Fed. 981, 39 C. C. A. 372; *Vaccaro v. Security Bank of Memphis*, 103 Fed. 436, 43 C. C. A. 279. In the former of these cases this court held that the procurement by an insolvent of the appointment of a receiver of his property by a state court could not be held to be an act of bankruptcy upon the ground that it produces results equivalent to those brought about by a general assignment for the benefit

of creditors, and that the acts of bankruptcy enumerated by the statute could not be enlarged by construction so as to include transactions similar or analogous to, but not identical with, those specified. Doubtless these decisions were influential in leading to the amendments of 1903. It is significant that these amendments are ingrafted upon original subdivision a (4), thus indicating that what was in the mind of Congress was a transfer which was equivalent in its results to a general assignment by operating to transfer to a trustee all of the property of an insolvent for the benefit of his creditors. The making of a general assignment by a debtor was always regarded as a confession of his insolvency, and it has sometimes been decided that such an assignment made by a person who was not insolvent at the time, or did not suppose himself to be insolvent, was void, as manifesting an intent to hinder and delay creditors in the collection of their debts. Some of these decisions are referred to in *Van Nest v. Yoe*, 1 Sandf. Ch. 4. Apparently what Congress intended by the amendment was to place a receivership, whether the appointment was procured by the initiation of the insolvent or whether it was procured by the application of his creditors, upon the same footing as a general assignment by an insolvent, and, when it had occurred, to permit the courts of bankruptcy to administer the estate, and have it distributed conformably with all the provisions of the bankrupt act. It will be observed that the first of the amendatory provisions confines the act of bankruptcy to the appointment of a receiver or trustee upon the application of the insolvent, while the second is a broader provision, and applies whenever a receiver or trustee has been put in charge of the insolvent's property "because of insolvency."

The petition for an adjudication did not allege such an act of bankruptcy as is enumerated in the first of these provisions, and the question to be considered consequently is whether the proofs sustain the averment of the petition that a receiver had been put in charge of Spalding's property "because of his insolvency." It appeared by the proofs that the receiver was appointed in an action brought by the corporation *W. & J. Sloane*, a creditor of Spalding, to set aside a conveyance and transfer of certain real and personal property of Spalding, made, as was alleged, with intent to hinder, delay, and defraud his creditors, and particularly the plaintiff. The plaintiff made application to the Supreme Court for the appointment of a receiver *pendente lite*, and the order appointing the receiver, in granting the application, recites the ground for the appointment as follows:

"That the plaintiff is a judgment creditor of the defendant *Robert H. Spalding*, and that its executions against his property issued by its judgments have been returned wholly unsatisfied; that the defendant *Robert H. Spalding* has been conveying, mortgaging, and otherwise disposing of his property in fraud of the plaintiff's rights and just demands, and is threatening to make further conveyances and dispositions thereof in fraud of the rights and just demands of the plaintiff."

Giving subdivision a (4) the construction which its language demands, we are of the opinion that it does not make a receivership an act of bankruptcy unless it was procured upon the application

of the insolvent himself, and while insolvent; and does not make the putting a receiver in charge of the property of an insolvent an act of bankruptcy unless this was done because of insolvency; and if the latter provision applies to any case where the trustee has not been put in charge pursuant to some statute of the state, or a receiver put in charge by a court acting under statutory authority, it certainly applies only when this has been done because of insolvency. In most of the states statutory provisions exist conferring jurisdiction upon designated courts for the appointment of receivers. The statutes of New York authorize the appointments of receivers of corporations in cases of insolvency, but there is no statute authorizing the appointment by any court of a receiver of the property of an individual merely upon the ground of his insolvency. The appointment in the present case was doubtless made pursuant to section 713 of the Code of Civil Procedure, which authorizes the appointment of a receiver of "the property which is the subject of the action," upon the application of a party who establishes an "apparent right to or interest in the property, where it is in the possession of an adverse party," and when its custody by a receiver becomes expedient.

Inasmuch as in the present case the receiver was not appointed upon the application of Spalding, it is immaterial whether Spalding was at the time insolvent. It is also immaterial that the plaintiff in the action may have alleged as one of the evidential facts of fraud that Spalding was insolvent. It suffices that the court in exercising its authority did not purport to do so upon that ground, and that the order appointing the receiver and reciting the grounds for the action of the court is conclusive to the contrary. The receiver was appointed because the court found that Spalding had disposed and was threatening to dispose of his property with intent to defraud the plaintiff in the action and other creditors, and assigned this as the only ground for its action in putting a receiver in charge of his property. If the court had merely appointed a receiver, without reciting the grounds of its judgment, the record could have been referred to, or the grounds shown by evidence aliunde. *Russell v. Place*, 94 U. S. 608, 24 L. Ed. 214; *Davis v. Brown*, 94 U. S. 428, 429, 24 L. Ed. 204. But, having recited the grounds, the recitals cannot be contradicted without impeaching the record; and this is inadmissible. *In re Watts*, 190 U. S. 35, 23 Sup. Ct. 718, 47 L. Ed. 933. That the appointment of a receiver under the circumstances of this case is not such an act of bankruptcy as is contemplated by subdivision a (4) is enforced by the consideration that such acts as led to the appointment are of themselves acts of bankruptcy by the terms of subdivision a (1) of section 3. It is not to be presumed that Congress intended to amend the section so as to create as an additional act of bankruptcy one which was already included in the section.

The conclusion we have reached renders it unnecessary to consider the other questions raised by the assignments of error. It is proper, however, to say that we are satisfied that the proceeding did not abate by the death of Spalding previous to the date of the

adjudication, and that we adopt the views which are so fully and satisfactorily expressed upon the general subject by Judge Wheeler in *Re Hicks* (D. C.) 107 Fed. 910.

We have considered the suggestion of counsel for the appellees that, in the event of a reversal of the adjudication, the proceeding should be remitted to the court below, with instructions to permit the petitioning creditors to amend their petition, and take further proofs as to the acts of bankruptcy alleged other than the one upon which the adjudication was founded. The appellants have been subjected to a long and expensive litigation in the trial of an issue which was without merit. The executor of Spalding will be able to assert the rights of his creditors to impeach any fraudulent disposition of his property, and will distribute his estate ratably among the creditors. If by superior diligence some of his creditors have acquired legal or equitable liens, there is no good reason why they should be deprived of their fruits. Under the circumstances we see no good reason for permitting the proceeding to be reopened.

The adjudication of bankruptcy is reversed, with costs, and with instructions to dismiss the petitions of the original and intervening creditors for an adjudication of bankruptcy.

STEPHENS et al. v. PHOENIX BRIDGE CO.

(Circuit Court of Appeals, Second Circuit. June 10, 1905.)

No. 226.

1. BUILDING CONTRACT—RIGHT TO SUE ON QUANTUM MERUIT.

An action on a quantum meruit may be maintained to recover for labor and materials furnished under a contract, subject to the right of defendant to set up the contract to limit the amount of recovery.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, §§ 23-33, 36.]

2. SAME—DAMAGES FOR BREACH—STIPULATION FOR PENALTY.

In a contract for the building of a structure to be completed by a certain date, a provision that the contractor should be "subject to a penalty" of \$100 per day for any delay beyond such time is not to be construed as fixing the measure of recovery for such a breach, where there is no reason why the actual damages cannot be ascertained.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 179.]

3. INTEREST—UNLIQUIDATED DEMAND.

Interest is not recoverable on a demand which is unliquidated, and which is subject to a counterclaim, also unliquidated.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Interest, §§ 35-40.]

In Error to the Circuit Court of the United States for the Southern District of New York.

L. Laflin Kellogg, for plaintiff in error.

Henry G. Ward, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This is a writ of error by the defendants in the court below to review a judgment for the plaintiff entered upon

the verdict of a jury. The action was brought to recover the reasonable value of the materials and labor furnished by the plaintiff for a viaduct which the defendants were erecting for the city of New York upon a written contract between them and the city. It appeared upon the trial that the materials and work were furnished under a contract between the parties by which the plaintiff undertook to complete the metal work of the structure at a specified date, and "to be subject to a penalty of one hundred dollars per day for any time beyond that day," and by which the defendants undertook to pay as the work progressed, upon monthly estimates, reserving 15 per cent. of the contract price, which was to be paid within 60 days after completion, part in cash and part in four months' notes of the defendants. Performance was not completed by the plaintiff within the time specified by the contract, but full performance otherwise was subsequently made, and the defendants accepted the work and paid all sums due by the terms of the contract, except the reserved payment, which amounted to \$13,960, less \$4,000 owing to the defendants for the use of their plant and other assistance. It was not disputed upon the trial that the reasonable value of the labor and materials was the contract price, but the defendants contended that, the contract not having been performed by the plaintiff within the specified time, the plaintiff was not entitled to recover, and that in any event the defendants were entitled to a deduction of \$100 per day for the delay. The trial judge ruled against these contentions, and allowed the defendants to prove the amount of their actual damages caused by the delay.

The only assignments of error that require notice are those which challenge the rulings of the trial judge that the plaintiff was entitled to maintain the action notwithstanding it had not fulfilled the terms of its special contract with the defendants; that the defendants were entitled by way of counterclaim only to the actual damages sustained by them by the delay in the completion of the contract, and not to the \$100 per day mentioned in the contract; and that the plaintiff was entitled to interest upon any amount which the jury might find to have been owing by the defendants to the plaintiff from the time when the demand became payable. These assignments of error may be briefly disposed of.

1. It is entirely well settled that an action in quantum meruit can be maintained upon the facts which appeared upon the trial, and the proposition is so elementary that it seems quite surprising that it should be controverted. The plaintiff was not required to produce the contract in evidence, and did not do so, but relied upon the ordinary proof of the reasonable value of the materials and labor furnished. When the contract was produced by the defendants, its only effect was to reduce the amount of the plaintiff's recovery by limiting it to the contract sum, less the amount of the defendant's counterclaim for damages for delay; and, if the sum referred to in the contract as a "penalty of one hundred dollars per day" for delay in fulfilling entitled the defendants to damages at that rate, the amount of their counterclaim was fixed accordingly.

2. There was nothing apparent on the face of the contract, and

nothing which we can discover in the extrinsic facts bearing upon the subject-matter of the contract or the situation of the defendants in respect to the consequences of delay, to show that the damages likely to be sustained by the defendants by delay in fulfilling the contract were extraordinary, or in their nature uncertain or incapable of being definitely ascertained. The case was therefore one where the general rule applies that the use of the word "penalty" in such a contract is not to be regarded as intended to fix the measure of recovery for a breach, but the party claiming damages must prove his actual damages.

3. Notwithstanding the greater liberality of the more recent adjudications in allowing interest by way of damages for withholding the payment of money justly owing against the delinquent party, none to which we have been cited go the length of allowing it in a case like the present. The sum owing from the defendants to the plaintiff was uncertain, and unascertainable by computation, at the time of the commencement of the action; it depended not only upon what should be found to be the reasonable value of the material and services furnished by the plaintiff, but also upon the amount which it should be found ought to be deducted from the plaintiff's claim, and this amount was likewise uncertain, and unascertainable by computation. That interest is not allowable from the commencement of the action upon such a state of facts is very satisfactorily shown by the opinion in *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544. That it is not allowable at all was determined in *Delafield v. Village of Westfield*, 169 N. Y. 582, 62 N. E. 1095, which is a case exactly in point, and which was cited and unquestioned in the later case of *Sweeny v. City of New York*, 173 N. Y. 414, 66 N. E. 101, where the general question of allowance of interest upon unliquidated demands was carefully considered by the court. See, also, *Carricarti v. Blanco*, 121 N. Y. 230, 24 N. E. 284. In the absence of controlling decisions in the federal courts, we are disposed to adopt as guides, in determining when interest should or should not be allowed, the rules deducible from the decisions in New York, where the question in all its phases has been so frequently and so fully discussed. We are satisfied that interest should not have been allowed in the present case, and, the amount allowed being \$1,295.-37, the recovery was to that extent excessive.

The judgment is reversed, unless the plaintiff stipulates to reduce it by deducting the amount of the interest; and, upon filing a stipulation to that effect in the court below, that court is instructed to modify the judgment accordingly.

UNITED STATES v. DICKSON.

(Circuit Court of Appeals, Second Circuit. May 24, 1905.)

No. 175 (3,456).

1. CUSTOMS DUTIES—COLLECTOR OF CUSTOMS—DUTY TO FOLLOW DECISIONS OF GENERAL APPRAISERS.

Where, under section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], the Board of General Appraisers sustains an importer's protest against the assessment of duty by a collector of customs, it becomes the duty of the collector to reliquidate the entry in accordance with the board's decision.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 197.]

2. SAME—PROTEST—SUFFICIENCY.

Where, in reliquidating an entry pursuant to a decision of the Board of General Appraisers rendered under section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], the collector fails to allow the importer all he is entitled to under such decision, the importer may legally file a protest against the action of the collector, as provided in said section.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The court below reversed the decision of the Board of United States General Appraisers, which had overruled the protest of George Dickson against the assessment of duty by the collector of customs at the port of New York. The opinions filed by the Circuit Court and the board are given in 131 Fed. 573

Charles Duane Baker, Asst. U. S. Atty.

Edward Hartley, for the importer.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Upon the review by the Board of General Appraisers of the decision of the collector, pursuant to a protest of the importer, when the decision sustains the protest it becomes the duty of the collector, pursuant to section 14 of the customs administrative act (Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933]), upon the transmission of the record to him by the Board of General Appraisers, to liquidate the entry according to the decision of the board. The former liquidation is abandoned so far as it is affected by the decision of the board, and to that extent is as though there had never been a liquidation. *Robertson v. Downing*, 127 U. S. 607, 8 Sup. Ct. 1328, 32 L. Ed. 269. In this case the collector, instead of conforming to the decision of the board, which was that the importations, consisting of ginger ale in bottles, were free of duty, decided that they were subject to a duty upon the corking and wiring of the bottles, and liquidated the amount accordingly. The importer duly protested in writing within 10 days of the liquidation, and took the proper steps to obtain a review under section 14 by the Board of General Appraisers. The board decided that the protest was filed too late, because 10 days had expired after the original liquidation by the collector. We

agree with the court below that this position is wholly untenable. Indeed, it can hardly be treated seriously. Undoubtedly an importer cannot a second time successfully challenge the same decision, and, if his protest against the first liquidation has been overruled by the Board of General Appraisers, he must seek his remedy by an application to the courts pursuant to section 15.

The Board of General Appraisers conceded that the second protest was well founded, and decided against the importer solely because it was too late. We concur with them that it was well founded, and entertain no doubt that the importer was entitled to another liquidation, superseding the second one made by the collector.

The decision of the Circuit Court reversing the Board of General Appraisers is affirmed.

BOOTH v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 24, 1905.)

No. 209.

1. CRIMINAL LAW—REVIEW—ADMISSION OF EVIDENCE.

Error cannot be assigned to the admission of a statement of a witness which was unresponsive, where no objection or motion to strike out was made, because the court had previously refused to rule that no evidence on the subject would be admitted at a time when the question was not directly presented.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2674.]

2. SAME—OBJECTIONS.

Objections to the admission of evidence, not specified when it was offered, cannot be considered in the appellate court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1630; vol. 15, Cent. Dig. Criminal Law, § 2653.]

3. FRAUDULENT USE OF MAILS—EVIDENCE.

On the trial of a defendant for using the mails to defraud, where he was charged with having used a letter head purporting to show that he was engaged in a business in which he was not in fact engaged, for the purpose of obtaining property on credit, it was error to admit in evidence against him a letter head of a firm having the same surname, where he was not charged with using such letter heads nor with making any representations respecting his connection with the firm, and also to admit a list, supposed to be of creditors, and unreceipted bills from parties not named in the indictment, all of which were found in defendant's office, there being no evidence to show by whom the list was made, nor whether or not he was in fact indebted to any of the parties, nor how the transactions arose.

In Error to the District Court of the United States for the Western District of New York.

This cause comes here upon writ of error to review a judgment of conviction upon three indictments containing five counts, which indictments were consolidated and tried together. The charges are for violation of section 5480, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3696].

Edward Lynn, for plaintiff in error.
Charles H. Brown, for the United States.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The section under which indictments were found makes it a crime to place any letter in or take any letter from any post office in the execution or attempted execution of any scheme or artifice to defraud, which scheme or artifice is devised to be effected by opening communication with some other person through the post-office establishment. It will be well to set forth in detail the substance of one of the indictments and of the evidence adduced in its support, in order to show the theory of the prosecution. When that is thoroughly understood, the assignments of error may be more readily disposed of. It is charged that on November 20, 1903, defendant, Booth, placed a letter in the post office directed to the Moline Pump Company at Moline, Ill., which contained an order directing shipment to defendant of a 4 H. P. gasoline engine. This letter was written on a printed letter head, which represented that Booth was engaged in the business of grain threshing and well drilling, of dealing in threshing and well-drilling machinery, of dealing in wrought-iron pipe and casing and well supplies of every description, to be a contractor for water, oil, gas, and artesian wells, prospecting, etc., to be an hydraulic engineer, to do the business of making complete water supply installations, and to make a specialty of torpedoing wells. It is charged that this pretense of being engaged in such businesses was a scheme or artifice to induce the persons receiving letters written under such letter heads to sell on credit and send to him various articles which could and naturally would be used in some of said businesses in which he so pretended to be engaged, he not intending to use said articles so received, or any thereof, in any of said businesses, and not being engaged in such businesses, or any of them, not intending to pay for the same, but intending to sell the said articles, and all thereof, as soon as he should receive the same from said various persons, for such amounts as he could obtain therefor, and fraudulently to convert the moneys received from such sales to his own use, and thereby to defraud the several persons who should send the articles to him. A second count charged the mailing of a similar letter on December 19, 1903, ordering a 6 H. P. gasoline engine. The proof showed that both these engines were sent to defendant, the price being \$390; that he never paid for them, but on January 29, 1904, sold them both for \$175. When sued for the price, he put in an answer denying that the agreed price was \$390, or that they were worth so much, and averring that they were not of the horse power represented. So far as appears, he never made any complaint of the engines until his answer was interposed. Judgment was entered against him for the full amount, but never satisfied. There was evidence tending to show that he was not at the time engaged in the business represented by the letter heads, and admissions of the

defendant were testified to, which, if true, indicated the existence of the scheme charged. Another indictment charged (in two counts) that on January 30, 1904, and February 19, 1904, he mailed letters to the Titusville Oil Works at Titusville, Pa., requesting the shipment of some gasoline. The evidence showed that the gasoline was sold and sent him at the agreed price of $11\frac{1}{4}$ cents a gallon, and sold by him shortly after its receipt for 9 cents a gallon. He never paid for it. Other indictments charged similar performances. It will not be necessary to recite them. Sufficient has been shown to indicate what issues were before the trial court.

In some of the transactions included in the indictments defendant used a different letter head, representing that he was engaged in the business of dealing in "boots and shoes, machinery, light and heavy hardware, pipe, contractor's materials, etc., agricultural implements, binder twine, wagons and buggies, harness, furniture, gasoline and steam engines and boilers, automobiles, bicycles and motor cycles, musical instruments," etc.

Only such assignments of error as are argued on the brief will be here discussed.

1. It is contended that the testimony of the witness Hayden regarding defendant's alleged statement "that he sold shingles for half what they cost" was not relevant, and was prejudicial to defendant. No exception to the admission of this testimony was reserved. Hayden was the chief of police, who was testifying to certain damaging admissions which he said defendant had made to him. He testified on the direct that defendant told him that the people he sold the goods to made more profit than he did, and that in answer to a question where he sold any goods that he got he had said that he sold some shingles down near Canandaigua. So far this was received without objection, but immediately upon the last answer defendant's counsel objected "to anything further in relation to the shingles." The court overruled the objection, and exception was reserved, but no further question as to the shingles was put to the witness on the direct. After a long direct examination he was subjected to an extended cross-examination in the course of which he stated that defendant gave as a reason why he was buying and selling different things that he was in debt, and was trying to get out of debt. Upon redirect the District Attorney put this single question: "Q. Counsel asked if the defendant said to you that he was in debt, and trying to get out of debt, and that was the reason he was dealing in this way. Now, did you understand this question?" This was a perfectly proper question, and was not objected to. In the course of his answer witness made the statement now complained of, viz., that defendant told him he sold a carload of shingles for half what they cost him. This was irresponsible to the question, but no objection was made to it, nor was any motion made to strike it out, nor any exception reserved. It would be unfair to the court to consider whether it was error or not to admit this particular statement about the shingles merely because an hour or so before the court refused to rule that it would exclude all further testimony about them, such ruling being made

at a time when no particular question indicating what was sought to be elicited was before the court for determination.

2. It is contended that the testimony of the witnesses Jones, Tackey, and Day in relation to letters received was incompetent, and the admission of such letters improper. It is difficult from the brief to make out what precisely is the point relied upon. Turning to the assignment of error bearing on Jones' testimony, we find that error is assigned in admitting the testimony of Jones that "he took out of the post-office box of the Boston Piano & Organ Company at Coshocton, Ohio, a letter addressed to Boston Piano & Organ Company, and signed 'F. A. Booth'; that the envelope was postmarked Rochester, N. Y.; that it was stamped with the post-office stamp in the regular way; that the stamp consisted of black marks." Turning to the record, we find that the witness produced the letter referred to, and testified that it was taken by him from the post-office box of the piano company, inclosed in an envelope; that (for reasons which he explained) he examined the envelope carefully, and, after taking the letter out, destroyed the envelope. The objections interposed were that the testimony was "not the best evidence, improper, incompetent, no evidence that it was ever deposited in the mail by defendant, no evidence that any post-office department had ever placed any postmark upon the letter." They were overruled, and exception reserved. Of course, additional evidence would be required to warrant a finding that the defendant deposited the letter in the mail, but it is difficult to understand upon what theory it could be held that the letter was not admissible, nor why the witness should not be allowed to describe the appearance and state the contents of a document (the envelope) which was lost or destroyed. The brief discloses no sound reason for the exclusion of this testimony, or of the testimony as to other letters and envelopes referred to under this point.

3. It is contended that the reception in evidence of the judgment roll in the action of Moline Pump Company against F. A. Booth was immaterial to the issue, and was improper, in that it was a violation of the fifth amendment of the Constitution of the United States and section 860, Rev. St. U. S. [U. S. Comp. St. 1901, p. 661]. Reference to the statement of facts, *supra*, will sufficiently indicate the materiality of the testimony. The other objections were not interposed when the proof was offered and admitted, the only exception reserved being "as immaterial, incompetent, improper." Other objections not then reserved cannot now be considered. An objection based on the Constitution and on a provision of the Code of Civil Procedure of the state of New York protecting persons from having testimony given by them upon supplementary proceedings used against them in a criminal proceeding was interposed to a question put to the lawyer who had entered the judgment referred to. It is of no moment, because no evidence was given or offered of any testimony elicited upon supplementary proceeding. All that was shown was that Booth had been examined in such a proceeding, and that the judgment was still unsatisfied.

4. It is contended that it was error to admit a letter head of a

firm known as "Booth Bros.," which had been in business for many years at Rochester, N. Y., the place named in defendant's letter heads. The Booth Bros. letter head reads: "Booth Bros., Shoe Machinery Manufacturers. Beading Machines a Specialty." We are unable to discover how this piece of evidence was in any way relevant or material towards establishing the issue that defendant had (by the use of his letter heads) pretended that he was engaged in a variety of businesses, when in fact he was not so engaged. It was manifestly error to admit it under the pleadings. And we cannot satisfy ourselves that such error was not prejudicial to defendant. The Booth Bros. heading had a tendency, however slight, to indicate an intention on defendant's part so to devise his letter head as to induce a person reading it to think that he was in some way connected with a concern bearing the same name "Booth," and engaged in the shoe machinery business in Rochester; which concern, as the evidence showed, had a good rating in Dun's Commercial Register. But no such fraudulent intent was charged against him in the indictment, and he came into court to try no such issue. Evidence tending to establish a different sort of fraud from that charged in the indictment was immaterial, and should have been excluded.

We think also that it was error to admit in evidence, apparently solely because it was found in defendant's office, a long typewritten list of names of firms and individuals, with amounts following their names, the list being headed with the word "Firms who want their money" written in pencil, and not shown to be in the handwriting of defendant. In the absence of any proof of handwriting, it could not be received as an admission of defendant; nor was it in any sense proof of the ordering or of the receipt of goods, or of their resale, or of failure to pay for the same. A like exception (incompetent and immaterial), which was reserved to nine packages of papers, not printed in the record, but said to contain bills and accounts, not receipted, from many dealers throughout the United States, is well taken. Presumably they were offered to show that defendant had ordered and obtained several thousand dollars worth of merchandise which he had not paid for; but they were not competent evidence to prove such fact. If the government thought it at all important to strengthen its case by showing that, in addition to the instances covered by the indictments, defendant had on many other occasions obtained and disposed of goods in the same way without paying for them, it might have established that fact by proof similar to that already introduced in the case of the Moline Machine Company, the piano company, and the oil company. The error must have been prejudicial to defendant. It must have helped to induce a belief in the jury's mind that defendant had carried on the same scheme in scores of instances, to the extent of thousands of dollars. Indeed, it is one of the assignments of error that in his summing up the District Attorney, holding the typewritten list in his hand, said to the jury, "If the defendant had paid any of these people, why had he not scratched their names from this list?"

Inasmuch as these errors in the admission of evidence require a

reversal it is unnecessary to consider any errors assigned for refusals to charge as requested. Defendant's counsel submits the point that the proof does not correspond to the facts set forth in the indictments, for the reason that all the acts specified in the indictments were committed at Stanley, N. Y., while the proof shows that at the time the acts were alleged to have been committed the defendant resided in Rochester, N. Y. What defendant's residence has to do with the offense charged we are wholly at a loss to conceive. The brief presents neither argument nor authority to support this point.

The judgment is reversed, and cause remanded for a new trial.

VON FABER-CASTELL v. FABER.

(Circuit Court of Appeals, Second Circuit. June 28, 1905.)

No. 180.

1. UNFAIR COMPETITION—FRAUDULENT USE OF NAME.

Defendants, having the undisputed right to use the name "Eberhard Faber" on their goods, are not chargeable with fraud constituting unfair competition because of the use of the name "E. Faber."

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 75, 84.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

2. SAME—SUIT TO RESTRAIN—RIGHTS GOVERNED BY CONTRACT.

The parties entered into a contract to settle their respective rights with respect to the use of the name "Faber" on lead pencils made and sold by them, which provided that "the firm of Eberhard Faber [defendant] binds itself to stamp all manufactures connected with lead pencils * * * not without first name, or at least with the initials of the first name." Defendant afterward used the name "E. Faber" on its goods as it had previously done. *Held*, that the use of such name was not in violation of the contract, but, even if so, the remedy of complainant was by a suit for its enforcement, or an action to recover damages for its breach, and that he could not ignore the contract and maintain a suit for unfair competition.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 124 Fed. 603.

This is an appeal by the defendant from a decree of the Circuit Court for the Southern District of New York, entered July 19, 1904. The decree is for an injunction and an accounting and enjoins the defendant from using the name "Faber" in connection with the manufacture and sale of pencils and stationers' rubber goods unless prefixed by his Christian name "Eberhard," "J. Eberhard" or "John E." The facts are carefully collected in the opinion of the Circuit Court (124 Fed. 603), and need not be repeated here.

Charles T. Haviland and Benjamin F. Tracy, for appellant.
F. W. Hinrichs, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The bill was filed to restrain unfair competition in trade. The entire controversy centers about the right of the defendant to use the name "E. Faber" in connection

with the business of making and selling lead pencils. The right to use his full name, "Eberhard Faber," is not now disputed; the decree of the Circuit Court permits such use and the complainant has not appealed. Neither does the complainant deny the right of the defendant to use the name "E. Faber" in connection with penholders made by him.

When it is realized that the principal accusation against the defendant is that he prefixed his surname with "E." instead of "Eberhard" it will be seen that the charge of fraud rests upon an exceedingly narrow and insecure foundation. In the recent case of *Howe Co. v. Wyckoff* (decided April 24, 1905) 25 Sup. Ct. 609, 49 L. Ed. —, the Supreme Court has reasserted and reaffirmed in clear and unequivocal language the right of every man to use his own name in all legitimate ways.

For reasons hereafter stated we are of the opinion that this action cannot be maintained as one to restrain unfair competition, but, assuming that it can be, the evidence fails to establish fraud on the part of the defendant, and fraud is the foundation of such an action. He may use the name "Eberhard Faber" indiscriminately in his business, he may use the name "E. Faber" in connection with part of the articles manufactured and sold by him, but the moment he uses "E. Faber" in the sale of lead pencils he commits a fraud on the complainant and the public. This is the proposition, but the evidence fails to sustain it. We are unable to say that the defendant used the initial of his Christian name, rather than the name in full, with a fraudulent intent, or that he has reaped any unfair advantage therefrom or that the public has been deceived thereby. The controversy, in so far as it is based upon a distinction so attenuated, seems to us inconsequential. We find the testimony quite insufficient to warrant the finding of a fraudulent purpose in the substitution of the initial of the name for the name itself. If the use of "Eberhard" be honest the use of "E." cannot be fraudulent. But the action cannot, in any view, be maintained as one for unfair competition.

On the 16th of March, 1898, the parties entered into an agreement settling their more important differences and, among them, the controversy which is the subject of this action. Paragraph 5 is as follows:

"The firm of Eberhard Faber binds itself to stamp all manufactures connected with lead pencils traceable to its establishment, not without first name, or at least with the initials of the first name, and under all circumstances to avoid anything which could tend to confusion as to the manufactures of the two firms."

If, then, the defendant has complied with the terms of this contract no action of any kind will lie against him. If he has broken the contract the complainant's remedy is twofold—either in equity for specific performance or at law for damages for the breach. The present action is neither.

It is said that the contract was originally written in German and that the word translated "initials" should have been translated "initial," but the court is not sufficiently versed in the intricacies of the

German language to determine this question. We think, however, that irrespective of the alleged inaccuracy in translation the defendant fully complied with the contract when he stamped his manufactures "E. Faber." It will be observed that the contract was not between individuals but between firms—the firm of A. W. Faber on the one side and the firm of Eberhard Faber on the other. This distinction is pointedly emphasized in the last clause of the contract which provides that "this agreement shall have full validity only after Mr. John Eberhard Faber, as copartner of the firm of Eberhard Faber, shall have added his signature here below." The contract is signed: "A. W. Faber, Lothar W. Faber, Eberhard Faber." It is not, therefore, necessary to look beyond the contract to see that the firm of Eberhard Faber was composed of himself and Lothar W. Faber as copartners, that the covenants and agreements were made by the firms respectively and that when the defendant signed his name as copartner on behalf of the firm it was Eberhard Faber simply. What then is the fair construction of the contract?

"The firm of Eberhard Faber binds itself" to stamp all lead pencils and so on made by it "not without," namely, "with," its first name, or at least with the initials of its first name. The firm name was Eberhard Faber, the first name was Eberhard and the initial of the first name was E. When, therefore, the defendant stamped his goods "E. Faber" he was within the terms of his agreement. The language of the contract, due perhaps to the translation, is infelicitous and inexact, but any other interpretation leads to more serious complications. It can hardly be maintained that when the contract states explicitly that the firm binds itself, it meant that one member, of the firm binds himself. If the firm agreed to stamp its goods with the name of but one of the partners, which partner was referred to? It is most improbable that it was intended that the names of both partners should be used for that would have required "Lothar W. Faber and Eberhard Faber" or "L. W. and E. Faber" to appear on each pencil—a most clumsy and inartistic mode of stamping. Moreover, if it were the purpose of the contract to provide for the use of the names of the partners rather than the name of the firm the words "first name" would not be twice repeated in the paragraph in question. It seems improbable that the partners would have used the language of this paragraph if the complainant's contention be correct. There would have been no ambiguity if they had provided that "the firm of Eberhard Faber binds itself to stamp all its manufactures Eberhard Faber, J. Eberhard Faber, John E. Faber or J. E. Faber."

The fact that the defendant had for many years prior to the contract used the trade-name "E. Faber" and has consistently refused to change it, together with the complainant's acquiescence in the use of such name after the contract, is in strong corroboration of the construction contended for by the defendant. We think this construction is sustained by the great preponderance of reasoning, but assume that it is not; how then stands the case? If the complainant's construction be correct he holds a contract whereby the defendant has promised and agreed not to use the name "E. Faber."

As there is no doubt that the defendant has used this name openly and persistently the complainant has a perfect cause of action against him either in law or equity, as he may elect. The same is true if the view be taken that the language of the contract is so ambiguous and doubtful as to require the construction of a court of equity. In no view of the situation can the complainant be permitted to ignore this agreement, cast it aside and proceed upon the theory that the defendant has made "improper, wrongful, wicked and fraudulent use of the name 'Faber.'" The decree specifically finds that the defendant "has been guilty of fraud in unfair competition in trade with the house of A. W. Faber." These allegations and this finding are not, we think, justified by the proof. The contract of 1898 is a valid subsisting agreement. The most favorable view which the complainant can expect is that the defendant has mistaken its import, misinterpreted its provision and in this way has violated its stipulations. But one may not be convicted of fraud because he misinterprets an instrument couched in obscure and misleading language. It is enough that the defendant has, in all essential particulars, complied with the contract as he understood it.

The decree is reversed and the cause is remanded to the Circuit Court with instructions to dismiss the bill with costs.

WALLACE, Circuit Judge. I do not think the agreement of March 16, 1898, would be an obstacle to the present action if the defendant had made any unwarranted use of his name for the purpose of unfair competition with the complainant, but am in favor of reversing the decree because the proofs do not show that the defendant has done so. By that agreement, according to its only rational construction, it was settled between the parties that the initial "E." should stand for the full name "Eberhard" when used in the lead pencil business by the latter. Irrespective of the effect of that agreement, there was no unfair or fraudulent use by defendant of the initial.

UNITED STATES v. FARRAR.

(Circuit Court of Appeals, Second Circuit. May 24, 1905.)

No. 236.

PRISONS—ALLOWANCE FOR GOOD TIME—FEDERAL STATUTE.

Act June 21, 1902, c. 1140, 32 Stat. 397 [U. S. Comp. St. Supp. 1903, p. 448], provides in section 1 that each prisoner "who has been or shall hereafter be" convicted of any offense against the United States, and imprisoned therefor, shall be entitled to an allowance of good time, as therein specified. Section 3 provides that the act shall apply "only to sentences imposed by courts subsequent to the time when this act takes effect." Held that, the two provisions being in direct conflict, the third section, being the later, and also the more specific, must govern, and that the act does not apply to prisoners sentenced before its passage.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prisons, § 26.]

Appeal from the District Court of the United States for the District of Vermont.

For opinion below, see 133 Fed. 254.

James L. Martin, for the United States.

L. C. Moody and John H. Seuter, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This appeal from an order in habeas corpus discharging the relator presents a question of the proper construction of the act of Congress of June 21, 1902, c. 1140, 32 Stat. 397 [U. S. Comp. St. Supp. 1903, p. 448], entitled "An act to regulate commutation for good conduct for United States prisoners."

May 19, 1900, the relator was convicted of a criminal offense against the laws of the United States, and sentenced to imprisonment in the House of Correction at Rutland, Vt., and was in confinement in execution of that sentence when the act of Congress took effect. If the act was applicable to prisoners who had been convicted and were in confinement at the time when it took effect, the commutation for good conduct therein specified would have entitled the relator to be discharged. If the act was not applicable to such prisoners, the court below erred.

The act, so far as it is material, reads as follows:

"Section 1. That each prisoner who has been or shall hereafter be convicted of any offence against the laws of the United States, and is confined, in execution of the judgment or sentence upon any such conviction, for a definite term, other than for life, * * * whose record of conduct shows that he has faithfully observed all the rules, and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence, to be estimated as follows: Commencing on the first day of his arrival at the penitentiary, prison or jail. [The section then specifies different commutations regulated by the term of sentence.]"

"Sec. 2. That in the case of convicts in any United States penitentiary the Attorney General shall have the power to restore to any such convict, who has heretofore or who may hereafter forfeit any good time by violating any existing law or prison regulation, such portion of lost good time as may be proper in his judgment, upon recommendations and evidence submitted to him by the warden in charge. * * *"

"Sec. 3. That this act shall take effect and be in force from and after thirty days from the date of its approval, and shall apply only to sentences imposed by courts subsequent to the time that this act takes effect, and hereinbefore provided. Prisoners serving under any sentence imposed prior to such time shall be entitled to and receive commutation heretofore allowed under existing laws. Such existing laws are hereby repealed as to all sentences imposed subsequent to the time when this act takes effect."

The repugnancy between the first and third sections of the act is plain, and utterly irreconcilable. The court below based its opinion upon these reasons:

"The provisions of the second section, being wholly free, those of the third can be applied to them without touching the very express provisions of the first. This will leave all the words to have some operation, and somewhat reconcile what would otherwise be a plain contradiction."

In this we are unable to concur. The provisions of the second section are wholly independent of those of the first and third, and apply to all convicts who have "heretofore or may hereafter" vio-

late any prison regulations; thus distinctly specifying the class to which its provisions shall apply.

The single question is, which of the two repugnant clauses ought to be rejected? One rule of construction is that, where there is irreconcilable conflict between different clauses of the same statute, the last in order of position must control. Another is that the clause which is directed especially to the particular subject must prevail, as regards the subject, over those mentioning it incidentally. The authorities illustrating the application of these rules are collected in Vol. 26, Am. & Eng. Enc. of Law (2d Ed.) 619, 620.

The first section of the act treats of the general subject and conditions of commutation to prisoners. The third section relates exclusively to the time when the act shall go into operation, and the prisoners to whom it shall not apply. It exempts from the general class those prisoners serving under any prior sentence, and, to emphasize the meaning of Congress that the privileges of the act shall not extend to the exempted class, expresses that meaning twice, and in different terms. As the third section is more detailed, and more carefully expressed than the first, in respect to the prisoners who shall be entitled to the commutation, it must be presumed that it expresses the more matured judgment of the legislative mind upon that particular subject.

The repugnancy between the two sections would not exist if the words "has been or" had been omitted in the first section. Apparently section 3 was inserted as supplementary to the bill as originally framed. It is probable that when the third section was added these words were inadvertently retained.

We conclude that the relator was not entitled to the benefit of the act, and that the order of the court below was erroneous.

The order is accordingly reversed.

CARY MFG. CO. v. DE HAVEN.

(Circuit Court of Appeals, Second Circuit. May 24, 1905.)

No. 213.

PATENTS—DAMAGES FOR INFRINGEMENT—BOX-STRAP REEL.

A decree awarding nominal damages only for infringement of the Cary patent, No. 403,247, for a reel for metal box-strap, affirmed on evidence showing that the reel was of slight value or utility; that in selling box-strap both complainant and defendant mounted the coils upon reels, for which no charge was made; and that the strap was salable independently of the reels.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

For opinion below, see 88 Fed. 698.

A. G. N. Vermilya, for appellant.

W. P. Pooble, Jr., for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The decree appealed from adjudged that the defendant has not infringed complainant's patents for an improvement in box-strap, and, as to those patents, dismissed the bill. It also adjudged that defendant had infringed complainant's patent No. 403,247, for an improvement in a reel for box-strap, and awarded complainant nominal damages for such infringement, and an injunction restraining future infringement.

The complainant has appealed from so much of the decree as awards nominal damages only against the defendant for the infringement of the reel patent, and, by its assignments of error, insists that the decree was erroneous in refusing to it a recovery of profits and damages in a substantial amount.

During the period of infringement—from August, 1893, to September, 1898—the complainant and defendant were competitors in the business of making and selling iron box-strap, an article used for strapping packing boxes, which is made of sheet metal, and wound into a coil, from which the user cuts the desired length to fit the box to which it is to be applied. For convenience in handling it, the coiled strap is commonly put up in a frame or reel. The complainant and defendant usually sold the strap coiled in the reels to their customers, making the price for the strap only, as the cost of the reel was a trifling item. During the period of infringement the defendant made and sold 31,000 of the patented reels having the strap coiled thereon, but, as he made no charge to his customers for the reels, he did not make any profits upon the reels; and, as the complainant did not make any charge to its customers for its reels, it did not sustain any damages by the loss of profits upon them caused by the diversion of its traffic by the defendant.

The complainant insists that the strap could not have been sold without the reels, and for this reason that it should have been awarded the profits which the defendant made upon the strap sold by him during the period of infringement, together with the damages accruing from loss of complainant's profits upon diverted sales of strap during that period. If the proofs had shown that the strap could not have been sold except with the patented reels, the contention for the appellant would be supported by the authority of cases like *Wales v. Waterbury Manufacturing Co.*, 101 Fed. 126, 41 C. C. A. 250. But the proofs do not show this, and not only the direct evidence, but also the presumptions deducible from the small utility of the patented invention, authorize and require a contrary conclusion. That the strap was salable independently of the reels is shown by the fact that during the period of infringement and subsequently the defendant sold it in considerable quantities without reels, as well as with reels which did not infringe the patent. The proofs also sustain the finding of the master upon the accounting that the complainant sold it during the period of the infringement "both with and without having a reel or frame attached, and made no advance of price in the box-strap by reason of attaching the patented reel." While the evidence shows that the purchasers of strap generally wanted the reeled strap, it does not show that they cared particularly whether the strap was mounted up-

on a reel containing the invention of the patent, or upon a reel or frame which did not contain the invention. The necessity for a frame or reel arose from the elastic nature of the strap. As the strap is cut from sheet metal in long strips (some 300 feet long), it requires to be put in compact form for handling and transportation, and consequently is usually wound in a coil; and thus it requires to be held in place, or it will partly uncoil and fall apart. Before the patented reels were made the coiled strap was sold by the patentee in a shallow circular box, made of thick paper, having a slit in the edge to permit the strap to be pulled out. Manifestly, when the strap was put in such a box it could be readily transported and conveniently used; and there is no reason to doubt that, if purchasers had been offered it at a reduced price, they would have bought it freely, and probably as freely when put up in that form as if it was mounted in the patented reel.

The patented reel is a frame consisting of a metal band bent upon itself so as to form two arms, one extending across the front and the other across the rear of the coil of box-strap, and having a spool mounted upon a metal peg between the two arms. The arms have holes at their upper and lower ends—one for the insertion of the metal peg on which the spool is mounted, and the other for inserting a nail or peg for fastening the frame against a post or other convenient support. When the strap is coiled around the spool, the spool is placed in the frame, and the metal peg is inserted. The coiled strap will then be held in place for transportation, and when it reaches the user he can nail it against a wall or post, cut off a desired length, and when that length is cut off the rest of the coil remains compact. The only novel feature in this device was the resiliency of the arms. This enabled them, by driving in the nail at the upper end, to operate as a brake to prevent the strap from being reeled off too rapidly. Whether this theoretical advantage ever attracted a purchaser does not appear. No witness speaks of it as influencing his purchase, and, so far as appears, no user ever discovered its practical value. In considering the question of the validity of the patent, the learned judge of the court below said: "The patent is an extremely narrow one. It would not be infringed by defendant's device if the latter had its arms rigid against compression, so that they could not act as brakes." If the arms of defendant's device had been made of sheet metal a trifle thicker than that used, it would not have infringed the patent.

The theory that an invention of this insignificant value was so indispensable to the users of box-strap that no purchasers would have been found for the strap unless it was put up in the patented reel is preposterous. While it may be conceded that the patented reels helped to sell more or less of the box-strap, the proofs utterly failed to show that the strap would not have been marketable except as an adjunct to them.

The judgment is affirmed, with costs.

WESTINGHOUSE AIR BRAKE CO. v. NEW YORK AIR BRAKE CO.

(Circuit Court, N. D. New York. July 22, 1905.)

No. 6,971.

1. PATENTS—DISCLAIMER—CONSTRUCTION AND EFFECT.

A disclaimer filed under Rev. St. § 4917 [U. S. Comp. St. 1901, p. 3393], cannot validate a claim of a patent except as to something of which the patentee was the inventor, and which was "a material and substantial part of the thing patented." A claim too broad in its terms cannot be rendered valid by a disclaimer of all except a particular form of construction which may or may not have been embraced in the broad language of the claim, but which, if so, was not in any way specified or suggested therein as distinguished from other forms of construction.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 224, 227½.]

2. SAME—ENGINEER'S VALVE FOR CONTROLLING AIR BRAKES.

The Westinghouse and Moore patent, No. 401,916, for an improved engineer's brake valve, claim 7, is void, as too broad in its terms, and was not rendered valid by the disclaimer filed June 13, 1902. Also held not infringed, conceding its validity.

Suit in equity for injunction to restrain alleged infringement of claim 7 of United States letters patent No. 401,916, as limited by a disclaimer filed about June 13, 1902, dated April 23, 1889, for new and useful improvements in engineers' brake valves.

Frederick H. Betts and J. Snowden Bell, for complainant.

Charles Neave and Edmund Wetmore, for defendant.

RAY, District Judge. Heretofore this patent, No. 401,916, dated April 23, 1889, issued to George Westinghouse, Jr., and Frank Moore, for new and useful improvement in engineers' brake valves, and now owned by complainant, has been the subject of litigation between these same parties. *Westinghouse Air Brake Co. v. New York Air Brake Co.* (C. C.) 112 Fed. 424, reversed 119 Fed. 874, 56 C. C. A. 404. In that suit claims 3, 4, 6, 7, 8, and 9 were at first involved. At the circuit Judge Coxe said:

"The eighth claim is the same as the fourth with an additional element added, namely, 'a direct exhaust-passage leading from the valve-seat to the atmosphere.' This exhaust-passage is found in the defendant's structure. It is thought that the claims are valid and infringed. The other claims, speaking generally, are repetitions of the fourth and eighth. In some instances unimportant features are omitted and in others new features are included, but they all contain the essential elements of the invention, except the seventh, which omits all reference to the equalizing-piston and supply-port, which are features of fundamental importance. All of the claims, technically are infringed, but claim 7 is of doubtful validity, and claims 3, 6 and 9 do not seem necessary in addition to claims 4 and 8. These latter claims secure to the complainant every right to which it is entitled and the court, as now advised, can see little reason for including others."

Claim 7, now in suit, was withdrawn, as were, it seems, 3, 6, and 9, by consent of the court, before or at the time the decree was signed. The Circuit Court of Appeals held not only that claims 4 and 8 had not been infringed by defendant's device, but that

the patent in suit is in no sense a pioneer patent, and that in view of the prior art it must be limited to the precise construction shown, or its equivalent. This suit is upon claim 7 of said patent, declared by Judge Coxe to be of "doubtful validity." As limited, or attempted to be limited, by the disclaimer, the validity and effectiveness of which is challenged by the defendant, the complainant insists that the claim is valid, and discloses patentable invention in view of the prior art. Claim 7 reads:

"(7) In an engineer's brake-valve, the combination of a valve casing or chamber, a main air-reservoir connection, and a brake-pipe connection leading thereinto, a direct supply-port formed in a valve-seat in the chamber and adapted to establish direct communication between said connections, a direct exhaust-passage leading from the valve-seat to the atmosphere, and a regulating-valve working on the valve-seat and controlling the direct supply-passage and having a recess or cavity adapted to establish communication between the brake-pipe connection and the direct exhaust-passage, substantially as set forth."

The disclaimer, so far as material, reads:

"(3) That in a certain suit pending and recently decided in the Circuit Court of the United States for the Northern District of New York, between your petitioner and the New York Air Brake Company, doubts have been expressed whether or not the 7th claim of said patent No. 401,916 is not too broad, and whether, therefore, the said letters patent does not, as to its 7th claim, include matter which the said patentees and their assignee, your petitioners, are not entitled to hold and claim by virtue of said letters patent.

"(4) That in so far as said 7th claim is, or should be, construed to be too broad, and to include more than that of which the said Westinghouse and Moore were the first and original inventors or discoverers, the error has arisen through inadvertence, accident, and mistake, and without any fraudulent or deceptive intention on the part of the said patentees or your petitioners.

"(5) That the subject-matter not disclaimed herein and hereby is definitely distinguishable from the part or parts claimed without right as aforesaid.

"Your petitioner, therefore, for the purpose complying with the requirements of law, and disclaiming so much or those parts of the 7th claim which your petitioner does not choose to claim or hold by virtue of said letters patent, does hereby enter its disclaimer to so much or such part of claim 7 of said letters patent as includes or may be construed to include

"An engineer's brake-valve (otherwise complying with the said claim) which is not provided with a movable abutment, working in a chamber in the valve casing and controlling a discharge valve from the brake-pipe to atmosphere, substantially as described in the specification."

It will be noted that the complainant enters its disclaimer to so much and such part of claim 7 as includes (if it does) "an engineer's brake-valve which is not provided with a movable abutment, working in a chamber in the valve casing and controlling a discharge valve from the brake-pipe to atmosphere, substantially as described in the specification"; that is, the claim as now made, takes in and includes every engineer's brake valve which is provided with a movable abutment working in a chamber in the valve casing, and also controlling a discharge valve from the brake pipe to atmosphere, as is described in the specifications, viz.:

"A movable abutment, 19, which is preferably a piston, as shown, but which may, if preferred, be a flexible diaphragm, is fitted to work freely in a chamber, 22, which communicates with the pipe, 18, so that the piston, 19, may be

subject on its lower side to the pressure in the brake-pipe. The piston, 19, is secured upon a stem, 20, the lower end of which carries a discharge-valve, 21, which is adapted to close upon a seat at the inner end of a discharge-pipe, 23, leading from the pipe, 18, to the atmosphere. The packing-ring, 4, which is interposed between the sections of the valve-chamber, extends into the piston-chamber, 22, so as to provide a bearing-surface for the piston at the upper extremity of its traverse, and thereby act, in addition to the packing of the piston, to prevent leakage past the same. The piston-chamber, 22, communicates above the piston, 19, with a chamber, 24, in the upper valve-casing section, 1, the chamber, 24, being connected by a pipe, 25, with a small supplemental chamber, 26, in order to provide an increased capacity for the storage of air under pressure."

Elements of claim 7 will therefore be: (1) An engineer's brake valve, provided with (2) a movable abutment, (3) such movable abutment working in a chamber located in the valve casing and controlling a discharge valve from the brake pipe to atmosphere. Note that in claim 7 the valve casing and chamber seem to be the same thing. Movable abutments were old, as were engineer's brake valves. The claim so limited, so far as the abutment, etc., is concerned, relates to alleged new elements in a combination, viz.: (a) The place where the abutment works (inside a chamber), and (b) the location of the chamber (within the valve casing), and (c) the function of such abutment, which is to control a particular discharge valve, viz., that from brake pipe to atmosphere. Or, first, location of abutment; second, location of chamber containing abutment (the location of the chamber of course controls the location of the abutment); and, third, the function of the abutment so located in controlling the discharge valve. Claim 7, as it reads, has these elements in combination, viz.: (a) An engineer's brake valve. (b) Valve casing or chamber. (c) Main air-reservoir connection. (d) Brake-pipe connection leading thereinto. (e) A direct supply port formed in a valve seat in the chamber, and adapted to establish direct communication between said connection. (Main air reservoir connection and brake-pipe connection leading thereinto.) (f) A direct exhaust passage leading from the valve seat to the atmosphere. (g) A regulating valve working on the valve seat and controlling the direct supply passage, and having a recess or cavity adapted to establish communication between the brake-pipe connection and the direct exhaust passage.

It seems to me that in the claim as attempted to be limited by the disclaimer we have something substantially different from and additional to what was first claimed. In fact, the disclaimer operates not as a limitation and a striking out or exclusion of something included by the terms of the claim that ought not to have been included because not invented by the patentee, but to substitute a new claim; a claim for something neither mentioned nor referred to in the claim itself as written in the letters patent. Where, among the elements of claim 7 as given above, a to g, inclusive, do we find any reference to or description of a "movable abutment," or of a "movable abutment working in a chamber in the valve casing and controlling a discharge valve from the brake pipe to atmosphere, substantially as described in the specification"?

Yet, to make a valid claim, concededly this must be read in the claim. Having claimed too much, too broadly, and not having claimed that which it is now desired to claim, or which it was desired to claim when the disclaimer was filed, the complainant says, in substance, I disclaim all of claim 7 except, etc., and then writes in the disclaimer the claim he desires to make, which is for a structure or mechanism that may (possibly) and may not have been embraced within the broad language of the claim as written, but which, if so included, was in no way specified or suggested therein or thereby as distinguished from other forms of construction, and says, "I disclaim everything except this kind of an engineer's brake valve;" that is, one having this particular element or these particular elements (describing them); elements not before in the combination of the claim. I do not understand that this claim can be amended and changed and enlarged in this way under the guise of disclaimer.

By section 4917 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3393] it is, in substance, provided that when a patentee by mistake, etc., claims more than he is entitled to, and it was included in his claims without fraud or fraudulent intention, his patent shall be held good and valid for what he really invented and is entitled to, provided the same is a material and substantial part of the thing patented. I fail to discover that "a movable abutment working in a chamber in the valve casing and controlling a discharge valve from the brake pipe to atmosphere" is a material or substantial part of the thing patented by claim 7. And I understand that statute to mean that, to be a material and substantial part of the thing patented, that which the patentee really invented must be mentioned in the particular claim to which the disclaimer relates. To make it so we must assume (1) that such an abutment so located and so working, and so controlling such a discharge valve, is a part of every engineer's brake valve, and that to have a brake valve at all we must have such an abutment so located and so working and performing the function specified, and that it was a material and substantial element of the combination described in claim 7. He may disclaim such part of the thing patented as he chooses not to claim. In this case complainant has disclaimed what? Something he describes as being a part of the thing patented? No. Something that is mentioned or described in the thing patented? No. But generally all engineer's brake valves which are not provided with a certain thing (abutment) located at and working in a certain place and controlling a certain valve, whether they are or are not included in and covered by the patent so as to form a substantial part of the thing patented. The truth is the complainant neither mentions nor describes what it disclaims or desires to disclaim, for the reason that it cannot. By the peculiar wording of the disclaimer complainant describes what it desires to insert in the claim, not what it wishes to exclude or disclaim, and in so doing describes something not before included in the claim, but by fair and necessary implication excluded therefrom for reasons that will be stated.

Section 4922 of the Revised Statutes is as follows :

"Sec. 4922. Whenever, through inadvertence, accident, or mistake, and without any willful default or intent to defraud or mislead the public, a patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators, and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof, which was bona fide his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in every such case in which a judgment or decree shall be rendered for the plaintiff no costs shall be recovered unless the proper disclaimer has been entered at the Patent Office before the commencement of the suit. But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer." [U. S. Comp. St. 1901, p. 3396.]

Is the "movable abutment" mentioned a material and substantial part of the thing patented, and is it definitely distinguishable from the parts claimed without right? That is, can we in any way find it described or mentioned in claim 7? I search claim 7 in vain for the description or mention of or reference to an engineer brake valve "provided with a movable abutment, working in a chamber in the valve casing, and controlling a discharge valve from the brake pipe to atmosphere," described in the specification. This position is made more emphatic and pointed by a reference to claims 3, 4, 5, 6, 8, and 9, in all of which we find the element of a movable abutment, etc., fully described. For instance, claim 3: "The combination of a movable abutment fitted to work in a chamber," etc. In claim 4: "The combination of a valve casing, * * * a movable abutment fitted to work," etc. We are not so to read and construe claim 7 (as in the patent unaffected by the disclaimer) as to make it cover and include the same elements as one or more of the other claims. The presumption is against repetition. This we would do should we construe claim 7 as the complainant insists we should do. The same element may be described in different claims of the same patent by the use of different language in each claim, and the element may be given a different name, but in some way and by some language it must be made an element.

Plainly omitted from claim 7 intentionally, this element of "a movable abutment," etc., cannot now be read into it by means of a disclaimer such as this for the purpose of avoiding a finding that the claim is invalid, as it was held to be by Judge Coxe in the case cited. In that holding this court concurs. That opinion of the learned judge is not *res adjudicata*, or in any sense binding, for the reason that finally claim 7 was permitted to be withdrawn from consideration in that suit; but on careful consideration this court holds that the situation of complainant is not improved by the disclaimer, and that claim 7 sued upon is invalid. A reference to the cases cited in which this patent was considered will disclose the reasons for this finding, and they will not be repeated here.

On the question of the disclaimer many cases might be cited,

but it seems to this court that *Albany Steam Trap Company v. Worthington*, 79 Fed. 966, 25 C. C. A. 258, controls this case. There, of a disclaimer which read:

"Your petitioner therefore hereby disclaims any apparatus, as included in the claims of said patent, which is not directly connected with the return pipe, H, under the pressure of the return from the heating system without escape to the atmosphere."

—the court said:

"The difficulty with this contention is that it substitutes a different invention from that described and claimed in the patent. It is not a narrower claim, but a different one. It is, as defendants suggest, 'an attempt to incorporate into a claim for a combination a feature which had not been claimed in connection with that combination before, and thereby make a new combination.' We do not understand that the statutory provisions allowing a disclaimer to be filed can be thus availed of to change the invention claimed in a patent, and we are referred to no authorities which sustain complainant's contention. The object of a disclaimer is well expressed in *Chemical Works v. Lauer*, 5 Fish Pat. Cas. 615, Fed. Cas. No. 12,135: 'It is designed to allow a patentee to recover on one claim of his patent, notwithstanding other claims in it are void for want of novelty. But it requires that the parts claimed without right, and the parts rightfully claimed shall be definitely distinguishable, as matter of fact, on the face of the claims; that is, be definitely distinguished from each other in the claims.'"

In *Thompson v. Bushnell*, 96 Fed. 238, 37 C. C. A. 456 (Second Circuit), the claims (1 and 2) were for "a saw." The specifications referred distinctly to four different kinds of saws—a circular saw, a back saw, a hack saw, and a band saw. The complainants disclaimed so much of said claims as cover "circular saws" and "back saws," leaving said claims to include only "hack saws" and "band saws." True, the claims did not read "a circular saw, a back saw, a hack saw, and a band saw," but, read with the specifications, they included all these saws. The disclaimer specifically states what it excludes—disclaims—viz., "circular saws" and "back saws," and what it retains and claims, viz., "hack saws" and "band saws." This seems to have been a strict compliance with the statute. In the case now under consideration the disclaimer neither states what it excludes nor what it includes. Generally, and in general language, all of a general description having certain characteristics are included; all others are excluded. Here, in claim 7, we find no reference whatever to engineers' brake valves provided with a movable abutment working in a chamber in the valve casing and controlling a discharge valve from the brake pipe to atmosphere, or to one provided with any kind of an abutment. The claim is for a combination that does not include such or any movable abutment or piston. But, should this court give recognition to the disclaimer, it holds that defendant does not infringe. The Circuit Court of Appeals, in passing on certain claims of this patent, has held that its claims must be strictly, not broadly, construed. Complainant is confined to what is specifically described. Defendant must use every element of complainant's device, operating in substantially the same way, to produce substantially the same result. This it does not do. In view of the thorough discussion of the claims of this patent by Judge Cox at circuit and

by the Circuit Court of Appeals on review by that court, it seems to this court unnecessary to more than refer thereto on this branch of the case. It seems to this court that the decision of the Circuit Court of Appeals in the case between these same parties, already cited, covers this proposition.

The defendant is entitled to a decree dismissing the complaint, with costs.

STONEGA COAL & COKE CO. v. LOUISVILLE & N. R. CO.

(Circuit Court, W. D. Virginia. June 1, 1905.)

FEDERAL COURTS—JURISDICTION—RIGHTS OF PARTIES—WAIVER.

Where a federal court in which suit was brought was without jurisdiction, because neither plaintiff nor defendant resided in the state or district, and such want of jurisdiction was raised by demurrer, defendant did not waive the objection either by appearing at the taking of depositions and cross-examining witness without declaring its intent to insist on its objection to the jurisdiction, or by stipulating during the taking of such depositions that copies of letters and telegrams might be used by either party in lieu of the originals.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 147.]

J. F. Bullett, for plaintiff.

Helm, Bruce & Helm and C. T. Duncan, for defendant.

McDOWELL, District Judge. This was an action at law commenced in this court, at Abingdon, by a summons returnable to the first rules in January, 1905. The declaration was filed on the return day of the writ, and at the next rules (January 16, 1905) the defendant, making then its first appearance, filed the following demurrer:

"Defendant, the Louisville & Nashville Railroad Company, a corporation, specially appearing for the purpose, and only for the purpose, of objecting to the jurisdiction of the court over defendant in this action, demurs to the declaration herein because it shows that neither the plaintiff nor the defendant is a citizen or resident of Virginia, or of the Western District thereof, and that this court has no jurisdiction over defendant in this action. And this," etc.

On January 13, 1905, the plaintiff gave the defendant notice to attend the taking of depositions on January 27th. The defendant attended, did not make protest or otherwise then assert its intention to rely upon its objection to the jurisdiction of this court, and cross-examined the witnesses. During the taking of the deposition counsel made an agreement, the nature of which will be stated later. At the first term of this court held at Abingdon after the institution of this action, counsel for the parties appeared and argued the question of jurisdiction, and the matter was taken under advisement.

As the plaintiff is a citizen of New Jersey, and the defendant a citizen of Kentucky, it is conceded by the learned counsel for plaintiff that this court has no jurisdiction (*Railroad v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; *Railway v. Allison*, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078), unless the want of jurisdiction has been waived (*Central Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286). The argument that there has been a waiver is based

on the fact that the defendant, pursuant to notice given in pais by plaintiff, attended the taking of depositions and cross-examined the witnesses without then expressly declaring its intent to insist on its previously made objection to the jurisdiction, and also on the fact that during the taking of the deposition the defendant stipulated with plaintiff that copies of letters and telegrams might be used by either side in lieu of the originals.

The first proposition has been expressly decided by the Circuit Court of Appeals of this circuit against the contention of the plaintiff. *Pacific Ins. Co. v. Tompkins*, 101 Fed. 539, 541, 41 C. C. A. 488. In this court this question is, of course, not open to discussion.

Whether or not the stipulation entered into between counsel during the taking of the depositions can be considered as waiving the objection has, so far as I am aware, never been decided. If the act of the defendant in attending the taking of depositions without protest, in cross-examining the witnesses, and in thus learning all that could be learned from the plaintiff's witnesses concerning the merits of the controversy, is not a waiver, it would seem to follow that the mere making of the stipulation in question could not be a waiver. The actual decisions of the Supreme Court, so far as I have found, go no further than to hold that pleading to the merits will waive objections to the jurisdiction such as we have here. But if an implied waiver can be otherwise made (*Wabash W. Ry. v. Brow*, 164 U. S. 271, 278, 17 Sup. Ct. 126, 41 L. Ed. 431), it seems to me that it must be made by such an act as either shows necessarily an intent to abandon the objection to the jurisdiction, or such as results in giving the defendant an inequitable advantage over his opponent. I cannot perceive that entering into the stipulation here in question did or could prejudice the plaintiff or give the defendant any unfair advantage. Nor did making this stipulation necessarily show an intent to waive the objection to jurisdiction. Making the agreement was consistent with the fullest intent to insist upon the objection, which had been previously filed, and which was urged at the first opportunity. It seems to me to be carrying the doctrine of waiver beyond reason to hold that mere preparation in pais for trial in the event that the trial court rules against one objecting to the jurisdiction shall constitute a waiver of his objection. Such acts show a doubt as to how the court will decide the question, but not necessarily the slightest intent to abandon the objection. It is settled that, if a defendant makes and unsuccessfully urges his objection to the jurisdiction, he can thereafter plead to the merits and enter into a trial of the cause without thereby waiving his right to insist on the objection to the jurisdiction in the appellate court. *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237, 9 Rose's Notes, 661; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 206, 13 Sup. Ct. 44, 36 L. Ed. 942. This being true, it follows that a defendant does not necessarily waive his right to object to the jurisdiction in the trial court by mere preparation for trial, in order to be ready for an adverse decision of the question. It is a familiar illustration of the often perverted doctrine that ignorance of law excuses no one that the utmost confidence of defendant's counsel in the soundness of a

preliminary objection to a plaintiff's pleading does not, in the event of an adverse ruling, excuse want of preparation for trial. When a demurrer to a declaration is overruled, a continuance is not ordinarily granted the defendant, no matter how confident his counsel had been that his demurrer was well taken. It would therefore be unreasonable to hold that mere preparation for trial, to be had in the event of an adverse ruling, is a waiver of the objection.

From what has been said, it follows that the admittedly valid objection to the jurisdiction of this court has not been waived. The declaration must be dismissed.

THE SOUTH BAY.

(District Court, W. D. Washington, W. D. June 27, 1905.)

No. 462.

SALVAGE—AMOUNT OF COMPENSATION—TOWING OF DISABLED SCHOONER TO PORT.

An award of \$2,000 made to the owners and crew of a tug for salvage services performed in towing to a port a steam schooner, worth, with cargo, \$50,000, which had been injured when passing out of Gray's Harbor, Wash., by striking the submerged stonework of a government jetty at the entrance of the harbor, and which was disabled and leaking and in actual peril, but not in imminent danger, the service in towing requiring some four or five hours, but without extraordinary peril or hardship.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, §§ 81, 82.

Salvage awards in federal courts, see *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suit by the owner, master and crew of the steam tug *Daring* to enforce a claim for salvage for the rescue from peril of the steam schooner *South Bay*. Decree for libelants for the aggregate amount of \$2,000.

John C. Hogan, for libelants.

Kerr & McCord, for respondent.

HANFORD, District Judge. The material facts in this case are as follows: At noon on the 24th day of November, 1904, the sailing and auxiliary steam schooner *South Bay*, of 480 tons burden, with a full cargo of lumber, in going to sea from one of the mills on Gray's Harbor, in this state, struck near the outer end of a jetty constructed by the United States government as a harbor improvement on the south side of the entrance to Gray's Harbor. The draught of the vessel, laden, was 17 feet, and the depth of water at the time and place of the occurrence was proximately 4 fathoms. There was a strong wind at the time, blowing off shore, and the tide had commenced to ebb, or was about on the turn. The vessel struck hard on the submerged stonework composing the jetty, and for a time seemed to be hung fast, but with the assistance of her sails and the swell of the sea she was lifted over the jetty, and was free in sufficient depth of water to float several minutes before the libelants came to her rescue. By her contact with

the jetty portions of her keel were torn off, and her rudder and the supports thereof were broken, and her propeller was disabled, and her hull was damaged so that she was leaking. Without assistance, the schooner would have soon drifted or have been carried by wind and the set of the tide into deeper water, where she could have anchored, and where she would have been in comparative safety so long as moderate weather prevailed, unless, owing to her leaking and helpless condition, she became water-logged. The Daring was returning to Gray's Harbor after having towed two vessels out to the open sea, and was about three miles distant when the accident occurred. She promptly responded to the signals of distress that were given, and towed the disabled vessel five or six miles around the jetty to a safe position inside the harbor, where she was left that night, resting upon a sand bottom, and the following day, with assistance of two small tugs, towed her to Aberdeen, where she remained until repairs were made. The time consumed in getting the towline from the Daring to the South Bay and towing from the place where the accident occurred to the beach where the schooner was left overnight was four or five hours, and she was docked at Aberdeen at about 3 o'clock p. m. on the next day after the accident. The value of the Daring is about \$65,000. She is a new and powerful tugboat, and completely equipped for service as a towing vessel. The rescue of the South Bay was accomplished with commendable promptness and skill, but without exposure to extraordinary peril or the endurance of special hardships. The value of the South Bay in her damaged condition and her cargo was proximately \$50,000. She was in a situation of actual peril, but not in imminent danger of destruction, as she probably would have remained afloat until relieved by another steamer if the Daring had not come to her relief immediately.

In consideration of the facts above stated, it is the opinion of the court that a meritorious salvage service was rendered, for which the libelants are entitled to a reasonable reward. The value of the property salvaged is to be considered in judging the merits of the service to be rewarded, but maritime law does not arbitrarily require that one-third of the value must be given to the salvors, nor fix any maximum or minimum percentage which they may claim. The policy of the law is to encourage valor in the rescuing of vessels and property imperiled by awarding to salvors a fair share of the value of what they save, and each case must be judged with reference to its peculiar facts. I consider that in this case 4 per cent. will be a reasonably liberal reward, and I therefore direct that a decree be entered in favor of the libelants for the following sums:

To the Gray's Harbor Tugboat Company, owner of the Daring.....	\$1,200
To A. T. Stream, her master.....	300
To George Benkinshaw, engineer, and T. W. Stream, mate, each \$100..	200
To John Ady, Wm. Boyce, Lock Sing, Fred Scott, Paul Webke, and Peter Gomis, members of the crew, each \$50.....	300

Amounting, in the aggregate to..... \$2,000

—and costs, and interest at the rate of 6 per cent. per annum from the date of the decree.

In re FELSON.

(District Court, N. D. New York. July 17, 1905.)

1. BANKRUPTCY—PROCEEDINGS BY CREDITORS—EXPENSES—STATUTES—APPLICATION.

Bankr. Act July 1, 1898, c. 541, § 64, subd. "b," 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], as amended by Act Feb. 5, 1903, c. 487, § 14, 32 Stat. 800 [U. S. Comp. St. Supp. 1903, p. 417], providing that where property of a bankrupt, concealed by him either before or after the filing of the petition, shall be recovered for the benefit of the estate by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery may be allowed to them, has no application to bankruptcy proceedings instituted prior to the date of its enactment.

2. SAME—ATTORNEY'S FEES.

Where a bankrupt's trustee was represented by able counsel, and immediately instituted a proceeding to recover concealed property, which he vigorously prosecuted, even to having the bankrupt committed for contempt and indicted, when he turned over to his trustee \$3,400 of the \$6,000 found to have been concealed, attorneys employed by creditors to assist in such proceedings were not entitled to fees out of the bankrupt's estate.

3. SAME—ATTORNEY FOR BANKRUPT.

Where an involuntary bankrupt's attorney prepared the schedules and attended the examination of the bankrupt, but thereafter represented the bankrupt in proceedings wherein the court found that he had knowingly and fraudulently concealed, while a bankrupt, from his trustee, some \$6,000, such attorney was entitled to \$50 for preparing the schedules and attending the examination, but was not entitled to anything for his subsequent services.

4. SAME—TRUSTEE.

Though a trustee in bankruptcy, who is an attorney, is not bound to perform legal services for the estate represented by him, yet if he does so he is not entitled to recover attorney's fees therefor.

This matter comes before the court on petition for review of the order of the referee in bankruptcy making allowances from the estate to the trustee and to the attorney for the trustee, and to attorneys for certain creditors of the bankrupt, and which order was made at the final meeting of creditors, and on the settlement of the accounts of the trustee in bankruptcy, May 20, 1905.

See 124 Fed. 288.

H. Walter Lee and Hastings & Gleason, for trustee.

A. W. Orvis, for bankrupt.

Jas. F. Akin, John M. Barr, J. C. Dolan, R. E. McLear, E. H. Neary, C. A. Hitchcock, and H. C. Quinby, each for certain creditors.

RAY, District Judge. This was an involuntary proceeding, but adjudication was made without contest, and the matter referred to a referee. At the very beginning of the proceeding, H. Walter Lee, subsequently chosen trustee, was appointed receiver. He was an attorney at law of the Supreme Court of the state of New York, and also admitted to practice in the District Court of the United States. Frederick H. Hazard was the attorney for the petitioning creditors, and filed the petition, procured the appointment of the

receiver and his qualification, etc. It seems from the affidavits that said trustee employed Hastings & Gleason, of New York City, as his attorneys. They resided at least 200 miles away from the trustee and bankrupt's place of business. The claims against the bankrupt amounted to about \$29,000, but only about \$24,000 were proved and allowed. The estate of the bankrupt surrendered consisted of goods in a jeweler's store—a cheap miscellaneous lot—a small interest in some real estate in New Jersey, a right of action to recover preferences, and an alleged equity in real estate in New York City. The stock of goods sold for \$1,689; the New Jersey real estate, for \$50. There was recovered from preference payments \$591.87, and collected on debts for repairs \$9.75, and from G. A. R. \$3. The claim was made, and, on investigation and examination into the facts, it was determined by the referee, on due hearing, that the bankrupt had knowingly and fraudulently concealed from his trustee in bankruptcy, while a bankrupt, and was concealing, over \$6,000 in value of assets. This court set that order aside for certain reasons, and in further proceedings the referee found the value of the property so withheld and concealed to be over \$7,000. This court, on review of the proceedings, reduced the amount to \$6,000, and the bankrupt was directed to pay over that amount in cash, or surrender the property. He did not obey the order, and contempt proceedings were instituted; and after a time the bankrupt was not only adjudged in contempt, but was indicted for the offense mentioned. Before the criminal trial, Felson was permitted to purge himself of the contempt by paying to the trustee the sum of \$3,400. This brought the estate of the bankrupt realized to the sum of \$5,743.62. The total expenditures of the trustee up to the time he filed his report were \$1,087.26; leaving a balance of \$4,656.36 for creditors, subject to the payment of legitimate expenses in the administration of the estate. Of the \$1,087.26 paid out, \$100 was for rent; \$31.50 for insurance; \$96 for appraisers of the stock in the store; \$86.22 for appraisers in New Jersey to make appraisal of the real estate that sold for \$50; \$381.03, disbursements allowed by the court to Hastings & Gleason as attorneys for trustee; \$63.20, disbursements allowed to J. C. Dolan, attorney for certain creditors; \$40 to the referee for stenographer's fees; \$63.55, disbursements of the trustee; \$37.50 to surety company for bond of trustee; \$125 to the referee, his fees, etc.; the balance for smaller necessary expenses. This court is greatly aided by the fact that it twice reviewed the proceedings to charge the bankrupt with having concealed property, heard motions to vacate the order and relieve from the contempt, and finally, in June, at the same term when this appeal was heard, the bankrupt was tried on the above-mentioned indictment. The evidence taken in the proceedings to charge the bankrupt with having concealed the property has been and is before the court.

From the stenographer's minutes of March 14, 1903, it appears that the bankrupt appeared in person and by A. W. Orvis and Mr. Rosenthal, his attorneys, that Hastings & Gleason appeared for the

petitioning creditors and the trustee, the trustee in person, and Messrs. Neary, Dolan, Johnson, and Henry C. Quinby each for certain creditors. The stenographer's minutes of the hearing commencing April 18, 1903, show A. W. Orvis and Mr. Rosenthal appearing for the bankrupt, Felson; Hastings & Gleason, for petitioning creditors and creditors; H. Walter Lee, trustee, in person; H. C. Quinby, E. H. Neary, and J. C. Dolan, each for creditors. Such minutes for a hearing commencing May 29, 1903, show appearances as follows: A. W. Orvis and Mr. Rosenthal, for the bankrupt. Hastings & Gleason, for New York Jewellers' Association; H. Walter Lee, trustee, in person; H. C. Quinby, J. C. Dolan, E. H. Neary, each for certain creditors. At all these times the bankrupt was knowingly, fraudulently, and persistently concealing his property from his trustee. It was the duty of the trustee, representing all the creditors, to employ all necessary counsel, and vigorously prosecute inquiries as to the property of the estate, and take all necessary measures for the recovery of this property, or its value in money. The matter was in his hands. Creditors could appear in the proceedings personally or by counsel, if they saw fit, and aid in the inquiry and investigation, but at their own expense, not at the expense of the estate. But if the trustee should not prosecute such an inquiry and employ necessary counsel, one or more creditors may, and if property transferred or concealed by the bankrupt is, under such circumstances, "recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors," then "the reasonable expenses of such recovery" are to be allowed and paid, and such reasonable expenses are to be regarded as a debt having priority. Section 64, subd. "b," of "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], as amended by the act of Congress approved February 5, 1903, c. 487, § 14, 32 Stat. 800 [U. S. Comp. St. Supp. 1903, p. 417]. Prior to the amendment of February 5, 1903, there was no provision of this kind, or applicable to such a case. This amendment has no application to bankruptcy proceedings instituted prior to February 5, 1903. See Collier on Bankruptcy (5th Ed.) p. 501, where it is said, speaking of this amendment, "The amendment is available only in bankruptcy proceedings begun after February 5, 1903." The amendment has no application to the case now under consideration, as the proceeding was instituted in December, 1902, and the trustee was appointed as early as January 28, 1903. In *re* Docker Foster Co., 10 Am. Bankr. Rep. 584, 123 Fed. 190; Collier (5th Ed.) p. 586. Indeed, the amendatory act expressly declares "that the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July 1, 1898." In *Re* Little River Lumber Co., 3 Am. Bankr. Rep. 682, the court held that where a trustee did not act, and a creditor did, and incurred expense, and so aided or benefited the estate, the court had power to compensate such creditor by mak-

ing an allowance out of the estate. In *Re Lesser Brothers*, 3 Am. Bankr. Rep. 815, 100 Fed. 433, certain creditors had obtained, at great expense, a lien which inured to the benefit of all the creditors by reason of the provisions of the bankruptcy act, which at the same time prevented the creditors who had obtained the lien from having the exclusive benefit thereof. Held, they might have compensation out of the fund. See opinion of Shipman, J., in same case on appeal, 5 Am. Bankr. Rep. 320, 321, 108 Fed. 201. In the case now under consideration there is no evidence that the trustee failed in his duty, or failed to press the matter of intentional and fraudulent concealment against Felson with promptness and vigor. Of the proceedings in this court of which it has knowledge, and which were taken in this very bankruptcy proceeding, it will take judicial notice. It will not do, even under the provisions of subdivision "b" of section 64, as amended, to permit creditors generally to come with their attorneys to the aid of the trustee seeking to recover property belonging to the estate in bankruptcy of the bankrupt, and concealed by him in violation of section 29 of the act (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433]), and have an allowance for their expenses or attorney's charges out of the estate. The amendment gives no such license as this, and clearly such a course was not permissible prior to the amendment. See *In re Smith*, 5 Am. Bankr. Rep. 559, 108 Fed. 39; *In re Silverman*, 3 Am. Bankr. Rep. 227, 97 Fed. 325. If one comes, why not all, and if several come, and the referee makes an allowance to one, why not to all?

With an estate of \$4,656.36 for distribution, the referee, at the final meeting of creditors, by his order of May 20, 1905, made the following allowances: To Hastings & Gleason, as attorneys for the trustee, disbursements, \$164.88; services, \$900; total, \$1,064.88. To F. H. Hazard, as attorney for petitioning creditors, disbursements, \$35.94; services, \$50; total, \$85.94. To A. W. Orvis, as attorney for the bankrupt, disbursements, \$109.32; services, \$600; total, \$709.32. To J. C. Dolan, as attorney for certain creditors, disbursements, \$16.50; services, \$650; total, \$666.50. To C. A. Hitchcock, as attorney for a certain creditor, disbursements, \$28.08; services, \$50; total, \$78.08. To E. H. Neary, as attorney for certain creditors, disbursements, \$30.78; services, \$50; total, \$80.78. To H. C. Quinby, as attorney for certain creditors, disbursements, \$338.09; services, \$150; total, \$488.09. To Conger & McLear, as attorneys for certain creditors, disbursements, \$9.80; services, \$50; total, \$59.80. J. F. Akin, attorney for certain creditors, services, \$75. To the jewelers' association, not a creditor, but an association having a deep interest in ferreting out and exposing and punishing such transactions, disbursements, \$138.80; and to H. Walter Lee, such trustee, for his services as receiver, \$150, as allowed by the judge who appointed him, and \$184.10, disbursements; and further says the order:

"It appearing to the satisfaction of the referee that the trustee has rendered services to the estate over and above the usual and ordinary responsibility of his trust, and that he is entitled to a compensation therefor, and that the

sum of \$250 is a reasonable compensation therefor, it is ordered that the trustee do, out of the funds in his hands to the credit of this proceeding, retain to his own use the sum of \$584.10; being the amount of his said allowance as receiver, his said allowance as trustee, and his said disbursements as receiver and trustee. It is further ordered that the trustee is entitled to the sum of \$154.87 commissions as trustee upon the moneys disbursed and to be disbursed by him, and that he do, therefore, out of the moneys in his hands, retain to his own use the said sum of \$184.57."

As a justification for the allowances to the attorneys for the general creditors, the referee says:

"It appearing to the satisfaction of the referee that the services of Mr. Hazard, Mr. Akin, Messrs. McLearn & Conger, Mr. Dolan, Mr. Quinby, and Mr. Neary have been beneficial to the estate to the extent of the allowances hereinbefore made to them, it is," etc.

These allowances, aggregating \$4,356.36, made by the referee in the final decree for the distribution of the estate, reduce the amount for distribution to creditors from \$4,656.36 to the sum of \$300, in round numbers—a trifle over 1 per cent. of the proved and allowed claims.

This order and decree for the distribution of this estate in bankruptcy and making these allowances must be modified. As already stated, allowances to general creditors, one or more, who employ and pay counsel and incur and pay other expenses in doing things to benefit and increase the estate, and which have that effect, cannot be made unless the trustee has not been appointed at the time it is done, or, having been appointed, he has neglected or refused to act in the matter. Even in such case, unless there be an emergency demanding immediate action, the order and direction of the court should be first sought. In this case the trustee had an abundance of able counsel. There was nothing complex or very difficult in the case. The situation demanded considerable faithful, plodding work. No difficult questions of law were involved. Mr. Quinby says that he represented the jewelers' association and board of trade, and certain clients of theirs, who were creditors of the bankrupt, Felson. His statement is frank and in all respects truthful. It is not doubted, and cannot be doubted, that he expended money (representing these associations) and performed services of value to the estate and all the creditors, but he was not employed by the trustee. And as stated, the trustee was not neglecting his duty. Mr. Quinby testifies that he, representing these associations, employed J. C. Dolan in the matters in question, and paid his bill, \$80.45, and that he in the same behalf employed James F. Akin, and paid his bills, \$159.14. As these gentlemen represented other creditors in the litigation and proceeding, they must look to them for their compensation for such services. Mr. C. A. Hitchcock and Conger & McLearn represented creditors, but were not employed by the trustee. Mr. E. H. Neary says that he represented certain creditors, and also R. G. Dun & Co., and had had frequent interviews with the bankrupt, Felson, for months before the bankruptcy, and that he attended all the hearings, and thinks his knowledge and attendance was valuable to the estate. Probably this is true, but he was not employed by the trustee. F. H. Hazard was the

attorney for the petitioning creditors, and plainly, under the law, he is entitled to a fair allowance for services, and to his reasonable disbursements. See subdivision "b," § 64, Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]. The debts to have priority and the order of payment shall be "(3) the cost of administration, * * * and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases." His compensation, however, must be confined to services rendered prior to the appointment of the trustee. Up to that time the petitioning creditors are the moving parties in behalf of creditors. Thereafter the trustee represents these interests. His bill was fair and reasonable, and is approved and allowed. This same subdivision also covers and allows one attorney's fee for services to the bankrupt in involuntary cases while he is performing the duties required by the act. Mr. A. W. Orvis says he made the schedules and attended the examination of the bankrupt. He may be allowed \$50, and no more. The whole contest and litigation was to compel this bankrupt to disclose, uncover, and disgorge concealed property belonging to his estate in bankruptcy, and which the referee found, and this court found on appeal, he had knowingly and fraudulently concealed while a bankrupt from his trustee in bankruptcy, to the amount of \$6,000. He has turned over \$3,400, and no more. Upon what theory the referee awarded at least \$650 from this estate, recovered by the trustee from this bankrupt, who was wrongfully concealing it, to Orvis, who was aiding him in so doing, and who still aids him, and who has already been paid for his services, as appears from the bankrupt's own statements, this court fails to discover. At the same time that the referee makes allowances to the attorney for the wrongdoer who concealed the property, and whose services, except as allowed for, were rendered in aiding the concealment (it may be the attorney did not know the guilt of Felson), he also makes allowances to the amount of upwards of \$2,500 for legal services performed in the attempt to uncover the concealed property. In short, \$3,400 was recovered. The referee allows over \$4,000 for the work performed and disbursements incurred in doing the job, and divides it between the attorney who aided to conceal and those who aided to uncover. The allowance of disbursements to the jewelers' association cannot be approved. There is no law permitting such an allowance. To Mr. H. Walter Lee, who acted as receiver, this court made an allowance of \$150—an amount within the percentage allowance permitted by the act. See subdivision 5, § 2, which declares the policy of the law, and reads:

"(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services." Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409].

To Mr. Lee, as trustee, the referee makes an allowance of \$184.10 for disbursements. His statutory commissions and compensation

given by section 48 of the act (Act July 1, 1898, c. 541, 30 Stat. 557, 558 [U. S. Comp. St. 1901, p. 3439]), amounting to \$154.87. The referee also allows \$250 to the trustee, in addition to such compensation, for the reason that he is a lawyer, and performed services as such for himself as trustee. At the same time his attorneys are allowed nearly \$1,000 for services, and other attorneys for creditors over \$2,000, all from the estate, for doing the work (it is alleged) the trustee's attorneys should have done. This court, in allowing \$150 to Mr. Lee for compensation as receiver, in effect doubled the commissions. By this process of "allowances" the trustee would be permitted to take from this estate of \$5,743.62 the sum of \$554.87 in addition to his disbursements for administering this estate in bankruptcy. This court has heretofore held, after careful examination and consideration, that a trustee in bankruptcy, "though an attorney, is not bound to perform legal services for the estate represented by him, but if he does so he cannot have compensation therefor from the estate." In re McKenna (D. C.) 137 Fed. 611, decided May 16, 1905. This court there said, and now repeats:

"It is well settled that a person, being a trustee, cannot perform legal services for himself as trustee, and have compensation therefor from the estate he represents. Nor is he under obligation to perform such legal services because he is the trustee. In many cases the compensation permitted by the bankruptcy act to a trustee in bankruptcy would not pay 10 per cent. of the value of the purely legal services rendered in addition to those legitimately performed by the trustee in the discharge of the usual duties of that office. However, when a trustee performs legal services, he cannot have additional compensation therefor."

See 1 Perry on Trusts (2d Ed.) § 432; *Parker v. Day*, 155 N. Y. 383, 49 N. E. 1046; *Collier, as Executor, v. Munn et al.*, 41 N. Y. 143.

Collier on Bankruptcy (5th Ed.) referring to this question, says (page 474):

"It was held early in the administration of the present law that a trustee who was also an attorney could be allowed the same fees that would have been paid to other competent counsel. This may be doubted, the trustee's fee being limited by section 48 and general order 35 (3), 89 Fed. xiii, 32 C. C. A. xxxiv."

In re Florence B. Mitchell, 1 Am. Bankr. Rep. 687, is but the opinion of a referee, and is not sustained by reason or authority. The referee cited Perkins' Appeal, 108 Pa. 314, 56 Am. Rep. 208. It was there held:

"(1) The just and proper compensation of a trustee depends upon the circumstances of each case, and cannot be determined by an inflexible rule. Such compensation may be claimed and awarded in a gross sum, and not by way of commissions.

"(2) A trustee, who is also a member of the bar, may be allowed credit in his account for a fee to himself for professional services rendered by him to, and for the benefit of, the trust estate, shortly prior to his appointment as trustee.

"(3) A trustee, who is a member of the bar, may be allowed compensation for services of a professional character rendered by him, after his appointment as trustee, in the investigation of an account filed by the executors of his deceased predecessor in the trust, in addition to compensation for the performance of his ordinary duties as trustee."

It will be noted there was no statute fixing the compensation of trustee. His compensation was based on a quantum meruit. Hence all the trustee did was properly considered and allowed for. In matters in bankruptcy the compensation of trustees, before the amendment of February 5, 1903, as since, was fixed by the act (section 48, Act July 1, 1898, c. 541, 30 Stat. 557, 558 [U. S. Comp. St. 1901, p. 3439]). See, also, general order 35 (89 Fed. xiii, 32 C. C. A. xxxiv), adopted by the Supreme Court of the United States, subdivision 3, which reads:

"(3) The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts."

The allowance of \$250 to the trustee not only violates the provisions of the act, but the general order of the Supreme Court. That allowance must be disallowed.

It appears that James C. Dolan did perform some services for the trustee. The court finds from the proof that the value of such services was \$125, and his allowance is reduced to that amount. He has already been paid \$63.20 disbursements. Hastings & Gleason have been paid \$381.03 disbursements allowed by this court. The amount of their allowance for services to the trustee is reduced to \$600, which is found to be a full and fair compensation for all services rendered by them to the trustee as his attorney. To this will be added the disbursements not heretofore allowed and paid. It has been seen, in reciting the appearances in the proceedings before the referee, that on each occasion, with one exception, that firm appeared for petitioning creditors and creditors and the jewelers' association, not for the trustee. These attorneys must look to their creditor clients for further compensation, if they are entitled thereto. Let the dividends go to the creditors, and let the creditors pay their attorneys. It is not for the court or referee to undertake, by "allowances," to see that the attorneys for creditors are taken care of. It is the duty of the court to take care of the creditors, and the duty of the creditors to take care of their attorneys, except in cases where allowances are directly authorized and permitted. The bankruptcy act of 1898 was framed and must be administered in the interest of creditors. This is a case where the transactions and conduct of the bankrupt justly aroused the indignation of the whole jewelry trade. The association took up the matter, and have pressed it honestly and sincerely in aid of the trustee; but this court cannot find, and indeed there has been no suggestion, that the trustee failed in his duty, so as to warrant allowances from the estate to creditors and associations who generously came to his aid because of the general desire and determination to vindicate the law.

The court has made and filed an order modifying the order under review in accordance with this opinion.

In re HUNT.

(District Court, N. D. New York. July 22, 1905.)

BANKRUPTCY—PREFERENCES—UNRECORDED MORTGAGE.

Under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445] as amended Feb. 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 416], which defines a preference, and provides that the four-months period within which a transfer of property of the character defined shall constitute a preference shall not expire until four months after the date of the recording or registering of the transfer "if by law such recording or registering is required," a mortgage of property in New York, which is not required by the laws of the state to be recorded to be valid, except as against subsequent purchasers or mortgagees in good faith, for value, takes effect, for the purpose of computing the four-months period, at once on its execution, without reference to its recording, and, if executed more than four months prior to the bankruptcy of the mortgagor, does not constitute a preference, and creates a valid lien, in the absence of proof that it was withheld from record pursuant to agreement for the purpose of defeating the provisions of the bankruptcy law, or that other persons were thereby induced to extend credit to the mortgagor or forego their legal rights.

Review of an order of referee in bankruptcy allowing and establishing as a secured or preferred debt the claim of the Delaware National Bank of Delhi, N. Y., and directing payment thereof to the extent of \$3,900 from the proceeds of the real estate of said bankrupt, John A. Hunt. The trustee insists that for several reasons the mortgage lien on the real estate of the bankrupt is invalid, and not a valid lien thereon as against the trustee in bankruptcy and general creditors, and that the payment of the notes secured to be paid thereby cannot lawfully be directed from such proceeds.

C. L. Andrus, for claimant Delaware National Bank.

Hamilton J. Hewitt, in pro. per. (M. M. Palmer, of counsel).

RAY, District Judge. June 4, 1903, John A. Hunt, the bankrupt, and Sarah J. Hunt, his wife, of Delhi, N. Y., gave a mortgage on all his real estate to the Delaware National Bank, of the same place, reciting an indebtedness to the bank of \$5,000 (in fact it was considerably less), "secured to be paid by their [the mortgagors'] certain notes," and "conditioned for the payment of the said sum of five thousand dollars (\$5,000) in the aggregate, and any and all renewals thereof with interest. This mortgage is given as security for the payment of all liability or liabilities of the parties of the first part to the said bank, or party of the second part, due or to become due or that may hereafter be contracted." This mortgage was recorded in the clerk's office of the county of Delaware, N. Y., on the 10th day of June, 1904, at 1 o'clock p. m., Liber 88 of Mortgages, page 26. On the 17th day of June, 1904, said John A. Hunt was duly adjudicated a bankrupt on his own petition duly filed that day. The existence of the mortgage from the time of its execution to that of its recording, one year and six days, was known to the mortgagors and the bank and its officers only. It is conceded by the bank that when the mortgage was given, Honeywell, the president of the bank, and who did the business in taking it, and

who took the acknowledgments thereof, asked Hunt if he would not give him a mortgage to secure what he owed the bank; that Hunt consented, requesting that it be not recorded, and asking if it was necessary to record it, and also stating he owed no one else, and that to record the mortgage might or would hurt his credit in New York; and that the president of the bank said in reply he would not be in a hurry about recording it. The president very soon thereafter consulted counsel for the bank, one of the directors, as to the necessity for recording the mortgage, and was advised by such counsel, a director of the bank, it was not necessary, in view of Hunt's statement that his entire indebtedness was represented by obligations in the bank.

The proof of claim sets out seven promissory notes, each made by John A. Hunt, each payable at said bank, and each duly indorsed by the person to whose order same was made payable, and aggregating in amount \$4,721. Several of them are indorsed by Hunt's wife, who joined in the mortgage. The claim states that each of these notes was given in renewal of a like note for the same or a greater amount, and held by said bank when the mortgage was given. The proof establishes the truth of this statement to the amount of \$3,900 thereof in any event. The real estate mortgaged—and the bankrupt had no other—is worth not to exceed \$4,500. At the time the mortgage was given, the said mortgagor, now the bankrupt, owed at least \$25,000 in that vicinity and elsewhere, or about \$20,000 more than his indebtedness at the bank. This had been his indebtedness to various parties for several years. The personal estate of said Hunt was worth about \$3,000, and consisted almost entirely of his stock in a grocery store which he was conducting in Delhi. He had dealt with the bank for several years. The referee finds:

"That his dealing with the bank, creditor, began in 1893, increasing gradually down to the 4th day of June, 1903, at which time he owed the bank \$4.150. The money borrowed from the bank was placed to his credit, and checked out in his business, the bank taking notes of the bankrupt, indorsed by his wife, representing the loans. The evidence also discloses that the bankrupt renewed the notes representing his indebtedness to the bank from time to time from five days to ninety days. His account was frequently overdrawn, and checks upon the same were often dishonored and protested by the bank under the same management as at the date of the execution and delivery of the mortgage. That about June 3, 1903, Mr. Honeywell, president of the bank, came to the bankrupt, and asked him if he (bankrupt) and his wife would give the bank a mortgage to secure the amount he had in the bank. The bankrupt replied that he would. There was something said between the bankrupt and the president of the bank about recording the mortgage, but what it was the bankrupt does not appear to be very positive. Mr. Honeywell very positively denies that he agreed not to record the mortgage; the conversation being: 'He asked if it was necessary to record it, and I [Honeywell] said, "I suppose so." When I told him he said he would rather a little it weren't; it would hurt his credit in New York. I told him I wouldn't be in any hurry about it. Q. Did you tell him you wouldn't record it? A. No, sir.'"

The fact remains, however, that the bank did not record it, and in the meantime extensive credit to Hunt was given and extended by other parties. It also appears that on two occasions the president of the bank stated, in substance, to inquirers to whom Hunt owed money, that he owned his real estate clear.

By order of the referee this mortgaged property was sold, and the proceeds of the sale deposited to await the determination of the court as to the validity of the mortgage as a lien in preference to the claim or right of the trustee. In short, is the bank or the trustee entitled to the proceeds? Subdivision "b" of section 60 of the act approved July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], entitled "An act to establish a uniform system of bankruptcy throughout the United States," as amended by the act approved February 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 416], provides:

"If a bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

If the giving of the mortgage under the circumstances constituted the giving of a preference within the meaning of the act, it is plain that the bank and its agent, Honeywell, the president, not only had reasonable cause to believe, but knew, that a preference was intended; that is, that by giving the mortgage the mortgagor intended to give a security that should result in paying his indebtedness to the bank to the extent of \$5,000 from his real estate before paying anything to any other creditor from that property. He intended to prefer the bank. His other property was insufficient by many thousands of dollars to pay his other indebtedness. The evidence also shows that the mortgage was given to secure an extension of his indebtedness to the bank; that is, a renewal of his notes. Of course, after obtaining the mortgage which secured the indebtedness of Hunt, the bank was willing to carry and renew the notes. For four months, at least, it was necessary for the bank to carry them and keep the mortgage secret; that is, unrecorded. If not kept secret, it could have been avoided by the trustee in bankruptcy, provided such proceedings had been instituted. This the bank knew. The fact that officers of this bank went on the bond of Hunt as supervisor of the town is of no consequence. The funds were kept in the bank, and no defalcation of any amount could have occurred. Again, there was no thought that Hunt, even if insolvent, would misappropriate the funds coming into his hands as such officer. The bank and its agent intended to secure and secured this mortgage for the purpose of obtaining a preference in the sense just stated. The transaction shows all this. No other inference logically or honestly can be drawn from the transaction in the light of the surroundings. But, to constitute a voidable preference within the meaning of the bankruptcy act, something more is necessary. Subdivision "a" of the same section (section 60) says, "A person shall be deemed to have given a preference if, being insolvent" (Hunt was insolvent), "he has within four months before the filing of the petition * * * made a transfer of any of his property" (this he has done, for a mortgage is a transfer. See subdivision 25, § 1,

30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]), "and the effect of the enforcement of such * * * transfer" (mortgage) "will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." (This it will do, for there were other creditors of the same class, who will receive nothing if this mortgage prevails.) "Where the preference consists in a transfer" (mortgage) "such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." This last sentence was added by the amendment of February 5, 1903. As introduced in the House of Representatives by the author of the amendment, as it was reported from the judiciary committee of the House of Representatives, and as it passed the House, the words "or permitted, or if not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property transferred," followed the word "required," and ended the sentence. Had the section become a law in this form, the ending of the amendment would have been, "if by law such recording or registering is required or permitted," etc. In such case there would be no contention here on this subject. In this regard it followed subdivision "b," § 3, of the act (30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]). The Senate struck out the words "or permitted," etc., above quoted. Did it regard these words as surplusage? Were they surplusage? This court thinks not. The words, "if by law such recording or registering is required," must mean the same as they would if the words "to make the transfer valid against the person executing it," or "to make the transfer valid as against the general creditors of the person executing it," were added after the word "required." In New York the registering or recording of a mortgage on real estate is not required in order to give it validity as against the mortgagor, or general, or even judgment, creditors; consequently recording is not required to give it validity as against the trustee in bankruptcy. The word "required" does not mean the same as "permitted," or the same as the words "required in any case, or for any purpose." In some states a real estate mortgage must be recorded or registered to be good as against even general creditors. The laws of New York require the recording of such a mortgage as against purchasers and mortgagees in good faith and for value only. Real Property Law, § 241 (Laws 1896, p. 607, c. 547). That section reads:

"Sec. 241. Recording of Conveyances. A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded."

On the subject of the failure of the amendment of the bankruptcy act as proposed and as it passed the House, Collier on Bankruptcy (5th Ed.) p. 453, says:

"The concluding sentence of subdivision 'a' is new. It was inserted by the amendatory act of 1903. Its purpose is apparent—to meet the decisions that held the date of the delivery of a preferential instrument, rather than the date of its record, the beginning of the four-months period. Its parentage, a similar clause in section 3b, is clear. The Ray bill also contained after 'required' the words 'or permitted, or, if not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property transferred.' For some reason the Senate struck out these words. The result will prove unfortunate. The concealment of preferences through the four months, and thus the accomplishment of gross frauds on creditors, will be possible, unless the preference is accomplished by an instrument which must be recorded. The evils aimed at by the Ray amendment are but partially eradicated."

The writer of this opinion regrets that such amendment as proposed did not become a part of the act. Secret liens of any character ought not to be tolerated by the act. The date of the beginning of the four-months period referred to ought to be the date of recording or filing the instrument or of taking open possession of the property. However, courts must administer the law as they find it.

Little v. Hardware Co., 13 Am. Bankr. Rep. 422, 133 Fed. 874, is instructive in this connection, but has nothing to do with the crucial question, as in that case there was no pretense of a statute either requiring or permitting the recording of the bill of sale for any purpose. Within the meaning of the act, a preference (by mortgage of real estate), to be avoided by the trustee, must have been given by the (now) bankrupt under the following conditions: (1) The debtor must have been insolvent. (2) The effect of the enforcement of the preference (mortgage in this case) must be to enable any one of the creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. (3) The person receiving such preferences, or his agent acting in receiving it, must have had reasonable cause to believe that it was intended thereby (the giving and receiving of the instrument) to give a preference; that is, in making such transfer by giving the instrument, to enable the creditor receiving it to obtain a greater percentage of his debt than that received by any other of such creditors of the same class. (4) In the state of New York such instrument, if a mortgage of real estate, must have been executed and delivered within the four months immediately preceding the filing of the petition in bankruptcy. It is proper to say that in New York the purpose of recording real estate mortgages is not, and has not been, to give notice to or protect the general creditors, or even judgment creditors, of the mortgagor. As to judgment creditors, even unrecorded mortgages on real estate are valid. In Georgia the rule is somewhat different. There the Code requires a mortgage of real estate to be recorded. Code 1895, § 2724. But, if not recorded, it is held good as against the mortgagor (and consequently is good as against the trustee in bankruptcy), but not as against judgment creditors. In such case section 67, subs. "a" and "b," 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], will apply. If creditors obtain judgment, and bankruptcy intervenes, the trustee may assert the nonrecord, etc., for the benefit of the estate. As to the laws of that state, see *Clayton v. Exchange Bank*, 121 Fed. 630, 57 C. C. A. 656.

A trustee in bankruptcy is not a purchaser in good faith, nor does he occupy the position of such a purchaser. He takes the property of the bankrupt in cases not affected by fraud in the same plight and condition the bankrupt held it as of the date of the adjudication, and subject to all equities impressed on it in the hands of the bankrupt, except in cases where there has been some conveyance or incumbrance void as against the trustee, made so by some positive enactment of the bankruptcy law. In *re Garcewich*, 115 Fed. 87-89, 53 C. C. A. 510, approved *Thompson v. Fairbanks*, 196 U. S. 526, 25 Sup. Ct. 306, 49 L. Ed. 577. He takes the title the bankrupt then had; no more, no less. Section 70, subd. "a," 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]. He takes title to such property charged with all liens and equities valid against the bankrupt, unless, as just stated, they are made void or voidable by some positive provision of the act. Same cases. But in some cases liens may be avoided by the trustee that could not have been avoided by the bankrupt if the bankruptcy proceedings had not intervened. In *New York Economical Printing Company*, 110 Fed. 514, 49 C. C. A. 133, the court said:

"The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee."

In *Hewit v. Berlin Machine Works*, 194 U. S., at page 302, 303, 24 Sup. Ct. 690, 48 L. Ed. 986, the Supreme Court quote this language, and say:

"We concur in this view, which is sustained by decisions under previous bankruptcy laws [citing cases], and is not shaken by a different result in cases arising in states by whose laws conditional sales are void as against creditors."

Care is not always taken to distinguish those cases where a lien is actually created or given by an agreement in writing from those where a lien is agreed to be given or created in the future. An agreement to give a lien is one thing—an agreement to create a lien merely. A writing given creating a lien as a mortgage on real estate described therein is a lien actually created and existing from the execution of the instrument, and quite a different thing from the agreement to give it. All logical minds must see and concede that an agreement to make a transfer of property is not the making of a transfer. Sometimes, in equity, that is regarded as done which ought to be done and is agreed to be done; but this rule is not applied to defeat the bankruptcy act, and hence an agreement to make a transfer is not held to be a transfer, but the transfer is held to be made when it is in fact made, although long before agreed to be made.

In *Mathews, as Trustee in Bankruptcy, v. Hardt et al.*, 79 App. Div. 570, 80 N. Y. Supp. 462; *Id.*, 9 Am. Bankr. Rep. 373, 80 N. Y. Supp. 462, we have nothing but an agreement to give a lien on per-

sonal property or rights of action of all descriptions, some not then in existence. The court itself describes the agreement, viz. (page 574 of 79 App. Div., page 465 of 80 N. Y. Supp.):

"We think the parties themselves properly designated it as an agreement to give a lien on the property of the corporation, which conferred upon the defendant firm the right to enforce such lien when and after they had made the advances to the extent stipulated, and upon the refusal of the corporation to repay such advances."

Again (at page 577 of 79 App. Div., page 467 of 80 N. Y. Supp.):

"Fairly construed, the agreement was that the firm was to make the advances to enable the corporation to go on in its business, and that at any time in the future, when the firm had advanced the amount stipulated, they were entitled, upon the failure of the corporation to pay back such advances, to have a lien for such advances upon the then property of the corporation."

The court then says (page 579 of 79 App. Div., page 468 of 80 N. Y. Supp.):

"The crucial factor, therefore, is whether a preference was given 'within four months,' and this in turn depends upon our conclusion as to whether the transaction is to be treated as of the date when the agreement for the lien was given, or is to be considered as of the date when possession was taken. In other words, the question is, did the delivery of the possession to the defendants and their taking possession within four months of bankruptcy constitute a preference within the meaning of the bankruptcy act of 1898?"

In *Wilson v. Nelson*, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147, there was, in effect, a power of attorney to give or confess a judgment made more than four months prior to the filing of the petition in bankruptcy, but the judgment was given or confessed within that period. Held voidable as a preference. In *Matter of Sheridan* (D. C.) 98 Fed. 406, there was an agreement executed to pledge personal property as security for a debt before the four-months period, but no actual pledge was made either by delivery or by a writing. In *Matter of Fanny Mandel*, 10 Am. Bankr. Rep. 774, 127 Fed. 863, the agreement made is stated at pages 775 and 776, of 10 Am. Bankr. Rep., page 864 of 127 Fed., as follows:

"On the opening of the account with the Jefferson Bank an agreement was made between the bankrupt, acting by her said attorney, and the bank, whereby the bankrupt agreed that the bank should have a lien upon any surplus of the deposit account, and upon all property of the bankrupt left with the bank as security or otherwise, and upon all collateral to any loan or otherwise, which collateral should also be held for any other liability to the bank, whether then existing or thereafter contracted."

The account was opened in February, 1902, when a number of accounts were transferred to the bank, and a credit and advance of 70 per cent. made to the bankrupt. The last transaction of this description under this agreement was September 26, 1902, when 37 accounts were assigned to the bank (pursuant to said agreement), aggregating \$2,657.43, on which the bank advanced \$1,000 only. It then held two notes of the bankrupt, one of \$600 and one of \$700. October 15, 1902, a petition in bankruptcy was filed, and an adjudication made. The transaction of September 26th was assailed as a preference so far as the bank sought to hold the proceeds of the accounts and apply them on the notes. The transfer was made

and the preference given on that day, September 26th, of course, for it was on that day the accounts were assigned. All these were agreements to make transfers. But a real estate mortgage is the present transfer of an estate in the land and declared by subdivision 25 of section 1 of the act itself to be a transfer.

Attention is called to *Tatman v. Humphrey*, 184 Mass. 361, 68 N. E. 844, 63 L. R. A. 738, 100 Am. St. Rep. 562, 12 Am. Bankr. Rep. 62. That case has been reversed by the Supreme Court of the United States (*Humphrey v. Tatman*, 14 Am. Bankr. Rep. 74), the court holding the mortgage was good as against the trustee.

The trustee insists that the facts of this case bring it within the principles declared in *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080. It was there held:

"A mortgage of his entire estate, executed by an insolvent mortgagor to a creditor, who knows of his insolvency, and who, for the purpose of giving him a fictitious credit, actively conceals the mortgage, withholds it from record, and represents him as having a large estate and unlimited credit, by which means he is enabled to contract other debts which he cannot pay, is void at common law. A mortgage executed by an insolvent with intent to give a preference to a creditor who has reasonable cause to believe him to be insolvent, and knows that it is made in fraud of the provisions of the bankrupt act, and who, for the purpose of evading them, actively conceals it and withholds it from record for two months, is void, although executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor."

There can be no doubt that there was an agreement between Hunt, the mortgagor, and Honeywell, the president of the bank, at the time the mortgage was given, and as a part of the transaction, that the bank would not put the mortgage on record at that time, and that Hunt would not put a mortgage on the premises to some other person ahead of the one given the bank. Honeywell also concedes that Hunt was given to understand by him that, if the mortgage was not given, the notes held by the bank would not be renewed. There is no doubt that there was also an understanding between Hunt and Honeywell at some time that the mortgage must have been executed and delivered over four months prior to bankruptcy proceedings in order to be good as against general creditors. But the evidence would tend strongly to show that this understanding was arrived at about May, 1904, not in June, 1903. The evidence does not show that there was any agreement to keep the mortgage from record for any definite period of time, or for at least four months. The evidence also shows that about April or May, 1904, Mr. Honeywell, when asked as to the financial responsibility of Mr. Hunt, said, in substance, they (meaning the bank) regarded him (Hunt) as solvent; that he had his real estate with nothing against it more than the amount of the bank's indebtedness, and his stock of goods and accounts would more than offset his other indebtedness. It does not appear that Honeywell knew, even approximately, the indebtedness of Hunt. It also appears that shortly before filing his petition in bankruptcy Hunt made incorrect and untruthful statements regarding his indebtedness to some of his numerous creditors. It is undoubtedly true

that Honeywell, along in the spring of 1904, but more than six months after the execution and delivery of the mortgage, failed to disclose that the bank held the mortgage when inquiry was made as to the standing and financial responsibility of Hunt; but it is not shown that Honeywell had authority to make such concealment of the fact, or that he actively concealed the existence of the mortgage, or that Honeywell's acts and declarations, whatever they were, influenced any person to give or extend credit to Hunt. In short, it is not made to appear that the nonfiling of the mortgage either induced any person to give credit to Hunt or forbear suit or bankruptcy proceedings. If the evidence established that Honeywell, president of the bank, mortgagee, kept secret and withheld the mortgage from record for the purpose of allowing the four months to run so as to defeat the provisions of the bankruptcy act relating to preferences, and intended so to do when he took it, this court would hold that such acts were in fraud of the act, and rendered the mortgage void. *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080; *Clayton v. Exchange Bank of Macon*, 121 Fed. 630, 57 C. C. A. 656; *Curtis, Receiver, v. Lewis et al.*, 74 Conn. 367, 50 Atl. 878; *Hildreth v. Sands*, 2 Johns. Ch. 35. But while the court may have its suspicions that such was the fact, it is not therefore at liberty to so find or hold, even if those suspicions are justified by and grow out of the evidence. Fraud must be proved. It may be inferred from facts established by competent proof, but the inference of fraud cannot legally be drawn and is not justifiable when the inference of innocence is just as consistent with the facts. I cannot find from this evidence that the failure to record the mortgage was accompanied by such acts on the part of the mortgagee or of its agents that a fictitious credit was given to Hunt, now the bankrupt, or that the acts of the defendant induced any creditor to forego any right. The defendant is not estopped from asserting the mortgage.

The order of the referee is affirmed.

UNITED STATES v. FIFTY WALTHAM WATCH MOVEMENTS.

(District Court, N. D. New York. June 6, 1905.)

1. CUSTOMS DUTIES—ILLEGAL IMPORTATION—FORFEITURE—FRAUD—ABSENCE OF INTENT.

Proceedings for forfeiture of merchandise illegally imported may be sustained under section 3082, Rev. St. [U. S. Comp. St. 1901, p. 2014], though the United States has not been defrauded of any sum, and there has been no intent to defraud.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 297.]

2. SAME—FREE GOODS—INTENTIONAL EVASION OF LAW.

An importer, for the purpose of serving his own pecuniary interests, intentionally omitted to meet the requirements of the customs laws of the United States, in that he failed to enter certain imported articles at any customhouse, and to comply otherwise with the law. If duly imported, the articles would have been free of duty. *Held*, that this was an offense which rendered the merchandise liable to forfeiture, under section 3082,

Rev. St. [U. S. Comp. St. 1901, p. 2014], as imported "knowingly * * * contrary to law."

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 297.]

3. SAME—NECESSITY OF COMPLYING WITH LAW.

The requirements of the customs laws regarding the importation of goods are just as positive in respect to goods exempt from duty as in respect to dutiable goods. It is the duty of importers to comply with such laws, irrespective of whether the merchandise they import is dutiable.

4. SAME—TREASURY REGULATIONS—CONTINUATION UNDER NEW TARIFF.

The rules and regulations prescribed by the Secretary of the Treasury under one tariff act may legally be kept in force under a succeeding act by adopting and continuing to enforce them.

5. SAME—FAILURE TO PROMULGATE REGULATIONS.

On proceedings under section 3082, Rev. St. [U. S. Comp. St. 1901, p. 2014], for the forfeiture of merchandise imported contrary to law, which would have been admissible free of duty on compliance with regulations which the Secretary of the Treasury is authorized by law to prescribe, it may not be maintained in defense that the regulations have not been promulgated, and that therefore the importer was justified in importing the merchandise according to his own convenience, independently of the requirements of law. Such an importation would be "contrary to law," under said section.

6. SAME—ILLEGAL IMPORTATION—COMMON-LAW OFFENSE.

Where an importer brought merchandise into the United States without complying with the customs laws, but there was no intent to defraud the United States, *held*, that this would not constitute an offense at common law.

Action for Forfeiture of Merchandise Seized as Illegally Imported.

Note Six Parcels of Placer Gold v. U. S. (Ariz.) 76 Pac. 473.

This is an action or proceeding under the provisions of section 3082 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2014] to condemn 50 Waltham watch movements, manufactured at Waltham, Mass., exported to the Dominion of Canada, there purchased by one J. H. Racicott, the claimant herein, and by him sent by team across the border into the United States for sale and use in the United States without passing through the customhouse, or complying with the rules and regulations of the Secretary of the Treasury of the United States alleged to be applicable in such cases. The main defense relied upon is utter absence of intent to defraud the United States, the claim of Racicott being that unless such intent is shown the action for condemnation cannot be maintained.

Geo. B. Curtiss, U. S. Atty.
S. L. Wheeler, for defendant.

RAY, District Judge. Section 3082 of the Revised Statutes of the United States reads as follows:

"If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

Paragraph 493 of the act of October 1, 1890 (chapter 1244, 26 Stat. 603), entitled "An act to reduce the revenue and equalize duties on imports and for other purposes," reads as follows:

"Articles the growth, produce, and manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; casks, barrels, carboys, bags, and other vessels of American manufacture exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes; also quick-silver flasks or bottles, of either domestic or foreign manufacture, which shall have been actually exported from the United States; but proof of the identity of such articles shall be made under general regulations to be prescribed by the Secretary of the Treasury; and if any such articles are subject to internal tax at the time of exportation such tax shall be proved to have been paid before exportation and not refunded."

Under this provision the Secretary of the Treasury made the following rules and regulations:

"(483) Exportations under this provision of law must be bona fide and not for the purpose of evading any revenue law. Merchandise, the growth, produce, or manufacture of the United States, ostensibly exported to ports in Canada in foreign vessels, but really shipped from one place in the United States to another by routes part water and part rail, and passing through foreign territory, are not bona fide exportations, and the merchandise is not entitled to free entry on importation.

"(484) If returned to the port of original exportation, the fact of regular clearance for a foreign destination must be shown by the records of the customs, except in regard to exports to Canada by ferryboat, and by the declaration of the person making the entry. But when the reimportation is made into a port other than that of original exportation, there shall be required, in addition to the declaration, a certificate from the collector and the naval officer (Cat. No. 773), if any, of the port where the exportation was made showing the fact of exportation from that port (and such certificate shall be furnished on application by the collector of customs at the port of exportation). If the importation be made within one year after the date of exportation, the collector shall require the importer to produce the affidavit (Cat. No. 594) of the exporter to the fact that such exportation was made in good faith and without any purpose or intention to reimport the merchandise. If such certificate of exportation cannot at once be procured, and the proof otherwise required be produced, free entry will be permitted on bond (Cat. No. 596) being given for the production of the certificate in a sum equal to what the duties would be if it were foreign merchandise. The issuance of such certificate shall be noted on the export manifest.

"(485) To guard against fraud, and to insure identity, the collector shall require, in addition to proof of clearance, the production of a declaration made by the foreign exporter of the goods before the United States consul of the fact that the merchandise was imported from the United States, and that it has not been advanced in value nor improved in condition by any process of manufacture or other means. But if it be impracticable to produce such declaration at the time of making entry, bond may be given for the production thereof. Collectors, with concurrence of naval officers, if any, may waive the record evidence of clearance and above declaration in the case of domestic goods on which no drawback has been allowed, valued at not over \$100. In default of observance of the foregoing requirements imported merchandise will be treated as foreign."

Article 384 of the customs regulations of 1899, at page 123, provides as follows:

"All imported merchandise must be entered at the customhouse of the port of arrival."

Chapter 11 of the customs administrative act, as amended by the act of July 24, 1897, in sections 3095 to 3101 [U. S. Comp. St. 1901, pp. 2025, 2027], regulates the bringing of merchandise into the United States on the northern border from contiguous countries. The sections referred to admit the bringing of merchandise into the United States from Canada by means of vehicles or other means of transportation, but provide that such merchandise must first be reported to and entered at the customhouse nearest to the point at which they cross the border. Section 3100 provides:

"All merchandise and all baggage and effects of passengers and all other articles imported into the United States from any contiguous foreign country, except as hereafter provided, as well as the vessels, cars and other vehicles, and envelopes in which the same shall be imported shall be unladen in the presence of and be inspected by any inspector or other officer of the customs at the first port of entry or customhouse in the United States where the same shall arrive and to enable the proper officer thoroughly to discharge this duty he may require the owner or his agent or other person having charge or possession of any trunk, traveling bag or sack, valise, or other envelope or of any closed vessel, car or other vehicle to open the same or to deliver to him the proper key."

Section 2766 [U. S. Comp. St. 1901, p. 1861] provides as follows:

"The word 'merchandise' as used in this title may include goods, wares and chattels of every description capable of being imported."

And section 2767 defines the word "port" as follows:

"The word 'port' as used in this title may include any place from which merchandise can be shipped for importation or at which merchandise can be imported."

Paragraph 483 of the act approved July 24, 1897, c. 11, § 2, Free List, 30 Stat. 195 [U. S. Comp. St. 1901, p. 1680], entitled "An act to provide revenue for the government and to encourage the industries of the United States" reads as follows, leaving off the provisos which are entirely immaterial:

"Articles the growth, produce, and manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; casks, barrels, carboys, bags, and other vessels of American manufacture exported filled with American products, or exported empty and returned filled with foreign products, including shooks and staves when returned as barrels or boxes; also quicksilver flasks or bottles, of either domestic or foreign manufacture, which shall have been actually exported from the United States; but proof of the identity of such articles shall be made, under general regulations to be prescribed by the Secretary of the Treasury, but the exemption of bags from duty shall apply only to such domestic bags as may be imported by the exporter thereof, and if any such articles are subject to internal tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded."

The facts upon which this proceeding is based are as follows:

(1) At some time prior to June 13, 1904, the Waltham Watch Company, of Waltham, state of Massachusetts, U. S. A., a corporation of said state engaged in the manufacture of watches and watch movements, manufactured at its place of business in Waltham aforesaid the 50 watch movements in question here, of the value of \$230, and then exported them to the province of Quebec, Dominion of Canada, where they were held for sale or sold. Thereafter the

claimant, Joseph H. Racicott, of St. Johns, in said province of Quebec, purchased and became the owner of said watch movements; and on the 13th day of June, 1904, he knowingly sent the same, by a liveryman in his employ, who carried and transported them by team, from St. Johns, Dominion of Canada, to Rouses Point, in the state of New York, within the United States of America, to be sent from that place to the city of New York, in the United States, by express. For his services in such matter the claimant paid said liveryman the sum of \$5.

(2) The Waltham Watch Company had, it is alleged by the claimant, Racicott, and conceded by the United States, for the purposes of this case, a black list, so called, which contained and in which were entered from time to time the names of persons who, having purchased goods of this character in Canada, without any change thereof, had theretofore sent or were then engaged in sending or exporting them from Canada aforesaid into the United States. To each and every person whose name was upon this list the said Waltham Watch Company, it is alleged, refused to sell, in Canada or elsewhere, watch movements of this character or make. This allegation of Racicott and concession by the United States for the purposes of this case was made in open court in this case, to which the Waltham Watch Company is not a party, and in which it is in no way represented. It was not represented when the concession was made, and is in no way or sense bound thereby. Since the trial in open court the said Waltham Watch Company has been permitted to enter its denial of the existence of such a black list or of any list of that nature. The company asserts that such a list never existed. The watch movements in question, and all movements of that class or description manufactured for said company, were made for the foreign market, and not for sale or use within the United States. It was for the interest of the said company, it is alleged and conceded for the purposes of this case, not to have such movements sold on the market in the United States; and the said Racicott, by purchasing same in Canada and bringing or sending them back into the United States, without any change in their condition whatever, could make a gain or profit.

(3) The 50 watch movements in question, at the time and place and in the manner aforesaid, were sent and brought or returned into the United States by said claimant without any change whatever, and when so sent into the United States by said Racicott the said watch movements were in the same condition in all respects as when they were exported into Canada by said company from the United States. No labor or material had been added, nor had anything been taken therefrom, and they had not been advanced in value by any process of manufacture.

(4) The said claimant, Joseph H. Racicott, sent the said watch movements into the United States in the said way and manner for the purpose of preventing the Waltham Watch Company, of Waltham, Mass., from learning that he was returning to the United States watch movements which said company had exported to Canada, and to avoid being placed on the said alleged black list by the

Waltham Company at their office in Canada, and thereby prevented from purchasing of said company more of their watch movements in that dominion. He believed such a list existed.

(5) At the time the said claimant so sent said movements into the United States he had full knowledge of the aforesaid regulations of the Secretary of the Treasury of the United States, which require a consular certificate and proof of identification of the goods as having been previously exported into Canada from the United States, and entry of the same at the United States customhouse after being imported into the United States, and proof that they had not been advanced in value by any process of manufacture. He was advised before sending them into the United States in the mode and manner aforesaid that he had the legal right so to do, and believed such advice. He did not pay or tender the consular fee of \$1 for a consular's certificate, or enter or offer to enter said goods at any customhouse or port of entry. In no way did he comply with or offer to comply with such regulations.

(6) On the 14th day of June, 1904, said watch movements were seized by the deputy collector of customs of the United States at Rouses Point, in the state of New York, on the claim that they had been improperly brought into the United States.

(7) On the 17th day of June, 1904, said Joseph H. Racicott filed with the collector of customs of the district of Champlain, state of New York (the district into which such merchandise was brought, and in which it was seized), a claim to such property, as owner thereof, and gave the bond required, and same was duly filed and approved by the proper officer, and such seizure was immediately reported to the proper officer of the government of the United States, and the said watch movements were, and still are, detained by the collector of the port of Champlain.

(8) Before such seizure such watch movements, by authority and direction of said claimant, had been delivered to an express company at Rouses Point aforesaid for shipment to, and were addressed to, one Charles H. Keen, at 180 Broadway, New York. It must be distinctly understood that the above statement of fact as to the existence of a black list is based entirely on the assertion of Racicott, the claimant of the goods, and the concession of the government made for the purposes of this case, and not on the testimony of any witness. Such statement should in no way affect or prejudice the said Waltham Watch Company.

The claimant insists that the said watch movements were not brought into the United States either "fraudulently" or "knowingly contrary to law" or "contrary to law," and therefore the provisions of section 3082 of the Revised Statutes of the United States, above quoted, were not violated. He also insists that the rules and regulations above referred to, and in part quoted, were not adopted under and pursuant to, or after or in anticipation of, the enactment of the tariff act of July 24, 1897, containing the clause or subdivision quoted, which authorizes the making of rules and regulations by the Secretary of the Treasury, but under the prior tariff act (that of 1890), the applicable section of which has been quoted,

and that, as the quoted section or subdivision 483 of the act of 1897 covers the whole subject included in and covered by section or subdivision 493 of the act of 1890, its enactment into law repealed the former by implication, and the rules and regulations made by the Secretary of the Treasury thereunder and by virtue thereof fell with it, being but creatures thereof, dependent upon it for life and vitality, and that when these watch movements were brought or sent into the United States by the claimant and owner, on the 13th day of June, 1904, there were no rules and regulations on the subject in force.

It is clear that when the tariff act of July 24, 1897, went into effect, it became a substitute for and took the place of the tariff act of 1890. It is true that subdivision 483 of the act of 1897, in all essential particulars, reads the same as subdivision 493 of the act of 1890, and yet the one is different from the other in some respects. It is unnecessary to dwell on the differences, as they are in no way material here, and it is undoubtedly true that the one act covering the entire subject embraced in the other wholly repealed that other. Assuming that the enactment of subdivision 483 of the one repealed subdivision 493 of the other, there was no moment when the same statutory law, so far as all questions involved here are concerned, was not in force, or when the Secretary of the Treasury was not authorized to prescribe general rules and regulations as to the bringing of "articles, the growth, produce and manufacture of the United States," into the United States after same had been exported therefrom, in all cases where such articles or merchandise had not been "advanced in value or improved in condition by any process of manufacture or other means." It will be noted that the act itself, speaking of articles that may come in free of duty, after specifying generally articles, "the growth, produce and manufacture of the United States when returned after having been exported without," etc., says, "but proof of the identity of such articles shall be made" under rules, etc., and then of the bags that may come in free only certain ones may come in, and, "if any such articles are subject to internal tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded." The act itself requires the proof to be made, but the rules to be adopted are to prescribe the time, place, and mode of making such proof, etc. In short, there were conditions precedent demanded by the act itself to be performed by the claimant before he was entitled to bring these watch movements into the United States, either as dutiable goods or goods free of duty, before he could bring them in at all without violating law—in short, without bringing them in "contrary to law." It is not for the citizen and resident of the Dominion of Canada to say, when he desires to bring or import goods manufactured in the United States, and then exported to and owned in Canada, back into the United States for sale—same not having been changed or improved in condition or advanced in value—that "the Secretary of the Treasury of the United States has not made rules and regulations as to the time and place and the mode and manner when, where, and how I am to take or im-

port such goods into the United States, and when, where, and how I am to make proof of identity, etc., as required by the act of Congress of the United States; and therefore, until he does, I am at liberty to take or send such goods into the United States at any place, or at such place as suits my convenience and serves my interest, without making such proof." When such sender or importer, the claimant in this case, so acts, he violates law, and knowingly imports and brings into the United States merchandise contrary to law, and in violation of the provisions of section 3082 of the Revised Statutes of the United States. In short, that section may be violated, and the merchandise brought into the United States "contrary to law," even if the Secretary of the Treasury has not made rules and regulations as authorized by paragraph 483 of the tariff act of 1897. But it is not intended to intimate or hold that the rules and regulations in evidence, and in part quoted, made by the Secretary of the Treasury after the enactment into law of paragraph 493 of the tariff act of 1890, were not in full force and effect from and after the enactment of the tariff law of 1897. These rules and regulations were not a part of the act repealed, but the rules and regulations made by authority of law bearing on and regulating that subject; and even should it be conceded that the Secretary of the Treasury was and is without power to make rules and regulations on that subject, independent of the provisions of the tariff act quoted, it cannot be held that when the act of 1897 went into effect the rules and regulations made after the enactment of the law of 1890 fell, and became inoperative and void. It was within the power of the Secretary of the Treasury to continue them in force by adoption, and by continuing to act under and by continuing to enforce them. In this case it is not shown that these rules and regulations were not properly adopted and promulgated.¹

Then, again, section 304 of the Customs Regulations of 1899 above quoted provides that all merchandise imported into the United States "must be entered at the custom house at the port of arrival." It cannot be that a resident and citizen of the Dominion of Canada may go wide of the customhouses established by the government of the United States, and bring or send merchandise into the United States which is entitled to come in free of duty if certain proof is made, without making the proof required by law, at any point he chooses, and at any time he sees fit to select, and say: "I have violated no law. I have not knowingly brought or imported merchandise into the United States 'contrary to law.'" It is no answer to say: "In fact, the merchandise was entitled to come in free. Proof was unnecessary. The facts existed." Goods entitled to come in free are imported as much as those which pay duty. The requirement of law is as positive that the one class shall come in through the customhouses as that the other shall. This is the policy of the government in the enforcement of its laws, in the collection of its revenues, in the protection of its interests. If it be

¹ Note Treasury Circular No. 108, T. D. 18,201, dated July 24, 1897, continuing in force under the tariff act of that date "all existing regulations relating to the importation of merchandise."

true that an intent to defraud the United States must exist—and it is not held or intended to be held in this case that such intent is necessary—the intent is sufficiently shown here. An intent to defraud the United States may be shown without proving a purpose to deprive the government of property or of money or of revenue. *Hyde v. Shine* (Sup. Ct. U. S. May 29, 1905, No. 406) 199 U. S. 62, 25 Sup. Ct. 760, 49 L. Ed. —.

But it is unnecessary to discuss that question here. The proof and admission is that for the purpose of serving his own pecuniary interests the claimant knowingly evaded the customhouses of the United States and its officers, and knowingly failed to observe or comply with positive provisions of law, and also certain rules and regulations promulgated by the Secretary of the Treasury of the United States, and under which the officers of the government were acting. He was knowingly and willfully depriving the government of the United States of its right and privilege, through officers of its own selection, to protect its interests and the interests of all its citizens, by preventing it from enforcing its laws duly enacted, and its policy duly adopted, for the purpose of preventing frauds upon the revenues by the importation of dutiable goods without the payment of duty. In this instance the government may not have been defrauded of any money or property, waiving the question of the consular fee for a certificate; but its laws were defied and violated, and the United States was deprived of its right to ascertain and determine the character of the merchandise brought or sent in, and whether or not it was subject to the payment of duty, or entitled to come in under any condition. There was an intent to violate the law, to the injury of the United States and one of its officers, for the gain and advantage of this claimant.

Section 2802 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1873] provides as follows:

"Whenever any article subject to duty is found in the baggage of any person arriving within the United States, which was not, at the time of making entry for such baggage, mentioned to the collector before whom such entry was made, by the person making entry, such article shall be forfeited, and the person in whose baggage it is found shall be liable to a penalty of treble the value of such article."

In *Dodge v. United States*, 131 Fed. 849, 65 C. C. A. 603 (C. C. A. Second Circuit), it was held:

"In construing the provisions in paragraph 697, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], that \$100 in value of articles purchased abroad by returning residents of the United States may be admitted free of duty, held, that it is the passenger's duty to enter and declare the value of such articles, whether they cost more than \$100 or not, and that when not so declared they are subject to forfeiture under section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873].

"In construing section 2802, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1873], providing for the forfeiture of 'any article subject to duty * * * found in the baggage of persons arriving in the United States, which was not at the time of making the entry for such baggage mentioned to the collector before whom the entry was made,' held, that fraudulent intent is not an ingredient of the cause of forfeiture; also that dutiable articles found in the handbag of a passenger after said passenger had entered other dutiable articles were subject to the enforcement of the penalties prescribed by said section."

The same principle was involved there as is involved here. It is undoubtedly true that the claimant must have had a bad mind, an unlawful purpose, but it is no defense that his main purpose was to escape the black list mentioned. *United States v. Kirby*, 7 Wall. (U. S.) 482, 19 L. Ed. 278. There it was held as to "knowingly and willfully obstructing the mail," that, "When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although to attain other ends may have been his primary object." Here the primary object of the claimant was to keep from the alleged black list, the existence of which is denied by the Waltham Watch Company; but in so doing he knowingly violated the law, and intended so to do. "Knowingly" is frequently used, as here, in contradistinction to "innocently," "ignorantly," or "unintentionally." *United States v. Claypool* (D. C.) 14 Fed. 127. See *Commonwealth v. Boynton*, 12 Cush. 499.

In *United States v. McKim*, Fed. Cas. No. 15,693, it was held that:

"The words 'knowingly and willfully,' as used in a revenue law providing a penalty for so constructing cisterns in a distillery as to permit the abstraction of spirits, do not require an intent to defraud the revenue, but the penalty prescribed by the act is incurred and the offense is complete when the defendants have left undone those things which they ought to have done, and done those things which they ought not to have done, without any fraudulent or criminal intent."

Valuable remarks and references to cases on the question of intent will be found in 2 Lewis' *Sutherland Statutory Construction* (2d Ed.) §§ 526, 527.

In *Regina v. Tolson*, L. R. 23 Q. B. Div. 168, 40 Alb. Law J. 250, it was said by Willis, J.:

"The intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may coexist with respect to the same deed."

The claimant here knew that in so acting as to escape the said alleged black list of the Waltham Watch Company, the existence of which is denied by the Waltham Watch Company—that is, in so acting as to serve and protect his own personal, private, business interests—he was violating the laws of the United States, and doing what he was forbidden to do, and failing to do what he was commanded to do by those laws. Conceding that to constitute a criminal offense in violating a statute there must be "a criminal intent," or a "bad mind," it seems clear to this court that, where the statute offended against fails to specify a particular intent as the one which must exist in order to make the doing of the act criminal, the knowing and willful violation of the statute (if not justified) for some personal end or gain shows the bad mind and establishes the criminal intent. Where acts constituting a crime at common law are described in general terms in a statute of the United States, and made a criminal offense, and a criminal intent is not in terms or by necessary implication mentioned as an ingredient of the offense, such intent must be read into the statute and proved on the

trial in those cases only where such intent was a necessary ingredient of the common-law offense. *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135. The acts done by the claimant here did not constitute an offense at common law. By section 16 of the act of June 22, 1874 (18 Stat. 189, c. 391), it was, in substance and effect, provided that in all actions, suits, and proceedings in the courts of the United States for the forfeiture of any goods or chattels the question should be submitted whether or not there was an actual intent to defraud the United States, and, if no such intent was found, there should be no forfeiture. This provision was repealed. *United States v. Ortega* (D. C.) 66 Fed. 713.

Sections 6 and 9 of the customs administrative act of 1890 (26 Stat. 131, c. 407), as amended by the act of July 24, 1897 (30 Stat. 211 [U. S. Comp. St. 1901, p. 1886]), have no application in this case.

The court finds and holds that, notwithstanding the fact that the primary intent or purpose of the claimant was to escape being put on the alleged black list of the Waltham Watch Company, the existence of which is denied, and no proof has been given of its existence, except the admission of the said Racicott and of the government for the purposes of this case—the Waltham Watch Company denying its existence—he brought in and imported the 50 Waltham watch movements into the United States knowingly, contrary to law, and with an intent and purpose to defy and evade the law, and that the watch movements described in the information are forfeited to the United States. Judgment accordingly is directed.

R. HOEHN CO. v. UNITED STATES.

(Circuit Court, S. D. New York. November 3, 1904.)

No. 3,450.

CUSTOMS DUTIES—CLASSIFICATION—ARTIFICIAL EYES—DECORATED GLASSWARE.

Glass eyes for dolls, in which, in order to complete the resemblance to the human eye, the iris and the pupil have been skillfully painted or traced, are within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], for "articles of glass, * * * painted * * * or otherwise ornamented, decorated," etc.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision under review is G. A. 5,471, T. D. 24,779, which affirmed the assessment of duty by the collector of customs at the port of New York. The opinion of the Board of General Appraisers reads as follows:

Somerville, General Appraiser. The goods consist of eyes for dolls, classified as dutiable at the rate of 60 per cent. ad valorem, under paragraph 100, Tariff Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], which provides for "articles * * * colored, * * * or otherwise ornamented, decorated, or ground." They are claimed by the importers to be dutiable under the provision in paragraph 112 of said act, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635], for "manufactures of glass, * * * not

specially provided for." The articles are made entirely of glass, in imitation of the human eye, being hollow, globular shapes, with an opening and projection at the back, presumably intended for fastening them in place. The glass of which they are made is white, except the parts representing the iris and the pupil, which are colored blue, gray, or brown. This coloring is applied skillfully, being delicately shaded and traced in a way to produce the desired effects. In reaching our conclusions in this case we must be governed by the decision of the Circuit Court of Appeals in *Koscherak v. U. S.*, 98 Fed. 596, 39 C. C. A. 166. That case involved the construction of paragraph 90, Tariff Act 1894, c. 349, 28 Stat. 513, which provided for various classes of glassware, when cut, colored, etched, etc., "or otherwise ornamented or decorated." The court held that to bring glassware within that paragraph the cutting, coloring, etching, etc., thereon must (1) be substantial, and (2) amount to an ornamentation or decoration. In our judgment, both requirements are answered in this case. The colored portion of the eyes is certainly substantial, constituting as it does a large proportion of the articles as made, and the most prominent feature of them as used. So, also, in our opinion, is the coloring ornamental or decorative. This case differs from *In re Glaenzer*, G. A. 3,373, T. D. 16,854, where similar articles were held to be dutiable as colored glassware under paragraph 94, tariff act of 1894, in that that paragraph did not contain the words "or otherwise ornamented, decorated, or ground," or their equivalent. So there was no implication that the coloring should be ornamental, etc. The protests are overruled, and the decision of the collector affirmed.

Comstock & Washburn, for the importers.
Charles D. Baker, Asst. U. S. Atty.

HAZEL, District Judge. The importation in question consists of glass having a globular shape in imitation of the human eye. For the purpose of fastening the eyes in place, a small hollow extension or stem is provided at the back. The iris and the pupil are skillfully painted or traced in order to complete the resemblance and to effectuate the desired object. The duty assessed by the collector of customs was under paragraph 100, which provides for the payment of 60 per cent. ad valorem. The importers claim the merchandise should have been assessed at 45 per cent. ad valorem, under paragraph 112; and they contend that the coloring is not decorative or ornamental, and hence is not dutiable under the first-mentioned paragraph of the act of 1897. The Board of General Appraisers was of the opinion that, considering the use to which the article is put, namely, for dolls, the painting and tracing of the iris and the pupil was in the nature of an ornamentation, and, further, that a substantial part of the glass was colored, and therefore the decision of the collector was proper.

The protest, in my judgment, was properly overruled, and I concur in the conclusions and reasoning of the board. The decision is therefore sustained.

WILLIAM CRAMP & SONS SHIP & ENGINE BLDG. CO. v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. June 26, 1905.)

No. 40.

CUSTOMS DUTIES—CLASSIFICATION—BRONZE HARDENER—UNWROUGHT METAL.

As to an alloy used chiefly as a hardener in the manufacture of manganese bronze, which in its present condition is of no use except to be melted and mixed with other metals to produce such effect as it is capable of producing, *held*, that it is dutiable as a metal unwrought under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645], and not as an article of metal, not specially provided for, under paragraph 193, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], nor either directly or by similitude, as ferro-manganese, under paragraph 122, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question affirmed the assessment of duty by the collector of customs at the port of Philadelphia. Compare *United States v. Roessler & Hasslacher Chemical Company* (C. C. A.) 137 Fed. 770.

Hatch, Keener & Clute, for importers.

Wm. M. Stewart, Jr., and J. Whitaker Thompson, for the United States.

J. B. McPHERSON, District Judge. The merchandise in question is an alloy of metal, composed of 62 per cent. of iron, 32 per cent. of tin, and 6 per cent. of manganese. It is chiefly used as a hardener in the manufacture of manganese bronze, although it is capable of being used for some other purposes. The board of appraisers classified it under paragraph 172 of the tariff act of July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 165 [U. S. Comp. St. 1901, p. 1643], as an alloy of which aluminum is the component material of chief value; but this is conceded to have been a mistake. The question for decision now is whether the material should be classified under paragraph 183 (30 Stat. 166 [U. S. Comp. St. 1901, p. 1645]), as a metallic mineral substance in a crude state, or a metal unwrought; or under paragraph 122 (30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]), either directly or by similitude, as ferro-manganese; or under paragraph 193 (30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]), as an article or ware of metal, either partially or wholly manufactured, not specially provided for. The testimony leaves the answer in some doubt, but I have finally come to the conclusion that paragraph 183 is more nearly applicable than either of the other two. The alloy is of no use in its present condition. It must be melted and mixed with other metals to produce such effect as it is capable of producing, and the process it has already undergone is so obviously a mere preliminary that it seems to me to be properly described as a

metal unwrought. Inspection of the sample tends to confirm this conclusion.

The decision of the Board of General Appraisers is reversed, with instructions to classify the merchandise under paragraph 183.

UNITED STATES v. McGETTRICK (two cases).

(Circuit Court, D. Vermont. July 12, 1905.)

Nos. 1,600, 1,601.

CUSTOMS DUTIES—CLASSIFICATION—OATMEAL FEED—OAT HULLS.

Held, that a by-product in the manufacture of oatmeal, which consists merely of the broken hulls of the oats, and is known as "oatmeal feed," is dutiable as "oat hulls," under paragraph 231, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 169 [U. S. Comp. St. 1901, p. 1649].

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,656, T. D. 25,235, which reversed the assessment of duty by the collector of customs at the port of Burlington on importations by P. McGettrick.

James L. Martin, U. S. Atty.

WHEELER, District Judge. These importations are of what is invoiced as oatmeal feed classified by the collector as oat hulls, under paragraph 231 of the act of July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 169 [U. S. Comp. St. 1901, p. 1649], which reads:

"Oatmeal and rolled oats, one cent per pound; oat hulls ten cents per hundred pounds."

On protest they were classified as nonenumerated manufactured articles, not otherwise provided for, under section 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

An affidavit in behalf of the importers, and the finding thereon by the Board of General Appraisers, show that:

"The said oatmeal feed is purely a by-product of oats, and is obtained from the hulling, dusting, and cleaning of oats which are used in the manufacture of oatmeal. The method of obtaining said oatmeal feed is briefly this: The oats are passed through special machinery arranged for cleaning and hulling them before they are put in the crusher to make oatmeal. Consequently the said oatmeal feed corresponds to the bran and shorts which are obtained from the milling of wheat, being a by-product of an oatmeal mill, as wheat bran and wheat shorts are a by-product of flour mills."

This by-product appears therefrom to be merely the broken hulls. The provision is not, and could not be intended to be, for whole hulls. They would necessarily be broken by any possible process of removal. It seems to fall exactly within the description of this paragraph. The analogy to bran and shorts fails when it is noticed that there is no such provision for wheat hulls as this is for oat hulls, and that such by-products of wheat are left by the act to go to the general provisions. The classification of the collector seems, therefore, to have been right.

Decision of board reversed, and that of collector affirmed.

STADLER et al. v. MISSOURI RIVER POWER CO.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1905.)

No. 1,155.

1. DEEDS—RESERVATION—CONSTRUCTION.

In the absence of a clearly expressed intention to contract for other rights, a reservation from a grant by deed or lease is limited to some part of the estate owned by the grantor, and which would otherwise pass by the grant.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 465.]

2. WATER COURSES—COVENANT FOR EASEMENT TO FLOOD LANDS—CONSTRUCTION.

Defendant owned a dam on the Missouri river, used for generating electrical power, and instituted condemnation proceedings against lands of plaintiffs lying above. After judgment defendant bought the land condemned, together with an additional tract from plaintiffs' ranch, at the same time executing a lease of the same to plaintiffs for 20 years at a rental of \$1 per year, in which the right to flood the land leased was reserved, and it was provided that plaintiffs "hereby agree to permit and recognize the right of said first party to flood said premises by the waters of the Missouri River as they may be raised by the dam belonging to said first party * * * as the said dam now exists, or as the same may be hereafter raised or lowered, without claim for damage." Sufficient consideration for the lease appeared in addition to the nominal rental. *Held*, that such provision extended no further than the reservation, and did not release defendant from damages for flooding other lands owned by plaintiffs, not described or mentioned.

Appeal from the Circuit Court of the United States for the District of Montana.

For opinion below, see 133 Fed. 314.

The Helena Water & Electric Power Company, hereinafter designated the "Helena Water Company," the predecessor of the appellee herein, had constructed and was maintaining a dam across the Missouri river in Lewis and Clarke county, Mont. On the bank of the river about eight miles above the dam the appellants owned and were operating a cattle ranch, consisting principally of low and comparatively level grazing and hay lands. The Helena Water Company wished to raise its dam, and, finding that it would thereby flood some of the lands of the appellants, on December 16, 1897, it commenced, in the district court of the First Judicial District of Montana for Lewis and Clarke county, against the appellants, a suit to condemn a body of land, being the lower portion of the appellants' ranch, and consisting of 393 acres. Those proceedings resulted in a judgment rendered upon the verdict of a jury on June 29, 1898, whereby the value of the lands so sought to be condemned was fixed at \$35 per acre, and in addition thereto the sum of \$2,700 was awarded the appellants as damages to their other lands by reason of their severance from the lands condemned. After that judgment was rendered, and in September, 1898, in view of the loss of the condemned land, the appellants bought the adjoining ranch of their next neighbor up the river. About this time the Helena Water Company, finding that by raising its dam as contemplated it would flood more of the appellants' land than had been anticipated, entered into negotiations with the appellants for the purchase of other lands above the lands condemned. These negotiations resulted in a conveyance, on January 17, 1899, whereby, in consideration of \$22,487.55, the appellants conveyed to said company not only the land so condemned, but in addition thereto 243.57 acres lying next above it, the total quantity of land so conveyed being 637.42 acres. At the same time with the execution of the conveyance, and as a part of the same transaction, the company executed to the appellants a lease of all

the lands which had been so conveyed to it, which lease is as follows: "This indenture, made the seventeenth day of January, 1899, between the Helena Water and Electric Power Company, a corporation, by C. W. Whitley, its general manager thereto duly authorized, party of the first part; and Louis Stadler and Louis Kaufman of Lewis and Clarke county, Montana, parties of the second part witnesseth: That in consideration of the rents hereinafter reserved and the covenants hereinafter contained on the part of the said Louis Stadler and Louis Kaufman, their executors, administrators, and assigns, to be observed and performed, the said Helena Water and Electric Power Company does hereby let and rent unto the said parties of the second part for the term of twenty years, except as hereinafter stated and limited, the following described premises. [Here follows a description of the premises leased.] Also, such other land as the party of the first part now owns on the island in the Missouri River near the above-mentioned property, reserving, however, to the said party of the first part, its successors and assigns, the right at all times hereinafter to flood any or all of said premises by the waters of the Missouri River as the same may be raised by the dam belonging to the said first party at Canyon Ferry, Lewis and Clarke county, Montana, as the same now is or the same may be hereafter raised or lowered and this lease is given subject to this right. In consideration whereof, the said parties of the second part agree to pay unto the said party of the first part the yearly rent of one dollar for the use of said premises, payable on the 17th day of January, 1900, and every year thereafter during the continuance of this lease. And said second parties for themselves and each of themselves, their and each of their heirs, executors and assigns, do hereby agree to permit and recognize the right of said first party to flood said premises by the waters of the Missouri River as they may be raised by the dam belonging to the said first party at said Canyon Ferry, Montana, as the said dam now exists or as the same may be hereafter raised or lowered, without claim for damage. It is hereby mutually agreed and understood that if at any time hereafter the dam of the said party of the first part at said Canyon Ferry as it now exists or as it may hereafter be altered or changed shall be washed away so that it does not afford sufficient power to the said first party, that this lease shall then and there terminate." At the same time a third instrument, called a "release," was executed, in words as follows: "Know all men by these presents, that we, Louis Stadler and Mary Stadler, his wife, and Louis Kaufman, for and in consideration of the sum of one dollar, and other valuable consideration to us in hand paid by the Helena Water and Electric Power Company, a corporation, have forever released and discharged, and do hereby forever release and discharge the said Helena Water and Electric Power Company, its successors and assigns, from all damages or claim for damages which we have or claim to have, or may hereafter claim, against it by reason of it (said company) having flooded or hereafter flooding by the waters of the Missouri River the following described real estate, or any thereof, to wit. [Here follows description of the premises, being the same premises as those described in the deed and the lease.] All in the county of Lewis and Clarke, and State of Montana; also the land on the island in the Missouri River near said above-mentioned property." The Helena Water Company then raised its dam, and thereby backed water over portions of all the land so deeded to it by the conveyance above mentioned, and the same was maintained until August, 1902, when the appellee, as its successor in interest, raised the dam still higher, and thereby flooded large portions of other lands of the appellants, not conveyed to the water company, lying above the lands so conveyed, consisting of 289.49 acres, on which the appellants owned a dwelling house, sheds for cattle, a granary, corrals, and branding chutes. It was to enjoin the flooding of these lands above the deeded lands that the present suit was brought. On the issues presented testimony was taken before an examiner, and on the final hearing a decree was entered dismissing the appellants' bill.

T. J. Walsh, for appellants.

E. W. Toole, B. P. Carpenter, T. C. Bach, E. C. Day, and Stephen Carpenter, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, delivered the opinion of the court, after stating the case as above.

The rights of the parties in the present litigation depend on the construction of the lease and the release executed on January 17, 1889. Those instruments, as was also the deed of the same date, were prepared by the attorney of the Helena Water Company. Before they were executed there was inserted by the said company at its own instance, by interlineation, in the lease the following clause: "Also such other land as the party of the first part now owns on the island in the Missouri River near the above-mentioned property," and in the release the following: "Also the land on the island in the Missouri River near said above-mentioned property." What land was meant by these terms in these instruments is, as we shall presently see, the subject of much controversy, both in the testimony and in the argument of counsel. In the lease the appellee leases to the appellants for the term of 20 years all of the lands that had just been conveyed to it by the latter, the intention evidently being to permit the appellants to use for pasturage or hay cutting in connection with their cattle ranch such portions of the same as would not be flooded by the waters of the dam. In that instrument the right of the appellee to flood the leased lands is expressly reserved. The appellee contends, and the trial court so held, that the words of the reservation, together with the answering covenant of the lessees and the terms of the release, constitute a contract between the parties by which the appellee was given the right to raise its dam to any height, and that the flooding of other lands which the appellants owned was a necessary incident to such right was in the contemplation of the parties, and passed to the appellee by those instruments.

The first question, then, is, what was reserved to the Helena Water Company by the lease? The extent of that reservation, whatever it is, is not enlarged by the answering covenant of the lessees in the lease. That covenant recognizes the reservation. It repeats its language word for word, with the exception of the final words, "without claim for damage." Those words are unimportant, and are merely surplusage. They mean no more than that the lessor in the lease may exercise the rights reserved therein without claim for damage on the part of the lessees. A reservation has been defined to be an interest retained by a grantor out of the body of the thing granted. *Marshall v. Trumbull*, 28 Conn. 183, 73 Am. Dec. 667. Another definition is, "A clause in a deed whereby the grantor reserves some new thing to himself issuing out of the thing granted and not in esse before." 4 Kent's Com. 468. In *Winston v. Johnson*, 42 Minn. 398, 45 N. W. 958, the court defined a reservation as "something merely created or reserved out of the thing granted that was not in existence before." In *Craig v. Wells*, 11 N. Y. 315, the court said: "A reservation is always something which is taken back out of that which is clearly granted." In *Barataria v. Ott* (Miss.) 37 South. 121, the court said: "A reservation in a deed must not only be, as hereinbefore pointed out, of something which would otherwise, by operation of the terms of the

deed, be conveyed, but it must necessarily be of something which belongs to the grantor at and before the execution of the deed. Property cannot be conveyed by reservation." Judge Gray held, in *Hill v. Cutting*, 107 Mass. 596, that one of two tenants in common, who quitclaimed to his co-tenant all his interest in a certain described portion of the common property, reserving to himself the right to all the timber growing on a certain described eight-acre tract thereof, reserved thereby only his own undivided one-half of said timber, and did not acquire the undivided one-half interest of his co-tenant therein. The court said, "A reservation or exception can only be out of the estate granted." These definitions and utterances of the court express the general meaning and scope of a reservation in a deed or other instrument. It has been held, however, and it is conceded to be the law, that where an intention is clearly expressed in what is denominated a reservation that the grantor is to exercise some right outside of and above the rights which he had in the thing granted before the grant was made, and the grantee assents thereto, such an agreement, although expressed in the form of a reservation, may have the force and effect of a contract, if such is clearly the intent and purpose of the contracting parties. *Case v. Haight*, 3 Wend. 632. But are we justified in saying that such was the intention of the contracting parties to the lease under consideration? It is a rule of construction that the words of a reservation will be construed most strictly against the grantor and most beneficially for the grantee. *St. Anthony Falls W. P. Co. v. Minneapolis* (Minn.) 43 N. W. 56; *Brown v. Darling et al.* (Ky.) 52 S. W. 936; *Bolio v. Marvin*, 130 Mich. 82, 89 N. W. 563; *Wellman v. Churchill*, 92 Me. 193, 42 Atl. 352; *The Green Bay and Mississippi Canal Co. v. Hewitt et al.*, 66 Wis. 461, 29 N. W. 237. In determining the meaning of the words used, if they are ambiguous it is proper to consider the antecedent and attending circumstances. *Dunn v. English*, 23 N. J. Law, 128; *Lego v. Medley et al.* (Wis.) 48 N. W. 375, 24 Am. St. Rep. 706; *Canal Co. v. Hill*, 15 Wall. 94, 21 L. Ed. 64; *French v. Williams* (Va.) 4 S. E. 591.

The first step of the Helena Water Company in the proceedings which led up to the execution of these instruments was its condemnation suit, whereby it sought to condemn the lower portion of the appellants' ranch. Up to the time of that suit evidently the water company expected to flood no more of the appellants' land than that described in its complaint therein. The judgment in that suit gave it no right to flood any other lands. Afterward, finding that it needed to flood still other lands of the appellants, it bought such other lands, together with the condemned lands, all at the price per acre that had been fixed by the verdict of the jury in the condemnation suit. The conveyance then made, if it had stood alone, would have measured the full extent of the appellee's right to flood the lands of the appellants. But the settlement contemplated other things. The appellants wished to obtain a lease on the deeded lands, so that they might avail themselves of the hay and pasture lands thereof on such portions as might not be flooded, and the

Helena Water Company wished to obtain a release of the judgment of \$2,700 which stood against it, damages for the severance of the condemned lands from other lands, and also a release from damages for flooding the appellants' lands pending the condemnation proceedings and up to the time of the settlement. In the lease the reservation of the right to flood goes no further, by its expressed terms, than the lands belonging to the Helena Water Company. It is the right to flood the particular lands which it owned, only, that is thus reserved. If it had been the intention of both the parties to that instrument that other lands might be flooded, it is reasonable to assume that that intention would have been expressed in words. It is true the lease reserves the right to raise the dam as the same was then or might thereafter be raised or lowered, but the right to raise and lower the dam must be limited by the reserved right to flood, and the words used mean no more than that the water company was at liberty to raise the dam to any height it might deem necessary to flood the lands which it owned, and which it had reserved the right to flood. In other words, the lease, as we construe it, reserves to the water company the right to flood the lands described in the lease, and to that extent, and to that extent only, to raise its dam to any desired height.

It is contended that, if this construction of the instrument be adopted, no consideration is left to be apportioned for the lease which was given to the appellants. It is true that the consideration in both the lease and release is therein said to be \$1, and that the consideration expressed in the conveyance amounts to \$35 per acre for all the land conveyed. But the fact must not be lost sight of that in the condemnation proceedings \$2,700 had been awarded to the appellants as damages for the severance of the lands condemned from their other lands, and that award stood in the form of a judgment against the water company at the time when the instruments were executed. While the conveyance to the water company of those other lands so severed may be said to have extinguished that particular claim for damages, there can be no question but that still further claims of the same nature might arise for the severance of the lands conveyed from those still reserved by the appellants, and on which are situated their improvements. In addition to this, it appears that pending the condemnation suit there had been flooding of appellants' lands above the lands condemned, which flooding formed the basis of a claim of damages. The relinquishment of those claims for damages may well have been taken into the reckoning, and have been an adequate consideration both for the lease and the release. The very fact that the lease was taken, as it was, for a period of 20 years, shows that it was within the contemplation of both the parties thereto that a considerable portion of the land conveyed to the water company was to be available to the appellants for purposes of pasture or for cutting hay, and it cannot be doubted that the right to use those lands so secured to the appellants by the lease was supposed by the parties thereto to be a valuable right. When the words of a grant are ambiguous, the courts will also consider the acts done under it

as a clue to the intention of the parties. *Livingston v. Ten Broeck*, 16 Johns. 22, 8 Am. Dec. 287; *French v. Carhart*, 1 N. Y. 96. It is a circumstance to be considered in this connection that immediately upon the execution of the instruments the dam was raised so as to flood considerable portions of the leased lands, but not the lands of the appellants lying above the same, and was so maintained for $3\frac{1}{2}$ years, and until August, 1902, when it was raised to its present height. It is not disputed that when it was so raised the appellant Kaufman went to Mr. Gerry, then and since the organization of the appellee, its chief engineer and manager, and told him "that they were drowning us out," and that "Mr. Gerry said that there was no doubt about it; that the Missouri River Power Company would have to settle with us for it." But it is said that the release gave to the Helena Water Company the right to flood all the lands the appellants then owned, and this for the reason that it expressly recognized that company's right to flood the land on the island in the Missouri river. To one who examines the lease and the release without the aid of extraneous evidence, it must seem clear that the island land referred to in both is the same land—that is, that it is some land then belonging to the water company on an island in the Missouri river. Both clauses so interlined were inserted at the same time, and their language is the same, with the exception that in the release the words "as the party of the first part now owns" are omitted. The appellants contend that the island so referred to is a small island in the Missouri river opposite the lands which were the subject of the condemnation suit. The appellee contends, and it produced testimony to show, that the island referred to in both instruments is land in the Missouri river lying above the deeded lands consisting of lots 12, 13, and 14 in section 5, lots 2, 3, 4, and the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 8, lot 7 in section 7, and lot 17 in section 6, and that it is called an island for the reason that low ground in the shape of a channel separates it from the other land, in which channel in times of freshet water enters from the river so as to create a slough and form with the Missouri river an island; and that the island land belonging to the Helena Water Company referred to in the lease is lots 12 and 13 of section 5 and lot 2 of section 8, containing in all 65 acres; and that it is in the lease described as land which "the party of the first part now owns" for the reason that by virtue of the act of Congress which gave that company the authority to construct its dam across the Missouri river there was granted an implied right to flood lands belonging to the United States; that said lots were then and remain the property of the United States; that the "land on the island in the Missouri river" mentioned in the release is the remainder of said lands, the property of the appellants; and that the clause was interlined in the release for the reason that the water company wished to obtain a discharge of all claim of future damages for flooding any or all of the lands which the appellants still owned after the execution of the deed. One difficulty in the way of this explanation is the fact that the appellants at that time owned other lands not mentioned in the release, lands adjoining the so-called

slough, and similarly situated to the lands called by the appellee the island lands, consisting of some 140 acres, which has been flooded by the present dam, according to the testimony, nearly, if not quite, as extensively as the island lands. If it was the intention of the parties to the release to acquit the appellee of all claim of damages for flooding other lands of the appellants, it is not apparent, nor is it explained, why these other lands were not mentioned in the release. Another difficulty is that it is not perceivable how the appellee's predecessor could with propriety denominate in the lease the public land, in which it claimed no greater interest than the right to flood the same from the act of Congress authorizing it to dam the Missouri river, "land which the party of the first part now owns," or could assume to lease the same to the appellants. And there is also the additional fact that the appellants never asked for or discussed a lease of those lands. The testimony as to the circumstances under which the interlineations were made is meager. It is admitted that the lease and the release had been prepared for some time before they were signed; that they were prepared by the attorney for the Helena Water Company, but that thereafter, and just before they were signed, these interlineations were made. There is no dispute that they were made at the suggestion of Mr. Whitley, then the manager of the Helena Water Company. He testified that the interlineations were made to carry out the understanding of the parties, and that in the negotiations he distinctly remembered having stated to Mr. Kaufman, one of the appellants, "that at periods of low water we would undoubtedly resort to flashing, and that at that time the flashing would undoubtedly bring the level of the water to a height the same as flood heights in the spring"; but he also testified that he never had any specific conversation with either of the appellants in relation to lands upon the so-called island. One of the appellants testified that nothing had been said in the negotiations about flooding lands other than those which were deeded, and that little attention was paid by the appellants to the matter interlined for the reason that they understood the island referred to to be a small island in the Missouri river further down the stream, and opposite the lands which were the subject of the condemnation suit. He testified that Mr. Whitley said it "would be better to have that in there. I told him we would not come down and claim this island. I said, 'What do you want this island described for?' He said, 'It is better to have it there.'" The witness stated that he paid little attention to what the language meant.

If we assume that both parties testified truly as to their understanding concerning the land on the island, it is evident that they had in contemplation not the same, but different, lands. However that may be, we are convinced, upon a consideration of the whole of the evidence, that the minds of the contracting parties never met upon the proposition that the Helena Water Company was to exercise the right to flood the whole of the appellants' ranch, and never expressed such an understanding in their contracts. The papers had been prepared for execution several days before they were

signed. Presumably, as thus prepared, they expressed the agreement of the parties. They had been submitted to the attorney of the appellants, and approved by him. It is not conceivable that the appellants intended by the interlineations thereafter made just before the execution of the lease and the release to change the whole scope and tenor of their contract; or that they ever intended, as the consideration for the lease which they obtained, not only to relinquish all their claim for damages then accrued, but to submit the whole of their remaining land to the use of the Helena Water Company, and to grant it the right to flood the same to any desired depth. And such would clearly be the right of the appellee if its contention as to the construction of the papers were correct. We are of the opinion that neither in the lease nor in the release is the right given to the appellee to flood any of the appellants' lands.

The decree will be reversed, and the cause remanded for further proceedings not inconsistent with this view of the contract.

IMPERIAL BOTTLE CAP & MACHINE CO. et al. v. CROWN CORK & SEAL CO. OF BALTIMORE CITY.

(Circuit Court of Appeals, Fourth Circuit. July 7, 1905.)

No. 506.

1. PATENTS—INVENTION—COMBINATION OF OLD ELEMENTS.

Where a patent covers a combination of old elements, and none of the prior inventors exhibits or suggests any co-operation of the elements upon the principle adopted by the later patent, or upon any principle adapted to serve the same purpose, the use of the old elements may limit, but cannot defeat, the patent.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 27-29.]

2. SAME—NOVELTY—PRESUMPTION FROM GRANTING OF PATENT.

The presumption of novelty arising from the granting of a patent is greater or less according to circumstances. If the patent relates to something of temporary interest, and the object sought is of little importance, it may receive but little attention in the Patent Office, and the presumption is slight; but where the problem sought to be solved is of such importance that its solution promises great pecuniary returns, and it is shown that all the claims were subjected to critical analysis, resulting in amendments and disclaimers designed to distinguish the invention from everything in the prior art, the presumption of novelty is greater than in those cases where the patent may have passed by inadvertence.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 53.]

3. SAME—INVENTION—PRESUMPTION FROM UTILITY.

Where there is an actual and admitted improvement in a combination of old elements, and its utility is shown in a marked degree, there should be controlling reasons to rebut the presumption that there is a sufficiency of invention to support a patent.

4. SAME—BOTTLE STOPPERS—INFRINGEMENT.

The Painter patent, No. 468,258, for a bottle stopper, was not anticipated in the prior art; and, while the device consists of a combination of old elements, it was the first to be fully successful in a field where there had been many failures, and discloses patentable invention. Such patent, however, is not infringed by the device of the Abbott patent, No. 704,167, which employs the same elements to accomplish the same result.

but under a different arrangement, in which they severally perform different functions, and are applied to bottles having differently shaped necks.

Goff, Circuit Judge, dissenting on the question of infringement.

Appeal from the Circuit Court of the United States for the District of Maryland.

For opinion below, see 123 Fed. 669.

H. T. Fenton and John E. Semmes, for appellants.

Robert H. Parkinson and John C. Rose, for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. The validity of the Painter patent, No. 468,258, which the court below adjudged to have been infringed by defendants, was not challenged in the argument here when the case was submitted, but pending our consideration of the appeal, and prior to decision, the Circuit Court of Appeals of the Second Circuit delivered its opinion in *Crown Cork & Seal Co. v. Standard Stopper Co.*, 136 Fed. 841, holding this patent invalid for want of patentable novelty. In view of the importance of having uniformity of adjudication in the federal tribunals, especially in patent causes, where the Supreme Court is reluctant to issue its writs of certiorari, involving, as they generally do, merely questions of fact, we ordered a reargument at the May term, and the case is now before us for our determination. It is not claimed that the judgment of the Circuit Court of Appeals of the Second Circuit is controlling in the sense that the question is *res adjudicata*, but the high respect we have for the ability, learning, and experience of the judges of that court is a very persuasive reason for following it, when by so doing we may assist in securing that uniformity which is very desirable, thus avoiding confusion and preventing repeated litigation of the same question; but the parties before us have the right to our individual judgment, and considerations of convenience and expediency must give way to demands of duty, from which we cannot be absolved by the doctrine of comity. "Comity persuades," says Mr. Justice Brown in *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 488, 20 Sup. Ct. 708, 44 L. Ed. 856, "but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where in his own mind there may be a doubt as to the soundness of his views that comity comes in play, and suggests a uniformity of ruling, to avoid confusion until a higher court has settled the law. It demands of no one that he abrogate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals."

Many of the considerations that give weight to adjudications in other courts of equal and final authority are absent here. There

has been no concordance of opinion among several courts, nor has the decision stood for a series of years with general acquiescence therein, where business interests in reliance thereon have adjusted themselves thereto, and public policy requires adherence. If there had been anything like unanimity of opinion among learned judges whose experience in patent causes is so much greater than ours, it would so far awaken doubts as to the correctness of any opinion that we might entertain in opposition thereto that we would be inclined to defer to it. That was the case in *Beech v. Hobbs*, 92 Fed. 146, 34 C. C. A. 248, cited by defendants, where a carefully considered opinion of Judge Coxe was unanimously affirmed by the Circuit Court of Appeals, Second Circuit, and followed in the First Circuit. Here we have two circuit judges on one side, and two circuit judges on the other. Therefore we cannot feel ourselves permitted to accept this judgment as controlling, and proceed, not without misgivings, to state our conclusions:

The patent in suit was granted to William Painter February 2, 1892. It is one of a number of bottle-sealing devices by which Painter had undertaken to provide a substitute for the long cork which prior to this time was generally used as a stopper for bottles. One of his patents was before us in 1901, and in the opinion reported (*Crown Cork & Seal Co. v. Aluminum Stopper Co.*, 108 Fed. 845, 48 C. C. A. 72) some account is given of the condition of the industry and of the state of the art before his inventions were put on the market, which need not be repeated. The device embraced in the patent is generally known as the "crown seal," and for convenience will be so designated, and for the same reason the appellants will be herein referred to as the defendants, and appellee as the plaintiff.

The proofs show that the "crown seal" went rapidly into public use, that it is fast superseding all other bottle-stopping devices; that demand for it is constantly increasing, and that during the year preceding the taking of the testimony over 425,000,000 were sold; that the cost is about one-fourth or one-third of the old method; that it is capable of rapid application and easy removal, and is thoroughly sanitary. All of these advantages have secured for it phenomenal commercial success.

There are nine claims in the patent, and they have been referred to—perhaps truly—as unnecessarily verbose, and it does not seem necessary to recite them all. The patent is for a combination, and does not purport on its face to be a pioneer. As shown in the exhibits in the preferred form, the device is a hard metal cap, in which there is a sealing disk of cork about one-ninth of an inch in thickness, encircled by the cap, which is provided with corrugated, vertical flanges, extending substantially throughout its depth. The flanges of the cap are bent by suitable pressure, by a machine adapted to the purpose, under the shoulder, which is some distance below the bottle mouth. The locking of the cap under the shoulder holds the cap and the cork disk inside of the cap in sealing contact with the bottle head, and the lower edge of the flange, under the overhanging shoulder, projects sufficiently to permit a

prong or lever to easily pry off. The corrugations of the flange serve as a sort of cushion or yielding material between the metal and the glass, thus overcoming the difficulty incident to a rigid compression of metal against glass. They also, while permitting the inner ridges to yield and conform to the inequalities inseparable from glass bottles, enable the excess of material incident to the compression of the circumference of the flange around the bottle neck to be taken up. The apices or outer ridges of the corrugations serve as fingers or prongs, which the engaging tool can readily take hold of for the purpose of separating the cap from the bottle. This brief description, which will have to be enlarged upon hereafter in considering the case in another aspect, will, it is believed, suffice to present the question which lies upon the threshold; that is, whether there is sufficient patentable novelty to support the patent.

It may be conceded at the outset that none of the elements of the combination are new. The history of the patent in its progress through the Patent Office, as shown by the contents of the file wrapper, takes more than 50 pages of the record, and shows what was disclaimed, what was rejected, and what was allowed. Metallic sealing caps are admittedly old, the pendant flanges are old, and there is nothing new in corrugated metal. The patents which in the opinion of the court of the Second Circuit led to the conclusion that Painter's patent was void will be considered in the order in which they are presented in that opinion:

(1) Whittlesey patent, granted May 19, 1863. The claims are for "a cap for sealing fruit cans, etc., having a flat top, tapering slightly, and corrugated flange edge." That the Whittlesey cap has a visual resemblance to Painter's cap is undisputed, but there all resemblance ends. It does not profess to be a device for stopping bottles containing gaseous liquids. It is simply a metallic covering for a jar, and it has "slightly tapering sides," which, by peripheral contact with the sides of the jar, secure sufficient snugness of engagement to make a closure. There is no sealing disk; no compression of the disk in the mouth of the jar; in fact, the law of its operation negatives a sealing disk. There is no shoulder, nor bending of the flange under the shoulder for the purpose of locking it and holding the cap in its place. All that it purported to be was a "cheaper, more durable, useful, and ornamental article to serve as a cap for jars." The reference to cheapness and durability as the object of the invention manifestly indicates the intention of its being used over and over again on jars kept in an upright position, while the provision for ornamentation shows the object of corrugating the edge, for the scallop shown in drawing below the smooth, tapering portion has no other office. The extension of the vertical corrugations to the sides of the cap would have entirely defeated the Whittlesey plan. No amount of mechanical skill in carrying out this plan could reach the result attained by Painter, or anything like it. Taught by Painter, it is easy enough now to say that the Whittlesey cap, plus a sealing disk, plus a shoulder, plus some method of securely locking the cap, plus elements nei-

ther claimed nor suggested in the patent, and by the entire abandonment of the Whittlesey plan, might be converted into something capable of serving the purpose of Painter's devices, as any other piece of dumb metal might be so converted; but no amount of mechanical skill, carrying out the Whittlesey plan, could change this absolutely inutile thing into anything approaching the crown seal.

(2) Butler patent, July 9, 1872. The claims of this patent are "the cap, provided with the annular shaped depression, the saucer, and the slit flange." In this device the bottom of the annular depression is filled with wax, and when heated the cap can be applied over the mouth of the bottle or jar. The depression or saucer on the upper side is filled with cold water which will immediately chill the wax and other substance, and prevent it from running down the inside of the bottle. The lower edge of the flange is turned in—partly, as stated, to give a "neat finish," and partly to prevent the wax from running out. It was not intended that this flange should be pried off, for there is no projecting edge to afford a surface with which an opener would engage. The provision for unsealing the jar is the pouring of hot water into the depression or saucer, which melts the wax and allows the cap to be removed. In short, it is a metal covering stuck on the jar by melted wax. There is no sealing disk, no locking shoulder, no corrugations in the flange, nor the equivalent therefor. The court does not in its opinion point out wherein this device approaches Painter's, or remotely anticipates it, and without such assistance we cannot see it.

(3) Berthoud-Gedge patents. These are not strictly before us, for the learned counsel for defendants omitted to introduce them in the record among the many that were offered to show the state of the art. Such omission naturally raises the presumption that they were not considered helpful to his cause, but, as they were in the New York case, it was stated in the argument that there was no objection to our considering them as if they were in the record. The first patent was taken out by Berthoud & Co. in France, May 1, 1877, and was for preserving food substances—conserves alimentaires—in glass. The difficulty of effecting a sealing of metal upon glass is recognized, and the method of remedying it was by spinning metal along the shoulder of the jar by gradually applied pressure—a slow and tedious operation—which resulted in a thin, close-fitting edge. In the original patent no means of removal was proposed, and Berthoud recognized the difficulty and danger involved in removing this spun flange from the glass, and about a year after amended his patent by filing a certificate of addition, wherein he provided a means of opening it:

"Cette disposition pour produire l'ouverture est d'une importance aussi grande que le bouchage lui-même, car à son défaut il était difficile, dangereux même, d'ouvrir un flacon qui ne présente pas l'assiette d'une boîte de conserves. L'outil dont on se servait pouvant glisser et être la cause d'une blessure pour celui procédant à cette ouverture."

The method suggested by him was a strip or tongue extending from the flange, of sufficient length to enable it to be rolled up on

a key or similar device; thus tearing the tin so as to rupture the cap and admit a knife or other sharp instrument to work it off. This expedient was seen to be a slow and tedious operation, involving the tearing of the cap to pieces. So the patentee filed another amendment later, proposing another scheme for removing the cap. This consisted in soldering a horizontal band to the blank of metal which formed the lid, and setting this horizontal band under the bead of the neck of the bottle, making it longer than the circumference of the cap, so that an end or tongue was left, by which it could be unwound, tearing it from the solder, and the cap was thereby released. Gedge, the English solicitor of Berthoud, took out the English patent June 21, 1878. Nothing operating upon the plan of Berthoud seems to have been used in this country. Judge Townsend, who heard the case on circuit, discussed at length and points out the fundamental differences between Painter's and the Berthoud-Gedge patents. We can add nothing to his critical analysis, and agree with his conclusion that "the two devices were radically different in conception, construction, function, and result."

(4) The Thompson English patent for an improvement in metal boxes or receptacles for holding alimentary and other substances. This device is in a different art. The two engaging elements are of the same material (metal), and the problem of uniting metal with glass was not present. The closure is effected by the smooth, flaring surface of the lid, conforming to the corresponding beveled surface of the metallic box. There is no sealing disk, or anything resembling it. In fact, a sealing disk would be impossible, without destroying the tightness of the contact in the surfaces which the patent was designed to secure. There is no bending of the lid, for this would distort it, and manifestly the purpose was to use the same lid more than once. Both box and lid being of flexible metal, the corresponding beveled surfaces were wedged together. These boxes, as stated in the patent, were for holding alimentary and other substances, and there is no suggestion that they have been used or could be used for bottling gaseous liquids—the purpose which Painter sought.

(5) The Goulding patent of July 9, 1899, which is referred to in the opinion as a "bottle stopper." In his specifications, Goulding says, "This invention has for its object to provide a simple and durable device for securing corks in bottles;" and again, "The invention consists of a cork holder made of elastic metal." This correctly describes the invention, which did not profess to provide a substitute for the old system of stopping bottles with corks. He sought to supply a device that would take the place of the old wire caging as a retainer of the cork. It is nothing more than a spring latch for holding the cork in its place. In the drawings illustrating the patent, this holder is made of a top plate of stiff sheet metal, with depending arms, corrugated longitudinally, bent at their lower ends to form fingers, which engage the shoulder of the bottle neck. This holder is removed by pushing the same laterally from the enlargement of the neck of the bottle. The Goulding patent was

before the examiner of the Patent Office, as the record shows, and certain of Painter's claims were rejected on it; but on appeal to the examiners in chief they reversed the first examiner, using this language:

"But Goulding has no sealing disk, and no 'flange encircling the disk,' but a cap with elastic pendant fingers in place of the continuous flange of hard or nonelastic metal; such fingers being formed and bent before being put into engagement with the shoulder, and, of course, only adapted for use on bottles where the distance between the top and shoulder is predetermined and uniform, and is not, like applicant's design, adapted to be bent into engagement with the shoulder in the act of forcing it into position on the bottle, whatever the distance between such parts, as bottles are ordinarily constructed."

And on further appeal on other grounds to the Commissioner of Patents, he says:

"I agree with the examiners in chief that the Goulding patent does not constitute an anticipation."

It is not a bottle-stopping device at all, and the testimony of all the witnesses who were examined is that nothing operating on Goulding's plan could be used for any purpose in Painter's plan, and, so far as these witnesses knew, it had never gone into use for any purpose.

We have reviewed all the patents cited by the court of the Second Circuit as showing the prior art, and have carefully examined all of the patents in the record—especially McBane's and Poole's English patents and the German patent of Rademacher. They seem to us to show nothing more than that there were in the prior art certain elements which could be combined to produce the result which Painter attained. There is no proof or suggestion, even, that they ever were so combined. While some of the elements were found in one patent, and some in another, in not one were they in the same relation, or organized or operated on the same principle, or corresponding either in terms or in substance to any of the claims of the Painter patent. No mechanical skill applied to any one of them would convert it into anything analogous to Painter's devices, or having any analogous capacity. Not one of these devices, ingenious as some of them are, had ever been used or could be used for the purpose of the Painter invention, without departing from the respective plans inherent therein. It would involve substitution and reconstruction to convert any of them into the Painter plan. The law does not allow mere mechanical skill to usurp the place of invention, which involves higher thought, and brings different faculties into activity. It will not allow one to take from the public that which the public already has, or grant the exclusive privilege which the patent confers without consideration. It therefore is the duty of courts, which, in the last analysis, are the guardians of the public interest, to scrutinize with care every attempt to establish the monopoly which the patent gives, to examine the state of the art, and to see if the idea expressed in the invention has ever been communicated to the public, and was in such a stage of development in a prior patent that a skilled mechanic, working upon the plan or principle therein suggested, could by mechani-

cal means attain the result which the patentee attains. To constitute anticipation the previous patent should not only suggest the idea, but indicate the means and essential elements so distinctly that a mechanic versed in the art, in the light of the patent and of the state of the art at the time the same was granted, and not in the light of subsequent discoveries, could make, construct, and practice the invention without the exercise of his own inventive skill. The fact of discovery is often ascertained by results, and while it may be difficult for us to put our finger upon any precise thing in Painter's device, and say that Painter invented that, we find in the results a substantial addition of our stock of knowledge—a mode of application of simple forces embodied in an instrumentality so simple that our wonder is that it was not done before. Its very simplicity tends to raise a doubt whether the inventive faculty was needed to produce results which seem so obvious that we are prone to think that any mechanic, starting where Painter did, and with the knowledge of previous inventions which he had, could by mere mechanical skill accomplish what he did. The fact that no mechanic did accomplish it, although many inventors were eagerly trying to do so, and the world as eagerly awaiting a simple and cheap bottle-stopper device, if not conclusive proof, is very persuasive evidence, that something more than mechanical skill was required; that it demanded inventive genius or faculty to bridge the chasm which separated the bungling, imperfect, inoperative devices of previous inventors, and the simple, economical, and, for its purposes, perfect, device which Painter gave to the world. If the subject-matter was of little importance and of merely transient interest, we might say that mechanical skill did not accomplish it, because it did not make the effort; but if it was a matter of enduring importance, and promised great profit if the problem was successfully solved, it is safe to assume that there was great likelihood of some mechanic applying his skill, if success could have been readily achieved by merely mechanical means. In its opinions (*Crown Cork & Seal Co. v. Aluminum Stopper Co.*, 108 Fed. 863, 48 C. C. A. 72; *Farmers' Mfg. Co. v. Spruks Mfg. Co.*, 127 Fed. 691, 62 C. C. A. 447), this court has cited the decisions of the Supreme Court, and has stated the principles that govern patentability in cases where old elements had been combined to produce new results, and we will not lengthen this opinion by repeating what we then stated and still believe to be the correct rule. Where none of the prior inventors exhibits or suggests any co-operation of the elements upon the principle adopted by the patent in suit, or upon any principle adapted to serve the same purpose, the use of the old elements may limit, but cannot defeat, the patent.

There was a great demand for some method of stopping bottles, more convenient and economical than the long corks which had always been used for that purpose, but the testimony shows that there was practically no other closure for bottles containing effervescent liquids in general use prior to Painter's invention. The history of the art shows various ineffectual schemes by which other inventors failed to accomplish what he successfully accomplished.

It may be observed that none of the patents cited in the opinion of the Second Circuit were designed to secure a closure of bottles containing charged liquids generating aggressive internal pressure, unless Goulding's be so considered. His corkholder was designed to retain the cork which would so resist, but those were intended for sealing food products, fruits, etc. McBane's English patent was for a spring clip, with a crown and a number of vertical arms, intended to secure a cork or other stopper. There may be found, too, in the prior art, a stopper of rubber, hung upon a sort of hinge. McBane used a sealing disk. Poole, Rademacher, and Goulding used a shouldered bottle, and Whittlesey exhibits a corrugated flange. The finding in the old devices, one portion here, one in another, and so on, should not defeat a patent for the combination, which is only truly anticipated by a prior device having identically the same elements, or their mechanical equivalents, co-operating to produce the same results. Even if any of them nearly approached the complete invention, if they were not operative or available there would be the presumption that they were not identical with one of admitted superiority, the merits and utility of which are proved by general use. Granting that the elements were known, something before unknown had to become known. A new operative means had to be devised, by which what was known could be made available, and a creative or inventive faculty had to be invoked and exercised to discover the availability of a mode of application by which forces already known could be so united as to effect results desired, and theretofore sought in vain. The unknown and untried factors had to be united with the known factors, and the combination of these elements into a practical, operative means, and its embodiment into a concrete thing, constitute invention. There is always a presumption of novelty arising from the patent itself, greater or less, according to circumstances. If the patent relates to something of temporary interest, and the object sought is of little importance, and offers but slight chance of profitable use, it may receive but little attention in the Patent Office, and the presumption therefore is slight; but where the problem sought to be solved by the patent is of such importance that the solution of it promises great pecuniary returns, and the testimony shows, as it does in this case, that all the claims of the patent were subject to critical analysis by trained experts in that office, resulting in amendments and disclaimers designed to distinguish it from everything in the prior art, and the subject appears to have been thoroughly threshed out, the presumption in favor of novelty is greater than in those cases where the patent may have passed by inadvertence.

"Almost all inventions at this day," says Judge Blatchford in *Crandal v. Walters* (C. C.) 9 Fed. 659, "that become the subject of patents, are the embodiment and adaptation of mechanical appliances that are old. In that consists invention." Doubtless Painter may have profited by the experiments and ideas of others, and by their failures, and if he was aided by the suggestions and information of others, of such definite and clear character that nothing but

manual skill was needed (something which did not require thought, but simply the dexterity of a skilled mechanic, which, working upon the plan suggested in the previous patent, produced better results only by reason of his superior dexterity), then he could not claim to be an inventor; but if, knowing all that others had done or suggested, there still remained something necessary to complete it (something that his own skill and ingenuity had to devise to make a complete and perfect success); if he reorganized an old plan, based upon wrong principles, and rendered it successful; if he discovered a new application of an old force, supplying a hitherto unsatisfied want by a method essentially distinct from any previously known—he ought not to be deprived of the benefit of his labors. The law cannot take account of or draw a line which separates ideas generated in the mind of the inventor and those ideas which have come to him from external observation. It is difficult, too, to draw a line of distinction between the work of an inventor, the result of his ingenuity and the exercise of his thought, and the work merely of a skillful mechanic or adapter, whose merely imitative faculties attain the sought-for end. It must be remembered that the object which Painter sought was one which was apparent almost from the beginning of time; it was an object which, if attained, promised great rewards; and therefore it is to be presumed that others were seeking the same end, alert to take advantage of any ideas that were afloat; and, if mere mechanical skill was all that was needed, it would be strange that some mechanic had not adapted these ideas before Painter did, and accomplished the same result, but confessedly no one did. That fact raises a presumption that something more than mechanical skill was needed. Considering the simple nature of his invention, it may seem strange that it so long eluded others, and baffled the skill of previous inventors. His idea may have been but a slight step in advance, but, if it was something really novel, he is entitled to the benefit of it. The intrinsic novelty and utility of Painter's concrete invention cannot be disputed; using the word "novelty" in its popular sense, as meaning something altogether new as a contrivance for stopping bottles. It is different from any other method and an improvement on any other method. "A patented improvement," says Justice Clifford in *Union Sugar Refinery v. Mathiesson & Co.*, 3 Cliff. 639, Fed. Cas. No. 14,399, "consisting of old elements, cannot be proved to be invalid by showing some one of the elements in some prior machine, and another in another prior machine, until it is shown that all the elements which constitute the improvement were in prior use, because the theory of such a patent is that the elements are old, and the invention consists in a new combination, whereby a new and useful result is obtained." Where there is an actual and admitted improvement, and its utility is shown in a marked degree, there should be controlling reasons to rebut the presumption that there is sufficiency of invention to support the patent. "Its comparative utility—the superiority of its operation over all the existing methods of accomplishing the same result—may be so great

as to furnish conclusive proof that the invention is radically different from all preceding arts or instruments, and that, though it is imperceptible, some new force or new application or new object must have been discovered by the inventor. If, therefore, in its operation the concrete invention attains the desired end with greater economy of time, material, or labor—if it avoids difficulties hitherto encountered, and thus becomes an agency more valuable and effective than any previously known—the degree of this increase in value and effectiveness may be, though it not always is, sufficient to demonstrate that the invention is new, and hence that some new factor must have been discovered, and the creative powers have been employed.” Robinson on Patents, § 116, citing *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952, and other cases.

There is a suggestion in the opinion of the court of Second Circuit that the success of the crown seal is largely attributable to the machine used for putting the caps on the bottles. If it be true, as we think the testimony incontestably shows, that prior to Painter the well-nigh universal method of stopping bottles was the long cork or stopper of some resilient substance, held in place, where gaseous liquids created internal pressure, by a wire caging, or some other device analogous to Goulding's, and that Painter's devices were the first which dispensed with the long cork or stopper and the wire caging by substituting a simple and economical cap, whose utility and efficiency are undisputed, and that this cap is the best now or ever used, we cannot see that there is any reason to deny patentability to the invention of the cap because Painter contemporaneously invented a machine especially adapted to its convenient and effective application. That rather furnishes a reason for giving him protection in both.

Our conclusion is that Painter's patent is valid.

We come now to the consideration of the main question made by this appeal. There are 39 assignments of error. We need consider only those that relate to the subject of infringement.

In sustaining the validity of Painter's patent, we have said that the state of the art may sometimes be found to limit, although it may not defeat, the patent, and this case seems to illustrate that rule. The visual resemblance of the defendants' device to Painter's is so great that at first impression it seems a servile imitation, but, as we pointed out in the case of the Whittlesey cap, mere resemblance does not necessarily imply identity. The vice of our first impression and the error in the decree below seem to lie in the tacit assumption that the whole device embodied in the crown seal was the invention of Painter, without separating the old from the new, and defining the precise extent of Painter's improvement. The astute use of the doctrine of equivalents by the very ingenious experts of the plaintiff and the uncommonly able and earnest arguments of plaintiff's counsel were well calculated to lead to the conclusion that if the same result was produced by the use of the same elements, and embodied in a device which seemed to be the

same, it would necessarily follow that defendants' combination was identical with plaintiff's.

Painter's patent was sustained as a combination of elements, none of them new or his own exclusive property. His invention implied some modification of each part of the individual functions of the old elements, and such a co-ordination as to constitute a common function. He cannot prevent others from using the same elements, provided they are co-ordinated in a different way. "Identity of end" (Robinson on Pat. § 117) "is no proof of identity of means. Though an alleged invention may have no other ends than have already been obtained by using other arts or instruments, the idea of means which it embodies may still be new, and a true product of creative skill." There are many roads that lead to the same place. Painter cannot confine the public to the use of his road only. He has no legal or moral right to prohibit others from inventing other means to produce the same result. All that he can prevent is that others shall not produce the same effect by means substantially identical with his, by a mere colorable imitation. In *Pitts v. Wemple*, 5 Fish. Pat. Cas. 10, Fed. Cas. No. 11,194, Drummond, J., says:

"After a patent has been obtained for a particular thing by one person, another person, without appropriating that patent, may invent a new mode of accomplishing the same or a similar object, and the latter will be entitled to a patent for his discovery."

And the Supreme Court, in *Fuller v. Yentzer*, 94 U. S. 296, 24 L. Ed. 103, referring to a case of invention that consists merely in a new combination, says:

"A suit for infringement cannot be maintained against a party who constructs or uses a substantially different combination, even though it includes the same exact elements or ingredients."

See, also, *Electric Signal Co. v. Hall*, 114 U. S. 96, 5 Sup. Ct. 1069, 29 L. Ed. 96.

To determine whether the means are identical requires a more critical examination of Painter's patent than we have yet given. We must look to the claims and the description in the patent, for Painter must abide by the claims and description found there. The comparison is not between the two concrete inventions, but between the alleged infringing combinations and the description and claims of the patent. Each element of the combination so described in the claim is thereby made an essential feature, and cannot be repudiated by the patentee, whether necessary to the performance of its functions or not. Each element being one of the operative means, identity depends not merely upon the function performed, but upon the manner in which it is performed. The alleged infringer does not infringe if he omits one of the elements which the patentee has described as essential. He does not infringe if he uses any number of the parts less than the whole.

It would extend this opinion to an intolerable length if we recited the whole of Painter's description and claims, and the points that have impressed us as important, we hope, may be made intelligible

by contrasting the various elements of the respective combinations.

The alleged infringing device is shown in Abbott's patent, No. 704,167, applied for February 6, 1902, and issued July 8, 1902. The defendants own several other patents, but by stipulation the exhibits offered in proof of infringement were made in accordance with this later patent, which, although not issued at the time of the commencement of this suit, was then pending in the Patent Office. This device is a paper-lined, sheet-metal sealing cap, with a metallic crown, and integral, pendant, annular flange, with longitudinal crimps or corrugations, and an adherent paper lining; the flange retaining a smooth interior surface. The disk in the crown of the cap is of cotton duck. This cap, as described, is to be used on a bottle with a tapered neck; the sealing operation being effected by pressing the cap on the top of the bottle, and the compression of the flange circumferentially around the tapered neck by a clamping device patented by Abbott and Brass; the essential features being the frictional hold of the smooth, paper-lined cap, compressed and lying against the neck of the bottle in such a way as to exclude all air. As we have repeatedly said in discussing Painter's patent, all of the elements used by him were old. Poole, Rademacher, and Goulding and others used a bottle with a shoulder, McBane and others used a sealing disk, and Whittlesey exhibits a corrugated flange. The general rule is that every patent is to be read as if the whole state of the art is written on its face, and in considering patents for a combination, it is to be remembered that the alleged infringer has equal rights with the prior patentee to the use of every element known in the art at the time when the first patent was issued.

(1) The bottle element is different. Painter says:

"The head of a bottle adapted to use with my caps may be varied in form, but it must have at a proper distance below the top of the bottle or lip an annular engaging shoulder. The location of this annular shoulder with reference to the top or lip of the bottle is a matter of material consequence."

He does not claim to have invented this style of bottle head, but it is a "matter of material consequence" that at a proper distance below the lip of the bottle there should be a shoulder, because the lower edge of the flange which contains the sealing cap is locked under this shoulder. The bending of the flange under the shoulder is an essential feature of his combination. This bending or locking alone holds the cap on the bottle head. No other means of holding the cap is suggested in the combination; hence the material importance, as he describes it, of having a shoulder at a proper distance from the top of the bottle. The defendants' bottle head has a plain surface and tapering neck. It is an inverted frustum of a cone. Merely as bottles, they are obviously dissimilar. On looking at defendants' bottle no one would say that it had a shoulder, but plaintiffs contend that functionally it is a shouldered bottle, because the neck has a greater diameter at the top than it has below. The dictionaries give us various definitions of the word "shoulder"—some literal, some figurative. None of these definitions

describe the top of anything as a shoulder. One of the definitions in the Century Dictionary is "a prominent or projecting part below the top." A man's shoulder is certainly below the top of his head, and it seems to us that it would be a straining of the word beyond its natural meaning to define the top of defendants' bottle as a shoulder because its diameter is wider than the neck lower down. Certainly it is not a shoulder in the sense in which Painter used the word when he said that it was of material consequence that there should be a shoulder at a proper distance below the top of the bottle. A greater width at the top than below cannot answer that purpose.

(2) The sealing disk is different. While Painter describes various forms of sealing disks, and expresses a preference for "the flat linoleum disk, composed of granulated woody matter and a practically tasteless and odorless gum," he makes no claim for any special sealing disk, but the law of his construction requires a resiliently compressible disk. The disk actually used is of cork, about one-ninth of an inch thick, fitting snugly within the cap, and filling it to about one-third the depth of the flange. It is this disk that effects the closure of the bottle and makes the hermetical seal; and the principle of construction requires that it should have a certain degree of thickness, which enables it to be compressed vertically and to exert a vertical resiliency. It is pressed down in the bottle mouth when the cap is fitted on, and locked under the overhanging shoulder, and its resilient qualities exert a pressure upward, necessarily, and by that pressure upward the locked arms of the pendant flange under the shoulder are kept tight and close. The sealing disk of the defendants has none or few of the qualities of Painter's. It is true that both are used to close a bottle mouth, but they do not perform it in the same way. The defendants' disk is of paper or cotton duck. There is an inherent difference between that and a compressible cork disk. The defendants' has no resilient compressibility. Such a disk is inconsistent with the defendants' plan of closure. In Painter's plan the disk must be compressed, and the bottle mouth closure perfected, before the cap is bent under the shoulder of the bottle, for this cap is designed to maintain the closure previously effected. One of the exhibits in the case shows a bottle after Painter's plan, and one of his cork disks in sealing relation to the bottle mouth, held there by wire fastenings, and the closure is precisely the same as that effected by the cap when bent around the shoulder of the bottle. This shows clearly that the closure effected by Painter's plan is due to the disk. Defendants' disk cannot be held to be substantially identical with Painter's. Composed, as it is, of a thin piece of paper or cotton duck, it is not resiliently compressible, as Painter's is. It does not perform the same function in the same way. By itself it could not effect an efficient closure of the bottle mouth. The constructive principle of Painter's device is that the cap is a disk holder. The essence of the defendants' seal is that it dispensed with any like sealing disk by creating a mechanical union of the metal cap with a coextensive paper lining, leaving the paper interior of the

cap perfectly smooth; and this concrete unit, by being compressed against the smooth, cone-shaped neck, became by the one operation a closure of the mouth of the bottle and a firm fastening.

(3) Painter points out in his specifications that the inner ridges formed by the corrugations of the flange are left exposed, and capable of operating, when bent, as locking ribs. They are not mashed in the bending process, but are left intact. The radial line of the bending is about midway of the flange in Painter's device, the disks occupying about one-third of the upper half of the cap; and, although he speaks of the corrugations as extending substantially throughout the depth of the flange, it is plain that there is no need of corrugations throughout about one-half of the upper part which incloses the disk. The special function of the corrugations in his device, outside of the admittedly old office of stiffening and cushioning, is that the inner ridges, when bent under the shoulder, shall closely embrace it, while the outer ridges form a projected edge for the opening tool. He repeatedly lays stress upon these well-defined ridges, which maintain their character as corrugations after they are bent under the shoulder; a deformation and reformation taking place as the flange is bent inwardly to grip the overhang of the bottle. The contents of the file wrapper explain the essence of the device, and, in differentiating it from prior devices, in order to obtain the patent, contain certain controlling limitations, which operate as an estoppel against the patentee. Therein the sealing disk is referred to as "necessarily quite compressible," and this disk, being confined by the cap which peripherally encircles it, is made under pressure to not only evenly conform to the annular edge or lip of the bottle, but also to follow downwardly, and to lie in close packing contact with the outer surface of the bottle below its mouth. In the explanatory argument the disk is referred to as "applied under great pressure—sometimes several hundred pounds—and this pressure must therefore be retained for long periods of time throughout the annular line of the lip. This can only be done by a flange bending into locking contact with an annular shoulder." The disk, therefore, which is to accord with his specifications must be essentially one which is expansive, and needing peripheral restraint under vertical compression. It seems to us that he is estopped, therefore, from complaining that a disk of cotton duck meets the claims of his combination. The defendants' disk of cotton duck, although a form of packing well known in the art, has no resilient compressibility, which is the essential characteristic of Painter's disk. The decision of the board of appeals, allowing the fourth and fifth claims, overruling the examiner, who held that Goulding had anticipated them, shows that they regarded the vertical compressibility of the disk, and its resiliency under such compression, and the consequent variableness in the distance between the top of the disk resting on the lip, and the annular shoulder of the bottle beneath it, as important, because it says that Goulding's plan "is adapted for use on bottles where the distance between the top and shoulder is predetermined and uniform, and is not, like applicant's design, adapted to be bent into

engagement with the shoulder in the act of forcing it into position on the bottle, whatever the distance between said parts, as bottles are ordinarily constructed." It is manifest from this ruling that if Painter's disk had been a mere inert piece of paper or cotton duck, not resiliently compressible, this differentiation between Gouling and Painter could not have occurred.

(4) In the argument of Painter's attorney on the appeal from the examiners in chief, which rejected the first claim, great stress is laid upon the projected edge which affords an engaging surface for the bottle opener. That feature is pressed as essential, and as distinguishing it from Butler's patent, which had no such projected edge; and he says, "Although the cap is in firm locking contact with the engaging shoulder on the head of the bottle, the edge of the flange is in a projected position, because it is practically intact, the locking of it being wholly independent of the edge of the flange," and quotes from Painter's specifications, where he says, "By my improvement in the construction with the cap they can be readily secured in place, after being once put in position, by simply turning the lower edge of the flange." A construction such as the defendants', whereby the lower edge of the flange is pressed into close contact with the smooth surface of the bottle, and not bent under a shoulder, certainly does not seem to meet this claim of Painter's combination.

At the risk of some repetition, we will now sum up the distinction between the two devices: Both start out to accomplish the same end. In each there is a metal cap with corrugated flanges. Neither has any exclusive right to such metal cap, for it is old in the art. In Painter's the closure of the bottle mouth is effected by a resiliently compressible disk. That which is actually used is a disk of cork, about one-ninth of an inch in thickness, but he is not confined to the use of cork. It is of the essence, though, of Painter's disk, that it should be of a yielding nature, and when under compression should exert a constant upward push, else the seal is broken, for the cap element in itself merely holds the seal in its place, and can effect no seal without it. In the defendants' device the disk is a fabric washer—an inert cotton duck or paper. It has not the identifying characteristics of Painter's. It is not resiliently compressible, because the scheme of defendants' structure does not require the disk to exert any pressure upward against the top of the cap, as Painter does. There is such an inherent physical difference between the two that they cannot be said to be substantially identical. The corrugations in Painter's and defendants' plan perform each certain functions common in the metal workers' art—of giving stiffness, acting as cushion, and allowing the surplus metal when it is pressed circumferentially to be taken up in symmetrical folds instead of in irregular folds. There is no new office or new invention there, but in Painter's the new office performed and the operative principle (and that is one of the essential features of his combination) is that the inner ridges are bent under and conform to the shoulder, while the outer ridges form the projected edge for the opening tool to engage. This bending un-

der the shoulder locks the cap on the bottle, and the upward pull of the compressed disk holds it in locking relation. In defendants' device the new function and operative principle of the corrugations of the flange are that the inner ridges are driven into the paper lining of the cap far enough to mechanically connect the metal and the lining; leaving a perfectly smooth interior paper surface, capable of making a close seal with the smooth glass surface of the bottle neck. As ridges they perform no function whatever, and when compressed the ridges disappear, and are mashed smooth against the bottle neck. In Painter's the lower edge of the flange is bent under the shoulder so as to form a hook. In defendants' there is no bending of the flange at all, in the sense of curving, making crooked, or deflecting from the normal condition of straightness, which is one of the definitions of bending. It is compressed against the smooth glass surface of the tapered or cone-shaped bottle neck. The principle of the defendants' construction is to press the smooth, paper-lined interior of the cap into close contact throughout with the conical neck of the bottle, giving it a frictional hold. Any bending will defeat the principle. Painter's principle, on the other hand, is not to give a frictional hold, but a fixed hold, by locking the ridges of the corrugated flange under the overhanging shoulder. In this operation the angle of the lower part of the flange is changed; in defendants', the angle of the lower part of the flange in its relation to the cap is the same as the upper part, thus showing that it is not bent. It cannot, therefore, be said that the corrugations in the two devices perform substantially the same functions. Thus it is seen that there are two separate and distinct elemental features in Painter's device, each performing its separate and distinct function: (1) A sealing of the bottle mouth by a compressible disk; (2) a locking of this disk which effects the closure by the bending of the flange under the shoulder; while defendants', in creating a mechanical union of the metal cap and its coextensive smooth paper lining, produces a device which, being compressed against the smooth, cone-shaped neck by one means and one operation, effects a hermetic seal firmly fastened on the bottle neck.

As we have already said, each element of a combination as described and claimed is thereby made an essential feature, and one of the operative means, and cannot be repudiated by the patentee. So, when Painter said that the shoulder must be a certain distance below the mouth of the bottle, and that there must be a resiliently compressible disk, he cannot be heard now, after another invention has taught how they may be dispensed with, to say that neither of these features is essential. Identity depends not merely upon the function performed, but upon the manner in which it is performed, and the supposed infringer does not infringe if he omits any of the elements which the patentee has described as essential; nor is he permitted to block the path of improvement or invention by claiming matters unessential. Though the same results are produced by the same elements, there is no identity if they are arranged under a different co-operative law. To constitute infringement,

they must coact upon each other in the same way to produce the common object. The inventive skill may seem small, and the change trifling, the result of accident or happy thought, yet, if there is some inventive element in the mind, the conception of some idea not previously present, however short may have been the duration of the mental process that invoked it, if the inventor embodies the idea in some tangible form, operating upon a different principle, he is entitled to protection, without regard to the comparative excellence, or otherwise, of his device.

Interchangeability or noninterchangeability is an important test on an issue of infringement, for, as a general rule, like results are produced by like means. The plaintiff, recognizing this rule, has offered testimony to show that the two caps are interchangeable. Without going into details which would necessitate too much repetition, we may say that the proofs are not convincing. "Seldom, if ever, in the material world, does any effect rest so exclusively upon a single cause that no other operation of natural or artificial forces could produce the same result. Identity of end is therefore no proof of identity of means. Though an alleged invention achieves no other ends than have already been obtained by using other arts or instruments, the idea of means which it embodies may still be new, and a true product of creative skill." 1 Robinson, § 117.

In sustaining the validity of Painter's patent, we referred to the principle, which is well settled, that the grant of a patent is *prima facie* evidence of patentable novelty. The same principle may be invoked in behalf of defendants. Painter's patent is specifically referred to in Abbott's application, and the Patent Office had before it Painter's and all the other patents showing the state of the art when the patent was granted. It was designed to accomplish the same functions as Painter's, and on its face it discloses and claims a substantial difference, and could not have been consistently granted if it were substantially the same as Painter's. The grant of it therefore must be considered as expert evidence, of high and impartial character, of nonidentity, and raises a fair presumption of patentable difference in its favor, which requires strong evidence to overcome. We are not satisfied that the plaintiffs have succeeded in so doing, and, in our opinion, there has been no infringement.

It follows, therefore, that the judgment of the court below should be reversed, and the case remanded, with directions to dismiss the bill.

Reversed.

GOFF, Circuit Judge. I find no error in the decree complained of, and I dissent from the judgment of this court that reverses it.

O'LEARY et al. v. UTICA & MOHAWK VALLEY RY. CO.

(Circuit Court, N. D. New York. July 24, 1905.)

No. 6,965.

1. PATENTS—VALIDITY AND INFRINGEMENT—CONVERTIBLE CARS.

The O'Leary reissued patent No. 11,992 (original No. 664,890) for convertible cars, having sliding window sashes and panels in the sides, removable at will, so as to convert the car from a closed to an open one, or from an open to a closed one, discloses patentable invention, and is of a pioneer character. It covers, by the term "convertible car," cars which are semi-convertible, in that the panels below the window sashes are not removable, as distinguished from those in which the sides are removable to the floor, so as to make a wholly open car, which can, if desired, be entered from the sides; the essential feature of the invention being the means by which the panels or sashes are moved to form an open car, and stored in a chamber within the roof while not in place. Also held infringed by cars constructed under the Brill and Bucknam patent, No. 709,073.

2. SAME—INFRINGEMENT—ADDING NEW FUNCTION.

Infringement is not avoided by adding a new function to an element of a combination which does not affect its performance of the function of the patent.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 380.]

Suit in equity to restrain alleged infringement by defendant of certain reissued United States letters patent, and for an accounting.

Frank C. Curtis, for complainants.

Kernan & Kernan (Joseph L. Levy and Francis Rawle, of counsel), for defendant.

RAY, District Judge. The reissued United States letters patent in suit, No. 11,992, dated May 20, 1902, are for new and useful improvements in convertible cars. The original letters patent were numbered 664,890, and dated January 1, 1901. Application therefor was filed July 6, 1898. Application for reissue was filed March 21, 1902. The claims in suit are numbers 1, 2, 4, 6, 7, 8, 9, 10, 13, and 14, and read as follows:

"(1) In a convertible car, the combination with the decked roof, grooved roof-supporting ribs, and a series of inflexible slide-panels vertically movable in the rib-grooves; of a corresponding series of storage-chambers extending from one side of the car approximately to the top of the deck of the car, substantially as described.

"(2) In a convertible car, the combination with a series of upwardly and inwardly inclined storage-chambers subjacent to the roof of the car; severally provided with oppositely-located upwardly and inwardly inclined slideways: of a corresponding series of inflexible panels vertically movable in slideways in the vertical side walls of the car and severally provided with guides movable in the respective inclined chamber-slideways, substantially as described."

"(4) In a convertible car, the combination with a pair of vertically-movable mutually-lapping panels; of a pair of panel-supporting ribs, each rib having, intermediately of its lower and upper ends, separate slideways for the respective panels, which slideways merge into each other and gradually increase in width and incline inwardly from the merging point toward the top of the car, substantially as described."

"(6) In a convertible car, having a decked roof, the combination with an inclosed deck-chamber extending upwardly and inwardly from the side of the car and provided at its outer and lower end with a downwardly-opening mouth,

of a guideway extending in an irregular path from a point near the mouth of such chamber in close proximity to the outer and upper wall of such chamber approximately to the top of the deck; panel-supporting vertical ribs, and an approximately straight and inflexible panel provided with a guide on its upper end movable along said guideway, substantially as described.

"(7) In a convertible open and closed car, the combination of the sliding window sashes, and panels, one of said parts being formed with an abutment for the other to bear against and for sustaining one part from the other as they are raised, and means for supporting the sashes and panels in the space between the chamber-walls in the top of the car, substantially as described.

"(8) In a convertible open and closed car, the combination of the sliding window sashes and panels, one of said parts being formed with an abutment for the other to bear against and for sustaining one part from the other when they are raised, and means for supporting the sashes and panels in the space between the ceiling and roof of the car, substantially as described.

"(9) In a convertible open and closed car, the combination of the sliding window sashes and panels, one of said parts being formed with an abutment having a recess to receive a portion of the other, so that the parts may be moved together and one be supported from the other when stored in the space between the ceiling and roof of the car, substantially as described.

"(10) In a convertible open and closed car, the combination of the sliding window sashes and panels, members formed with ways to guide said parts when sliding; a pintle or roller secured to one of said parts; and members formed with ways in the space between the ceiling and roof of the car to receive said pintles and rollers for guiding said parts in said space, substantially as and for the purposes described."

"(13) In a convertible open and closed car, the combination with the car-body having a panel-receiving recess or chamber extending inwardly from the side wall of the car, and side ribs provided with panel supporting and guiding grooves leading to said chamber; of an inflexible panel; means for guiding said panel along the grooved ribs and into and out of said chamber; and means for supporting said panel in an inclined position in said chamber.

"(14) In a convertible open and closed car, the combination with the car-body having a panel-receiving recess or chamber extending inwardly from the side wall of the car, and side ribs provided with panel supporting and guiding grooves leading to said chamber; of a plurality of inflexible panels; means for guiding said panels along the grooved ribs and into and out of said chamber, and means for supporting said panels in inclined position, one above another, in said chamber."

The patent in suit says, in the specifications, that the invention relates to improvements in convertible cars, and "it consists of the novel construction and combination of parts hereinafter described and subsequently claimed." Reference is had to certain drawings made a part of the specifications. The patent, in the specifications, further says:

"The object of my invention is to provide a convertible car with a convenient means for storing the movable inflexible panels which inclose the sides of the car in inclement weather when the panels are removed from the sides of the car to provide an open car without materially changing the interior or exterior dimensions of the car."

The specification then says, recurring again to the subject of the invention, "The invention consists of the novel construction hereinafter described, and particularly specified in the claims." I do not think this was intended to restrict the patent to a mode of construction. The patent also says that the top or roof of the car is connected with the bottom by vertical posts or ribs which support the roof. The usual deck-opening in the top of the car is formed by vertical deck walls raised from the inner roof or ceiling, and is

covered by the outer or main (real) roof. The ribs (or posts) are each provided with a slideway for the lower panel, which is usually solid, but might be a sash panel, and a separate slideway for the upper or sash panel. It is stated that these slideways are preferably separated at the lower end of the sash panel (upper panel) slideway by a stop which terminates about midway between the upper and lower ends of the rib, and above which the two slideways merge into each other, and the slideway (or slideways merged into one) then gradually increase in width, and incline inwardly to the top of the car. Just outside of the slideway, after the merger has taken place, is provided a groove serving as a guideway (another and different guideway from the slideway just described), which receives a roller rotatively supported by a stem or bracket, which stem or bracket is secured to and projects from one end of the sash panel; that is, as the sash panel is pushed upward, this roller attached thereto, moving in the guideway or groove last mentioned, compels the upper end of the sash panel to follow the groove or guideway, and, as this groove turns inwardly more and more, the upper end of the sash panel and whatever is attached to and carried with it is turned more and more inwardly (that is, towards the center of the car), but, by means of the guideway and roller and bracket, is kept near the outer or main roof, and above the inner roof or ceiling. Gradually the sash panel (and also the solid panel by its side, as will be seen) assumes more and more of a slanting position, until when wholly within the storage chamber in the roof formed by the main or outer roof and the inner roof or ceiling of the roof of the car (which storage chamber in a house would be called the "garret") the panels lie at an angle of about 45 degrees, wholly concealed from sight and protected from dust. The upper edge of the sash or upper panel is provided with a cap or abutment having a groove, and when it is desired to raise and store both panels the lower or solid panel only is pushed upwardly; that is, force is applied to it only. When its upper edge reaches and enters the groove in such cap or abutment, it engages therewith, and the raising or upward movement of the solid or lower panel then moves the sash panel also, and carries it with it; and both, sliding in the slideway first spoken of, and guided by the roller moving in the outer groove or guideway, and allowed to assume the slanting position gradually by means of the merged and constantly widening slideway, move side by side into the storage chamber, where they remain until it is desired to convert the now open car again into a closed car, secured by a spring bolt or bolts seated in the lower edges of the two panels, and adapted to enter a receiving socket in the body of the rib, and which socket is located at or near the bottom of the storage chamber, and also by the roller dropping into the recess as hereafter mentioned. To form the storage chambers for concealing and protecting the panels when not in use, the roof of the raised deck of the car is continued on practically the same curve to the vertical sides of the car, nearly; and here are provided vertical ventilator walls, and then the lower roof wall is curved down to the vertical sides of the car in the usual manner. In short, the

main or lower roof is made wider than usual, to aid in the formation and construction of, or, more properly, to make room for, the storage chamber. At the lower end of the storage chambers, or lower edge of the ceiling, such chambers have an opening or mouth of the same width as the slideways for the panels at that point. When the panels are in use this opening is closed by the cap or ledge or abutment on the upper edge of the sash panel. This closing of this opening protects passengers from a downward draft of air. This cap or abutment thus performs a double function. The panel guideway carrying the roller follows closely the outer wall and roof, and as a result the upper ends of the panels are close up to the outer roof, and there is little slanting until the bottom of the panels have entered the storage chamber, and the result is that but little widening of the mouths of these chambers is required. In this way the general size and shape of the car are maintained. It will be seen that the guideways form an irregular path, following the contour of the side of the car and roof, and this makes it possible to make available all the space in the ordinary car, and hence the storage chambers increase its size very little. The extreme upper end of this panel guideway is recessed, and forms a seat for the roller attached to the sash panel; and by this means, until released, the upper end of the upper panel is held in position in the chamber until forcibly released. This also holds the lower or solid panel in place, as, from the time the lower panel engages with the groove in the cap of the upper or sash panel, both move side by side. This is an operative device, and shows patentable invention of great utility and merit. A wholly convertible car is one where the sides, from floor to roof, are composed of panels and ribs or posts, and which panels may be removed in some way to some place so as to make a car wholly open on the sides. A semiconvertible car is one where the lower panel is not removable; that is, it forms an integral part of the car. It may be higher or lower, but the construction is such that in a semiconvertible car the side of it is not open to the floor when the movable panels are removed so as to make an open car. I am asked to find and hold that in this patent in suit the words "convertible car" and "convertible open and closed car" include the "semiconvertible car." A "self-contained" or "self-containing convertible car" is one which somewhere within it has the storage for the panels when removed from the sides, either by pushing them up or down or sidewise, or removing them from the sides entirely, so as to form the necessary openings. A convertible car (truly such) must have end entrances as usual in cars. Otherwise (unless it should be provided with a side door) the passengers would be boxed up and imprisoned—"shut in"—should it be converted into a closed car while they were inside, and would be prevented from entering at all when outside; that is, "shut out" when the car is being used as a closed car. It is very material in car construction—especially street car construction—for many apparent reasons, to keep the car within certain dimensions, not only in height and length, but especially in width. There must be economy of space, both inside and out, as well as of weight, and expense of operating.

The car must also have the necessary capacity for holding passengers without crowding or causing them discomfort. It is necessary to have the movable side panels along with the car, and in such position as to be easily and quickly handled, without being unsightly or interfering with the passengers or those operating the car. When it begins to sleet or rain the panels can be put in position; when it turns warm they can be quickly opened, etc. As to the storage chamber, it is not necessary to mention all the considerations, but it may be of moment to say that a closed storage chamber for holding the panels when not in actual use—that is, when not being actually used for closing the sides of the car—is essential, as otherwise, in summer time, dust would accumulate on the panels, and, from the jar of the car, or even the action of the wind, fall in quantities on the passengers. Neither would they present the clean and neat appearance they ought when brought back into actual use.

The defendant insists that, if broadly construed, the complainants' patent is void for want of patentability, in view of the prior art; that, if construed narrowly, as required by the state of the art as the art was at the time of the invention, the complainants' patent does not cover the defendant's structure, and therefore is not infringed. The defendant also insists that the patent in suit is, by its terms and on its face, expressly limited to a "convertible car," and that as the structure or car used by defendant is not a convertible, but a semiconvertible, car, it does not infringe. Defendant insists that the convertible car is a type of car it does not use. This question should be first disposed of. It is true that complainants are not pioneers in the art of building convertible cars, in the broad meaning of the term. Their patent and each claim must be construed in view of the prior art, and limited accordingly. But this court cannot find evidence, that is convincing, to satisfy it that the patent in suit is confined to wholly convertible cars; that is, to those cars where, when converted to an open car, the sides between the floor and the lower edge of the roof, and between the ribs, posts, or stanchions, are wholly open. If so narrowly construed as this, non-movable panels six inches or a foot wide or high, next the floor, and extending the length of the car, would take such car from the class or category of "convertible cars," even if such car had no doors or means of exit to the street or ground at the ends, and all the world would be at liberty to use complainants' structure in all cars of that description. I am of the opinion, and hold, that the words or terms "convertible car" and "convertible open and closed car" include "semiconvertible cars"—those where the panels, both solid and sash panels, are to be removed from the spaces they usually occupy when in use to close the car whenever it is desired to convert the car into an open car; that is, one having the panels removed from the spaces they usually occupy to close the car, so as to leave those spaces wholly open to the air and sunlight, or, it may be, storm, whether such panels reach from roof to floor, or only part way from roof to floor. In a wholly convertible car, when converted into a wholly open car (referring to the sides), the

panels are removed to the floor; and, if not obstructed by a railing or otherwise, the passengers, if the seats are arranged transversely, may step out or in at the sides, as well as at the ends, if end doors are provided. In semiconvertible cars this is not practicable, even if possible. In some wholly convertible cars we find a step on each side, running the entire length of the car. In others we do not find this, the purpose being to have the passengers enter and leave at the end of the car only. In some constructions we find the seats running from side to side of the car; that is, there is no center aisle, as in those cars where transverse seats are used, and it is intended to have the passengers enter and leave at the ends of the car only. I find nothing in dictionary definitions, or the generally understood language of the art, or in the language of the specifications or claims, that requires or justifies a finding or holding that confines the complainants' patent to wholly convertible cars, or that excludes semiconvertible cars from its claims. In fact, using the language of the company that makes the alleged infringing cars, the term "convertible cars" includes "semiconvertible cars." The alleged infringing car is not, as constructed, a wholly convertible car, but is a semiconvertible car, as usually known and described when the purpose is to differentiate different constructions of convertible cars. This structure of defendant's is made under the United States letters patent No. 709,073, issued to Brill and Bucknam, dated September 16, 1902.

The complainants' patent has for its leading object the storing of the movable, inflexible panels of the car, used to inclose the sides of the car, when removed to form an open car, and to store them in a chamber in the roof of the car without taking them out of the panel frames and lifting them up bodily and shoving them into a storage chamber, and to do this without materially changing either the interior or exterior dimensions of the car. As to means or a way of accomplishing this particular idea of so storing an inflexible side panel, O'Leary, complainant, seems to have been the pioneer inventor. The way and means of doing this are not found in the prior art. It is suggested, perhaps, by the Brownell patent of April 3, 1888, No. 380,617, for, if by means of grooves and slideways the panels can be run up into the open top of the car, the next idea would be to run them into a chamber of proper dimensions formed in the roof without substantially changing the general dimensions or appearance of the car. They are to be out of sight and protected, etc., as before mentioned. Of course, it would not do to materially reduce the height of the interior of the car. This, for many reasons, would be very objectionable. Brownell seems to store the panels within the interior dimensions proper of the car, and not within the roof dimensions after being inclosed; in other words, in a superfluous space, so far as the use of the interior of the car for the accommodation of passengers is concerned. Here we must give to complainants' patent a broad construction. It seems clear that O'Leary, in complainants' patent, was the first to provide such a chamber for inflexible panels, successfully at least.

If defendant is using a manufacture (and we must keep in mind that this patent is for and relates to a manufacture, not a machine) that includes all the elements of complainants' patent in substantially the same combination for the same purpose, and working or operating in substantially the same way, and actually accomplishing the same purpose or producing the same result, it infringes complainants' patent, if that patent is valid, even if defendant has added to its structure an element not found in complainants' patent, or more than one, or has changed the form of the elements, or of some of them. Let us note the general purpose of the complainants' patent: First. A closed storage chamber in the roof of the car is desired. Without it there can be no storage of the panels in a chamber. Second. It must be so formed and of such dimensions as to receive the panels, and these must be of about a certain size. They are inflexible, and cannot be bent. They are straight, and must be carried up without strain which would break the glass. The form and appearance and general size of the car must not be changed. To do this, they must change position from perpendicular to semihorizontal. This change is to be made within a limited space, and while passing and immediately after passing through the opening into the chamber, which must not be too large. After O'Leary had done all this successfully and secured his patent, after a contest, we find by reference to the file wrapper of defendant's patent that Brill and Bucknam (patentees of alleged infringing patent) strenuously and persistently struggled in the Patent Office to cover the same thing, and obtain a patent therefor. It would take too much time and occupy too much space to go into detail, but nearly if not quite a score of claims made by Brill and Bucknam, covering more or less the claims of the O'Leary invention and patent, and many of them plainly an infringement if made operative in the art, were rejected or changed in the Patent Office. In the prior art almost universally the panels had been made curved—those having glass with curved glass—and the body of the car curved accordingly, or flexible panels had been used, etc. Flexible panels had been stored in a pocket or chamber in the roof of the car. Made flexible, they operated like the flexible top of a roll top desk. But the storage of inflexible panels was quite another thing. Here was demanded the merging slideways and the increasing width thereof as the panels approached the top of the car. This and the recessed abutment, with the interlocking function, are not found in the prior art. The novel features of complainants' patent are found in the defendant's car alleged to infringe. It is true that in defendant's car the pockets in the roof are of different shape from those in complainants', but so is the shape of the roof itself; and it is well settled that a mere change of form or location of one or more elements, if the functions performed remain the same, and they are performed in substantially the same manner, does not avoid infringement. It seems clear that the mode or manner of storing the inflexible panels is substantially the same in defendant's car as in complainants'. There is nothing in complainants' patent that con-

finer or limits them to the precise form and dimensions and location of storage chamber shown in the drawings of that patent, except it must be in the roof, or that allows defendant to use a similar storage chamber for the same purpose in this kind of a car. The complainants first occupied this field. Defendant's car has a pair of vertically movable mutually lapping panels, surely, and a pair of panel supporting ribs (posts), and each of these ribs has intermediately its lower and upper ends separate slideways for the respective panels, and these, when merged, increase in width and incline inwardly towards the top of the car. Even if we fail to find for a short distance a division bead or rib, the fact remains that there are separate slideways, one for each panel, and it is entirely immaterial that the short partition is not found in defendant's structure. To my mind it is entirely immaterial whether we say separate slideways for the respective panels, or slideways which merge into each other and gradually increase in width, etc., or a broad, gradually widening slideway for the separate (respective) panels, etc. The one is the same as the other, in this construction and for this purpose, and performs the same function. The bead is superfluous. The broad slideway for both, as found in defendant's car, constitutes "separate slideways for the respective panels," inasmuch as the one panel cannot slide in the path or slideway in which the other moves. Each has as its slideway the path or position in which it moves. As well might we say that we do not have separate tracks for the respective parties who travel by wagon and by bicycle, because such tracks lie side by side and merge into one broad track, but each traveler uses and must use and follow his particular portion of the broad way. Again, this division is not made a part of the device. It is mentioned as a preferable mode of construction, simply, not as a necessary part of an element, or as an element in and of itself. Defendant's construction clearly infringes claims 7, 8, and 9 of the complainants' patent, unless it escapes because the mode of interlocking the top of the lower panel with that of the upper panel, when in the upward movement it reaches it, differs from complainants' device made for that purpose. The movement of the lower panel up to that point is the same; the movement of the two panels side by side and interlocked, from that point on until they find their resting place in the storage chamber, is the same; the purpose of the movement in each case is the same, viz., to carry the two panels side by side into the storage chamber, and there retain and protect them. The mode of interlocking and the means for interlocking are different, but the one is clearly the equivalent of the other. The two do the same thing in substantially the same way for the same purpose or object. Perhaps defendant's does a little more locking, but, if so, it is unnecessary for the accomplishment of the object of the invention. If the charge of infringement in this case can be avoided because of this difference, the charge of infringement can always be avoided in any case. The invention of O'Leary does not reside in the inter-

locking means. Defendant's expert seems to claim that the defendant's interlocking abutment does not infringe complainants' claims, for the alleged reason that it does more than complainants' does; that it performs one or more additional functions—interlocks the two panels in all directions instead of two only. In the first place, such an interlocking in all directions is not necessary to the invention, or its complete working and success. Then, again, infringement in such a matter is not avoided because defendant's interlocking mechanism performs an additional function.

In *Powell v. Leicester Mills Co. et al.*, 108 Fed. 386, 47 C. C. A. 416, it was held that "infringement is not avoided by adding a new function to an element of a combination which does not affect its performance of the function of the patent." This would seem to be a common-sense rule, and applicable here. The evidence shows that the makers of the alleged infringing car, in their application for their patent, No. 709,073, claimed that they had overcome a defect in all prior convertible car construction by a device which made one sash operate the other. For this they made a claim, as is shown by the evidence, only to have it repeatedly rejected as it was repeatedly made by them in more than one form. The idea and device for "making one sash operate the other" was in complainants' patent, and protected by it. We read in one of their (Brill and Bucknam) rejected claims, "Means to cause said sections [panels] to engage when one is raised, whereby lifting one lifts all;" and in another, "Means to cause a lower section [panel] to engage and lock with an upper section when it is raised, whereby lifting the lower section also lifts the said upper section;" and in another, "In a car having side openings, posts to define said openings, sectional sash panels, means to cause the lower section to lock with the upper when it is raised, whereby lifting the said lower section also lifts and carries with it the upper section." The same thing was repeated in various ways, but rejected. All this, as stated, was covered by the complainants' patent. The defendant is now using this construction, with these elements, for this purpose, which was patented to complainants, and for which thereafter the makers of the infringing car sought a patent in vain. It was denied them not because not patentable, but because already patented to O'Leary and his assignee. The court cannot find anything that avoids infringement by defendant of these claims of complainants' patent. In claim 2 of the patent in suit we find the combination in a convertible car of (1) the storage chambers (and these are in defendant's car); (2) oppositely located upwardly and inwardly inclined slideways (and these are in defendant's car); (3) a corresponding series of inflexible panels vertically movable in slideways in the vertical side walls of the car, and each severally provided with guides movable in the chamber slideways (and these or their equivalent the defendant's car has). This claim is not void for anticipation in the prior art, and, in view of that art, discloses patentable invention, and is infringed by defendant's car. Claims 13 and 14 are valid and infringed for reasons already given in speaking of other claims. Defendant insists that there

is no infringement of some, if not all, of the claims of complainants' patent, limited as they should be in view of the prior art, for the reason that in complainants' construction the panels, after being interlocked, are guided by the movement of lower panel, and not by that of the upper, as in complainants' patent. I do not see that this is material, or that it avoids infringement. The two panels are moved side by side, the lower first moving up by the side of the upper. At this point they interlock in both constructions. From now on, being interlocked so as to form in effect one, for all the purposes of the invention it is entirely immaterial to which the guiding apparatus is attached. O'Leary was the inventor; the complainants own the patent; the claims in suit are valid, and, in view of the prior art, disclose patentable invention. Properly construed, the defendant's car infringes the claims in suit. Complainants are entitled to a decree accordingly, and for an accounting.

JOHNSON v. COMPUTING SCALE CO.

(Circuit Court, N. D. New York. July 22, 1905.)

1. FOREIGN CORPORATIONS—JURISDICTION OVER—SERVICE OF PROCESS ON OFFICER TEMPORARILY IN STATE.

Jurisdiction of a corporation of another state which owns no property, has no place of business, and transacts no business in the state in which the suit is brought, cannot be acquired by service of process on an officer of the corporation temporarily in the state on private business.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2613.]

Service of process on foreign corporation, see note to *Eldred v. American Palace Car Co.*, 45 C. C. A. 3.]

2. REMOVAL OF CAUSES—WAIVER OF RIGHT—MOTION TO SET ASIDE SERVICE.

A defendant does not submit to the jurisdiction of a state court so as to be estopped to remove the cause by moving in the state court to set aside the service.

[Ed. Note.—Waiver of right to remove cause to federal court, see note to *Atlanta, K. & N. Ry. Co. v. Southern Ry. Co.*, 66 C. C. A. 612.]

3. SAME—PRESENTATION OF PETITION TO STATE COURT.

The presentation of a petition and bond for removal to a judge of the state court in chambers, and the filing of the same, with his order approving the bond indorsed thereon, with the clerk of the state court, is a sufficient presentation to such court within the removal statute.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 189.]

4. SAME—AMOUNT IN CONTROVERSY—HOW DETERMINED.

Where the amount claimed by a plaintiff in his complaint in a state court, and which he is entitled to recover if its allegations are true, is sufficient to give a federal court jurisdiction, and the cause is otherwise removable, he cannot defeat such jurisdiction after removal by changing his position or the record with respect to the amount claimed.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 133.]

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.]

The defendant having removed this cause from the Supreme Court of the state of New York to the Circuit Court of the United States, the plaintiff, Eli B. Johnson, moves to remand to the state court. The defendant, the Computing Scale Company, moves to set aside the service of the summons and dismiss the action for want of jurisdiction of the defendant.

Brown, Carlisle & McCartin, for plaintiff.

Kernan & Kernan, for defendant.

RAY, District Judge. Plaintiff is a resident and citizen of the state of New York. Defendant is a corporation organized under and pursuant to the laws of the state of Ohio, having its principal place of business in that state. At the time of the commencement of this action it owned no property, had no place of business, and was not transacting business in the state of New York. On or about January 25, 1905, Edward Canby, the vice president of the defendant, was temporarily in the city and state of New York on private business which had no connection with defendant or its business or property, and while in said state he transacted no business for or connected with defendant. The summons and complaint in this action, being a summons and complaint in an action in the Supreme Court of the state of New York, venue laid in the county of Jefferson, N. Y., was served on said Canby on said day while he was thus temporarily in the city of New York. That is the only service of the summons or complaint on the defendant. That it is insufficient and confers no jurisdiction is well settled by the decisions of the Supreme Court of the United States. *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 25 Sup. Ct. 728, 47 L. Ed. 1113; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Remington v. Central Pac. R. Co.* (S. C. U. S. No. 460, decided April 17, 1905) 25 Sup. Ct. 577, 49 L. Ed. 959. The complaint showing the diverse citizenship before stated alleges as its causes of action (1) the plaintiff's ownership of certain letters patent for a calculating attachment for weighing scales; (2) the making of a contract January 25, 1897, between plaintiff and defendant, the material parts of which read:

"Memorandum of agreement, entered into this day by and between The Computing Scale Co. of Dayton, Ohio and Eli B. Johnson, of Chaumont, N. Y. witnesseth;

"The said E. B. Johnson claiming to be the sole owner of Letters Patent of the U. S. #514,471, for a calculating attachment for weighing scales issued to himself, February 13th, 1894, and the said The Computing Scale Co. being desirous of manufacturing and vending the said patented article throughout the United States and territories, the said E. B. Johnson and the said The Computing Scale Co. agree as follows:

"The said E. B. Johnson agrees to grant unto the said The Computing Scale Co. the exclusive right to manufacture and vend the said patented article throughout the United States and territories during the life of the patent of said patented article under the terms, conditions and stipulations hereinafter mentioned. He agrees that any improvement he may make to the said patented article may be used by the said The Computing Scale Co. without changing the terms or conditions of this agreement. He grants unto the said The

Computing Scale Co. the right to bring suit for infringement of the said patented article, and all other rights, the same as if the said patent #514,471 was the exclusive property of the said The Computing Scale Co. so long as the conditions and terms hereinafter mentioned are fully complied with.

"The said, The Computing Scale Company, on its part agrees to at once place the said patented article in the hands of its experimental department for the purpose of perfecting the mechanism thereof, to push the sale of the scale when perfected throughout the United States and territories to promptly bring suit against infringers of said patented article, to pay to the said E. B. Johnson a bonus of two hundred & fifty (\$250.00) dollars upon the signing of this agreement, to pay a royalty of twenty-five cents on each and every scale it manufactures and sells of said patented article.

"It agrees that it will not make less than one thousand of the said patented articles in any one year, or in lieu of which to pay to the said E. B. Johnson the sum of two hundred and fifty dollars per annum during the existence of this contract. It agrees that any improvement it may make on the said patented article shall not impair the rights of the said E. B. Johnson, even though it may cause said improvements to be patented, so long as the primary and foundation principles in the said patented article are retained.

"It is further mutually agreed that after the said The Computing Scale Co. shall have paid to the said E. B. Johnson the total sum of five thousand dollars, the said patent #514,471 shall become the exclusive property of the said The Computing Scale Co. and all of the right, title and interest of the said E. B. Johnson in said patent shall pass to the said The Computing Scale Co. It is further mutually agreed that if the royalties paid to the said E. B. Johnson after the first year of this agreement shall not amount to five hundred dollars annually, the said E. B. Johnson shall have the option to declare the contract void.

"It is further mutually agreed that should the said The Computing Scale Co. be unable to profitably sell and place upon the market the said patented article, it may at the end of the year declare this agreement void, provided it shall have fully complied with this agreement up to the date of such declaration."

The complaint also alleges:

"That thereafter, and on the 2d day of February, 1897, at the request of the defendant, the plaintiff executed an assignment of said patent to the said defendant, as follows:

"Whereas Eli B. Johnson, of Chaumont, State of New York, did obtain letters patent of the United States of America, for certain Improvements in Calculating Attachments for Weighing Scales, dated the 15th day of February, 1894, and numbered 514,471.

"And Whereas, The Computing Scale Company of Dayton, State of Ohio, is desirous of acquiring an interest therein:

"Now therefore for and in consideration of the sum of two hundred and fifty dollars (\$250) to me in hand paid, the receipt whereof is hereby acknowledged and for and in consideration of a sum of not less than five hundred dollars (\$500) to be paid me annually until a total sum of five thousand dollars (\$5,000) shall have been paid, as per an agreement between the parties hereunto dated January 23, 1897, I do hereby sell and assign to the said The Computing Scale Company, its successors and assigns the entire right, title and interest in and to said invention and patent together with the right to sue for past infringement, and to collect all damages and profits for past infringements, and I hereby covenant with the said The Computing Scale Company that I am the exclusive owner of the interest herein conveyed and have good right to sell and convey the same. It is understood that this assignment is made subject to the provisions of the aforesaid agreement.

"Witness my hand this 2nd day of February, 1897.

E. B. Johnson.

"Witness

"F. A. Duford."

"That ever since the issuing of the patent as aforesaid plaintiff has been, and now is, the sole owner thereof, subject to the rights of the defendant as contained in the contract and assignment hereinbefore mentioned. That after

the execution of said contract the defendant proceeded to manufacture computing scales under the contract of January 25, 1897, and, as this plaintiff is informed and believes, ever since has been and still continues to manufacture and sell scales under said contract, and are now engaged in manufacturing and selling the same. That the plaintiff has repeatedly demanded of the defendant that they should furnish him with a statement as to the number of scales manufactured by them for the purpose of determining the amount to which he is entitled, but defendant has refused, and now refuses, to furnish him with any statement showing the number of machines manufactured under said agreement, and plaintiff has been unable to ascertain the exact number of machines manufactured by the defendant under said agreement, but alleges upon information and belief that they have manufactured many thousands of said machines and sold the same. That the only payments made by the defendant to the plaintiff under said contract was the sum of two hundred and fifty dollars (\$250.00) paid about January 25, 1897, to pay the bonus as provided in said contract, and the further sum of two hundred and fifty dollars (\$250.00) paid about January 24, 1898. That there is now due and owing from the defendant to the plaintiff a large sum of money, the exact amount of which this plaintiff is unable to state on account of the refusal of the defendant to furnish him with the number of machines manufactured, as provided by said contract. That the defendant refuses to pay the amount due to the plaintiff, although plaintiff has repeatedly demanded the same. Wherefore the plaintiff demands judgment against the defendant for an accounting between the defendant and the plaintiff as to the amount due him under said contract of January 25, 1897, and that plaintiff have judgment against defendant for such an amount as may be determined upon said accounting that is due him from the defendant, together with interest thereon, and the costs of this action."

February 11, 1904, without appearing generally, defendant, on the pleadings, and on affidavits of said Canby and others as to such service, residence, etc., obtained an order to show cause from one of the justices of the Supreme Court of the state of New York, returnable February 14, 1905, why such service of such summons should not be set aside. Not waiting to make and obtain a decision of such motion, a petition for removal, verified February 4, 1905, and a bond, duly executed and conditioned as required by law in removal proceedings, were presented to Judge Scripture, one of the justices of the Supreme Court, sitting in chambers, before the return of such order to show cause. The bond was approved by such justice by a writing indorsed thereon, duly signed, and same and the petition for removal were then filed in the Supreme Court of the state of New York by filing them with the clerk of the court in his office in Watertown, Jefferson county, N. Y. No further or other proceedings were taken in the state court. Plaintiff's motion to remand is made on the following grounds:

"(1) That the matter in dispute does not exceed, exclusive of interest and costs, the sum or value of two thousand dollars.

"(2) That defendant waived and is estopped from asserting any right it may have had to remove said cause from the said state court to the Circuit Court of the United States in and for the Northern District of New York by reason of the fact that the records in this proceeding show that the defendant procured an order from said state court in said action on the 11th day of February, 1905, whereby the plaintiff was directed to show cause before a Special Term of said Supreme Court of the state of New York at the city of Utica, N. Y., on the 14th day of February, 1905, why the service of the summons herein on the defendant and all proceedings had therein should not be set aside.

"(3) That said petition for removal and the bond filed therewith were not presented to the said state court.

"(4) The Circuit Court of the United States in and for the Northern District of New York is without jurisdiction to hear and determine the cause."

Defendant had the right to move in the state court to set aside the service, and it did not, by so doing, assent or submit to the jurisdiction of the state court. *Remington v. Central Pac. R. Co.* (U. S. Sup. Ct., decided April 17, 1905, No. 460, not yet officially reported) 25 Sup. Ct. 577, 49 L. Ed. 959. In that case the motion to dismiss was made in the state court, and denied. An appeal was taken. It then was made to appear that the amount involved was over \$2,000, whereupon the case was removed, and this court then opened the matter, and entertained and granted a motion setting aside the service. Its action was affirmed.

It appears clearly and affirmatively that the petition and bond were presented to the state court. Judge Scripture, a justice of said court, approved the bond, and made an order in the premises. The petition and bond were then filed in the state court. This was all-sufficient. *Remington v. Central Pac. R. Co.*, *supra*; *Groton Bridge Co. & Another v. American Bridge Co. (C. C.)* 137 Fed. 284.

The complaint on its face affirmatively shows, and the petition of removal states, that the amount in controversy and sought to be recovered by the plaintiff is over \$2,000. Under the first agreement set out at least \$1,750 is due, and under the second—the assignment—at least \$2,500 is due. The action is to recover on both. Both are set out and declared on. True, plaintiff says he does not know how many scales defendant has manufactured under the agreement, and he wants an account of such manufacture, etc. He says, in substance, that he does not know just how much to demand judgment for, but he wants all he is entitled to. In demanding an accounting under the first agreement alleged the plaintiff in no way suggests that the accounting is all he claims, or that he waives his right to recover the amounts due and unpaid under the terms of the assignment. As to the amount claimed the petition for removal says:

"The amount involved in said cause exceeds the amount of two thousand dollars, exclusive of costs and interest, said complaint being founded upon a contract under the terms of which a large amount of money, to wit, over three thousand dollars, is claimed, as will appear on its face."

If the allegations of the complaint are taken as true, plaintiff would be entitled to a judgment of over \$3,600. Plaintiff now seeks to show by affidavits that he cannot recover over \$1,750, and hence the amount in controversy and claimed, exclusive of interest and costs, is not over \$2,000. This court does not understand that after a cause has been removed from the state to the Circuit Court of the United States on pleadings of the plaintiff showing that the amount in controversy and claimed by him in such action exceeds \$2,000, exclusive of costs and interest, that he can procure the cause to be remanded to the state court by showing that the defendant insists and has insisted that the amount actually involved is very much less than the amount claimed, and that the plaintiff is willing to and does acquiesce in that claim of the defendant; or by showing that prior to the commencement of the action the

plaintiff himself asserted his claim and right of recovery to be less than, or not more than, \$2,000, exclusive of interest, etc. While the petition of removal must show the amount in controversy, and that it exceeds \$2,000, exclusive of interest and costs, it is not a concession by the party making it that the sum claimed or that any other sum is due or owing. It is a mere statement and showing of the claim made by the plaintiff in the suit. The claim made and standing on the record of the case at the time the removal is effected is what determines the jurisdiction of the Circuit Court of the United States (assuming that the other jurisdictional facts, etc., exist). *Hayward v. Nordberg Manufacturing Co.*, 85 Fed. 4, 29 C. C. A. 438, see opinion, pages 8, 9, of 85 Fed., pages 442, 443 of 29 C. C. A.; *Riggs v. Clark*, 71 Fed. 560-563, 18 C. C. A. 242, 245. In *Riggs v. Clark*, *supra*, it is said, page 563 of 71 Fed., page 245 of 18 C. C. A.:

"But it is the well-established rule that the question whether a case is removable or not is to be determined by the claim of the complainant, as shown by the record at the time of filing the petition. It is that only which the court can take cognizance of and base its action upon. Under the practice prescribed by the statute, there is no trial and determination upon extrinsic proof of the question as to how much is the actual value of the matter claimed. *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524; *Schunk v. Moline, Milburn & Stoddart Co.*, 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255; *Dickinson v. Trust Co. (C. C.)* 64 Fed. 895."

It, of course, stands to reason, in the absence of a statutory provision to the contrary, that, the plaintiff having made his allegations of fact in his complaint filed and served in the state court, showing a removable case, one within the act of Congress, and of which the Circuit Court of the United States has jurisdiction, and the defendant having acted on such pleading and record and procured a removal of the case to such Circuit Court, and its jurisdiction having therefore and thereupon attached, the plaintiff cannot, for the purpose of defeating such jurisdiction, and having the case remanded to the state court, change his position or the record.

It follows that the motion to remand must be denied, and that the motion to set aside the service of the summons and dismiss the case for want of jurisdiction of the defendant must be granted.

UNITED STATES v. F. W. MYERS & CO.

(Circuit Court, N. D. New York. June 8, 1905.)

CUSTOMS DUTIES—CLASSIFICATION—FIREPROOFED LUMBER—MANUFACTURES OF WOOD.

As to so-called fireproofed lumber, produced by subjecting ordinary sawed lumber to an expensive fireproofing process, which, without producing any particularly noticeable change in the appearance of the lumber, fits it for purposes for which it would not otherwise be suitable, *held*, that as it becomes a new article, with changed character, qualities, and uses, it is no longer within the provision for "sawed lumber" in *Tariff Act July 24, 1897*, c. 11, § 1, *Schedule D*, par. 195, 30 Stat. 167 [*U. S. Comp. St. 1901*, p. 1646], but becomes a "manufacture of wood," as enumerated in *paragraph 208*, 30 Stat. 168 [*U. S. Comp. St. 1901*, p. 1647].

On Application for Review of a Decision of the Board of United States General Appraisers.

This is an appeal by the government from the decision of the Board of General Appraisers of the United States (G. A. 5,827, T. D. 25,715) reversing the action of the collector of customs at the port of Champlain, New York, as to the duties on certain so-called fireproofed lumber imported into the United States.

Geo. B. Curtiss, U. S. Atty.

Cemstock & Washburn (Albert H. Washburn, of counsel), for importer.

RAY, District Judge. The material in question is known as "fireproofed lumber," and is the result of subjecting ordinary sawed lumber, at an expense of about \$19 per thousand feet, to the following process:

"The lumber is placed in cars, and then run into cylinders about 110 feet in length and 6 to 7 feet in diameter. The doors are closed, and the cylinders made air-tight. Steam is then turned on for the purpose of softening the lumber and opening its pores. Next the vacuum is applied, and the sap withdrawn from the lumber. Then, under pressure, a solution consisting of sulphate and phosphate of ammonia is injected into the fiber of the wood. The cars are then withdrawn from the cylinders, and the lumber permitted to become air-dried, after which the cars are placed in kilns, and the lumber dried by gradual heat until it is perfectly dry."

This process does not produce any material or particularly noticeable change in the appearance of the lumber. It has a slightly better finish. It must be conceded, however, that by means of labor expended thereon, and material applied thereto and incorporated therein, its composition is changed, and it is fitted for uses and purposes to which the lumber not so treated would not and could not be, or at least ought not to be, used. The lumber before treatment was highly combustible; after treatment, is fireproof. Before treatment it was pine, hemlock, ash, etc., lumber, as the case may have been; after treatment, it is "fireproofed lumber." Before treatment it was worth, say, \$20 or \$40 per thousand feet, while after treatment it is worth \$39 or \$59 per thousand feet. The difference in value represents added labor and material. The added material is there—remains with the "fireproofed lumber" as a part of it, and fits and adapts the material to new uses in new places—but does not change the appearance, except to the professional eye of the chemical expert. The sap has been withdrawn, with all its constituent parts, and another material has been added—a material not found in lumber unless placed there by the hand of labor—and when so added it does not change, but remains in the fibers of the wood. The process, however, does not in any degree unfit or destroy the lumber for use in every place, mode, and manner such lumber is used when not subjected to the process of "fireproofing." Its form "workability" is not changed in the least. But its cost in its new character would prohibit its use as ordinary lumber. The Board of General Appraisers, overruling the collector, held that the merchandise in question is "sawed lumber not spe-

cially provided for," and dutiable at \$2 per thousand feet, board measure, under paragraph 195, Tariff Act July 24, 1897, c. 11, § 1, Schedule D, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1646]. The contention is the finding or holding should have been that such merchandise is "a manufacture of wood not specially provided for," and dutiable as such at the rate of 35 per cent. ad valorem, under paragraph 208 of that act.

Chapter 11, Laws 1897, approved July 24, 1897, being "An act to provide revenue for the government and to encourage the industries of the United States," is divided into schedules, each schedule treating of a different class of merchandise. Schedule A treats of "chemicals, oils and paints"; Schedule B, of "earths, earthenware and glass-ware"; Schedule C, of "metals and manufactures of"; and Schedule D, of "wood and manufactures of." 30 Stat. 151, 155, 159, 167 [U. S. Comp. St. 1901, pp. 1626, 1632, 1636, 1646]. Each schedule has subdivisions and subheads, as, for instance in Schedule C, iron ore, etc., wire, general provisions; then manufactures of iron and steel, cutlery, firearms, spikes, tacks, needles, plates, saws, miscellaneous metals and manufactures of, gold and silver, lead. But these subheads are not safe guides as to what may be found thereunder, as, for instance, under the subhead "Lead" we find metallic mineral substances, mica, nickel pens, quicksilver, watch movements, etc. Hence these subheadings furnish no guide whatever as to what is to be regarded "genus," and what "species." Schedule D has no subheading. Paragraph 194 refers to "timber" hewn, sided, or squared, not less than eight inches square, and round timber used for spars and wharves. Paragraph 196 refers, first, to sawed boards, planks, deals, and other lumber of white-wood, sycamore, and basswood, and imposes a duty thereon of \$1 per thousand feet, board measure; and, second, to all other kinds of sawed lumber, such as hemlock, pine, spruce, beech, birch, maple, etc., excepting "cabinet woods," of which specimens are named in subdivision 198, and imposes a duty thereon of \$2 per thousand feet, board measure. It is evident that it was not intended to regard sawed lumber or boards of any description as a manufacture of wood, even when labor additional to the sawing has been expended thereon, for it is expressly provided (subdivision 195) that "when lumber of any sort [this includes all sorts of boards] is planed or finished, in addition to the rates herein provided, there shall be levied and paid for each side so planed or finished fifty cents per thousand feet board measure; and if planed on one side and tongued and grooved, one dollar per thousand feet board measure; and if planed on two sides and tongued and grooved, one dollar and fifty cents per thousand feet board measure"; and in subdivision 198 it is said "Sawed boards * * * not further manufactured than sawed fifteen per centum ad valorem. * * *" It is evident that, in giving construction to this act, sawed lumber is to be regarded as partly manufactured, but not as "a manufacture of wood." It is also evident that the provisions of subdivision 195, just quoted, were put in the act to meet the decision of the Supreme Court of the United States in *United States v. Dudley*, 174 U. S. 670, 19 Sup.

Ct. 801, 43 L. Ed. 1129. Paragraph 208 of the tariff act of 1891 (30 Stat. 168 [U. S. Comp. St. 1901, p. 1647]) reads the same as paragraph 181 of the tariff act of August 28, 1894 (chapter 349, 28 Stat. 509), except it increases the duty from 25 to 35 per centum ad valorem. Paragraph 208 reads:

"House or cabinet furniture of wood, wholly or partly finished and manufactures of wood, or of which wood is the component material of chief value not specially provided for in this act, thirty-five per centum ad valorem."

In the *Dudley Case*, supra, the court held:

"Sawed boards and plank, planed on one side and grooved, or tongued and grooved, should be classified under the tariff act of August 28, 1894, c. 349, 28 Stat. 509, as dressed lumber, and admitted free of duty."

And the court said:

"In other words, a new manufacture is usually accompanied by a change of name, but a change of name does not always indicate a new manufacture. Where a manufactured article, such as sawed lumber, is usable for a dozen different purposes, it does not ordinarily become a new manufacture until reduced to a condition where it is used for one thing only. So long as 'dressed lumber' is in a condition for use for house and shipbuilding purposes generally, it is still 'dressed lumber'; but if its manufacture has so far advanced that it can only be used for a definite purpose, as sashes, blinds, moldings, spars, boxes, furniture, etc., it becomes a 'manufacture of wood.' It follows that the words 'flooring, ceiling, sheathing,' do not under this act describe a new manufacture, but rather the different purposes for which sawed lumber may be used. It is much like the commercial division of lumber into 'selects, common and culls,' which are all lumber, but of different qualities. None of these are in reality new names, but merely specifications of the more general term 'lumber.' * * * It is true that the lumber in question was in a condition to be used for flooring without further manufacture, except such reductions in length as the dimensions of the room might require; but it was also usable for ceiling, sheathing, and for similar purposes, with no further alterations. Had it so far been changed as to be serviceable for only one thing, it is possible that it might be regarded as a separate and independent manufacture, though, under the case of *Tide Water Oil Co. v. United States*, 171 U. S. 210, 18 Sup. Ct. 837, 43 L. Ed. 139, this may admit of some doubt. But while lumber planed upon one or both sides may be 'dressed lumber,' we think that when tongued and grooved it is still 'dressed lumber,' and not a new and distinct manufacture; in other words, that tonguing and grooving is an additional dressing, but it does not make it a different article. Lumber treated in this way is still known in the trade as lumber, advertised as lumber, handled as lumber, shipped as lumber, bought and sold by the thousand feet like lumber. We also think that some light upon the proper construction of the words 'manufacture of wood,' in paragraph 181, is afforded by the fact that it is used in connection with 'house or cabinet furniture of wood, wholly or partly finished,' and is followed by the words, 'or of which wood is the component material of chief value.' This would indicate an article 'made up' of wood, analogous to furniture or other article in which wood is used alone or in connection with some other material. It seems to us quite clear that it could not have been intended to apply to lumber which had only passed beyond the stage of planed lumber by being tongued and grooved."

This would seem to settle the question that "fireproofed lumber" cannot be held to be a manufacture of wood, or a manufacture "of which wood is the component material of chief value," for the reason it is wood upon which labor has been performed. In no respect and in no sense has it been so changed physically that it cannot be used for every purpose to which it was applied before being fireproofed. But *United States v. Dudley*, supra, does not

go at all to the question of the wide change in the quality or characteristics of the lumber. "Fireproofed lumber" is not what it was before being subjected to the operation or process in which it received the additions before described, and during which process its qualities, by reason of additions and subtractions not visible to the naked eye, but easily found when subjected to chemical analysis or when put to use, were materially changed—so much so that it has become too costly for its old or prior uses, unless a fireproof structure or article is desired, and adapted to new uses, and is put in a condition in which it has lost some of its old qualities and taken on new ones. "Fireproofed lumber" is a new article made out of sawed lumber or boards of any kind of wood and sulphate and phosphate of ammonia. It is clearly a manufacture, for it is made of lumber or sawed lumber, or boards or wood—it may be wood in any one of a dozen different forms, each form bearing a different name—from which lumber or wood something, viz., the sap, has been taken during the process of manufacture, and to which sulphate and phosphate of ammonia, not found in wood or lumber of any kind except this new "manufacture," during such process of manufacture have been added. It is clear that "fireproofed lumber" is "a manufacture." It is no longer "lumber" or "sawed lumber" or "timber" or "wood." It is a new article of manufacture, "fireproofed lumber," having a new character, new qualities, and its special uses to which it is specially adapted—uses to which no other wood, in any form, can be put. It is no answer to say the new article can be used as was the wood or timber used in making it. If gold and silver are mixed together in such a way that we have a new combination that may be put to a use neither could be alone, and the new combination is the result of a process, and a name is given to such combination, is it deprived of its right to be called a manufacture of metals for the reason that, so far as its mechanical uses are concerned, the new combination may be employed for all the uses to which gold was or may be put?

A "manufacture" is "anything made from raw materials by the hand, by machinery or by art, as cloths, iron utensils, shoes, machinery, saddlery, etc." See Webster's Dictionary. See, also, Worcester's Dictionary; Brandes Enc.; *Tide Water Oil Co. v. United States*, 171 U. S. 210, 18 Sup. Ct. 837, 43 L. Ed. 139; *United States v. Schoverling*, 146 U. S. 76, 13 Sup. Ct. 24, 36 L. Ed. 893.

In *United States v. Schoverling*, supra, finished gunstocks, with locks and mountings unaccompanied by barrels, were held dutiable as manufactures of iron.

In *Tide Water Oil Co. v. United States*, supra, the court said:

"The primary meaning of the word 'manufacture' is something made by hand, as distinguished from a natural growth; but, as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily the article so manufactured takes a different form, or at least subserves a different purpose, from the original materials, and usually it is given a different name. Raw materials may be, and often are, subjected to successive processes of manufacture, each one of which is

complete in itself, but several of which may be required to make the final product. Thus logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name. The material of which each manufacture is formed, and to which reference is made in section 3019 [U. S. Comp. St. 1901, p. 1990], is not necessarily the original raw material—in this case the tree or log—but the product of a prior manufacture; the finished product of one manufacture thus becoming the material of the next in rank. * * * It may be said generally, although not universally, that a complete manufacture is either the ultimate product of prior successive manufactures, such as a watch spring, or a penknife, or an intermediate product which may be used for different purposes, such, for instance, as pig iron, iron bars, lumber, or cloth, while a partial manufacture is a mere stage in the development of the material toward an ultimate and predestined product, such, for instance, as the different parts of a watch, which need only to be put together to make the finished article. * * * While the nails, which were used in fastening the shooks together, and were made from iron rods imported from abroad, may be said to have been wholly manufactured in the United States, within the principles here announced, they lost their identity as such when used in nailing the shooks together, and became so far a part of the boxes that no separate drawback could be claimed for them."

It seems clear that "fireproofed lumber" is something, and a new thing, and that it is made from raw materials—wood, sawed wood, or split wood, or boards or timber, it may be, and sulphate and phosphate of ammonia. That it is made by the work of the human hands and machinery and art working together cannot be questioned. The result of the combination is "fireproofed lumber." But is it a manufacture of which wood is the component material of chief value? If we are to construe the act as meaning that the wood in the product must have cost more in dollars and cents, or have been of greater value in dollars and cents, than the other ingredients or component materials in all cases, it is somewhat doubtful whether "fireproofed lumber" is a manufacture of wood, as defined in paragraph 208; that is, "a manufacture of which wood is the component material of chief value." This court is of the opinion that a reasonable and practical construction is to be given to paragraph 208, and that wood must be a component material and of chief or most important value or utility in the manufactured article or product. It is not necessary, in order to come within paragraph 208, that in making basswood boards into "fireproofed lumber" the boards shall have cost more in the foreign country than the phosphate and sulphate used in the manufacture of the finished product, dividing the cost of the labor equally. It is evident that in all cases the main thing is the lumber. That is the component material of greatest value or utility in the making of "fireproofed lumber," and in most instances its value in dollars and cents would be the greater at the commencement of the manufacturing process. It is perhaps well to remark that I have considered every point raised by the importer, but it would not be profitable to discuss them all here. It is true that in most instances all the materials used in creating a manufactured article change their form, but that is not

always the case. This is one of those cases. The sulphates and phosphates disappear from sight and change their form in the wood, while the wood apparently is not changed in appearance. To make "fireproofed lumber," sawed lumber is changed in name, and in character and to an extent in use. In some directions its use is much more limited, and in others more extended. In the case under consideration the white pine was, with the phosphates and sulphates, manufactured into "fireproofed lumber," and in fact the white pine was the component material of chief pecuniary value at every stage.

The decision of the Board of General Appraisers is reversed, and that of the collector is affirmed.

BURCH v. SOUTHERN PAC. CO.

(Circuit Court, D. Nevada. July 24, 1905.)

No. 813.

FEDERAL COURTS—REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—RESIDENCE.

Since Act Aug. 13, 1888, c. 866, § 1 [U. S. Comp. St. 1901, p. 508], providing that, when jurisdiction is founded on diverse citizenship, suit shall be brought only in the district of the residence of the plaintiff or defendant, confers a mere privilege on the defendant, which it may waive, Circuit Courts have jurisdiction over controversies wholly between citizens of different states, though neither plaintiff nor defendant is a resident of the district in which the court to which the action was removed is sitting.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 810, 811.

Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

Motion to Remand.

Henderson & MacMillan, for plaintiff.

S. Summerfield, for defendant.

HAWLEY, District Judge (orally). This action was brought in the state court by the plaintiff, who was and is a resident and citizen of the state of Utah, against the defendant, a corporation, duly organized and existing under the laws of the state of Kentucky, and therefore a resident and citizen of Kentucky, to recover damages for injuries received by plaintiff on account of the alleged negligence of defendant. The defendant, upon filing a petition and bond, secured a removal of the case to this court upon the ground of the diversity of citizenship between the parties.

The motion to remand is based solely upon the proposition that, upon the facts stated, neither of the parties being a resident or citizen of Nevada, this court has no jurisdiction of the case under the removal act of 1887-88. This question has never been directly passed upon by the Supreme Court of the United States. There are, however, numerous decisions that have been rendered upon this point by the Circuit Courts of the United States. They are not entirely unanimous. Plaintiff's counsel rely principally upon the

decision of Judge Keller in *Foulk v. Gray* (C. C.) 120 Fed. 156. They also cite *Gebbie & Co. v. Review of Reviews Co.* (C. C.) 134 Fed. 150, and claim that, as these are recent cases, the question ought to be thoroughly reviewed by this court. Counsel also cite that portion of *Mexican R. R. Co. v. Davidson*, 157 U. S. 201, 208, 15 Sup. Ct. 563, 39 L. Ed. 672, which refers to the case of an assignee of a cause of action, and which has no application whatever to the case in hand. The distinction between such cases and the present was clearly pointed out in *Utah-Nevada Co. v. De Lamar*, 133 Fed. 113, 116, 66 C. C. A. 179. Several of the earlier cases referred to by the court in *Foulk v. Gray*, *supra*, in favor of the proposition that this class of cases cannot be removed, were expressly overruled long prior to the decision in *Foulk v. Gray*. Especially is that true of the County of Yuba *v. Pioneer M. Co.* (C. C.) 32 Fed. 183, and *Harold v. M. Co.* (C. C.) 33 Fed. 529. In *Wilson v. Western Union Tel. Co.* (C. C.) 34 Fed. 561, Mr. Justice Field, referring to the Yuba County Case, said:

"The opinion in the case was written by my associate, the Circuit Judge, but I concurred in it and in the judgment which followed. I have, however, long been satisfied that we fell into an error, and I am happy that we have so early an opportunity of correcting it. Whether that case is in such a position that the motion can be renewed, and the ruling reconsidered, I am not able to state. We can, however, prevent the decision from misleading hereafter in other cases."

After construing the provisions of the act in question, he said:

"According to this construction of the two sections, the corporations of Nevada, defendants in the Yuba County Case, had a right to its removal to the Circuit Court of the United States, and we erred in remanding it back to the state court. So, in the present case, the defendant, the Western Union Telegraph Company, has a right to its removal to the Circuit Court, and, the removal being made, the motion to remand the case back to the state court must be denied. Since the decision in the Yuba County Case, the same question has been before several Circuit Courts, and the decisions rendered by them, after a careful consideration of the subject, have been against the one we made, and which we now overrule."

In *Kansas City & T. R. Co. v. Interstate Lumber Co.* (C. C.) 37 Fed. 3, 7, Judge Brewer, then Circuit Judge, in the course of his opinion, said:

"I am aware that in the case of *Harold v. Mining Co.* (C. C.) 33 Fed. 529, I concurred with Judge Hallett in an opinion different from that herein expressed, but further reflection, after hearing the question discussed at length and frequently, has satisfied me that that opinion was erroneous. It is perhaps unnecessary to carry this discussion any further, and it is enough to say that we hold that the fact that both parties are nonresidents of this district does not oust this court of jurisdiction in a case removed from the state court by a nonresident defendant."

In *Sherwood v. Newport News & M. V. Co.* (C. C.) 55 Fed. 1, 5, the court said:

"With the exception of a few of the earlier cases arising under this judiciary act, such as *Yuba Co. v. Mining Co.* (C. C.) 32 Fed. 183, and *Harold v. Mining Co.* (C. C.) 33 Fed. 529, which have since been expressly overruled, there has been a substantial uniformity of judgment in the Circuit Courts on the question of our jurisdiction by removal; and in accordance with such current of decision, as well as upon my own independent judgment upon this

question, which, in different forms, has several times been presented to the court, I have no doubt that this suit is removable, nor of our jurisdiction."

In this connection it is proper to state that Judge Keller, who wrote the opinion in *Foulk v. Gray*, participated in the decision of the Court of Appeals in *Wirgman v. Persons*, 126 Fed. 449, 453, 62 C. C. A. 63, where the suit was brought in North Carolina and removed into the federal court, and neither of the litigants was a citizen or resident of that state. The court said:

"We are disposed to think that there was only one controversy, and that was between the plaintiffs, citizens of New York, and Wirgman, a citizen of Pennsylvania; and we think if Wirgman, because of the relief sought by the complaint, was the only necessary defendant, and the other defendants were only formal or nominal parties, his petition for removal can be sustained as giving jurisdiction."

It will thus be seen that the number of authorities cited in support of the principles announced in *Foulk v. Gray* have been materially reduced. In fact, there are only a few skeleton cases, which never came up for review, that are left to support plaintiff's contention.

It is unnecessary to cite the cases at length which support the jurisdiction of the Circuit Courts in such cases. Several of them are cited in the *Foulk* Case, and Judge Keller there frankly admitted that numerically the greater number of cases support this rule, and that the "trend of authority is distinctly in favor of the proposition decided in *Whitworth v. Railroad Co.* (C. C.) 107 Fed. 557, 558," wherein the court said, "It may be regarded as conclusively established that the right of removal exists in such cases," and cites numerous authorities in support of this view, and quotes from Judge Dillon on Removal of Causes, wherein that author said:

"It is now well settled that, where the parties are citizens of different states, and the other conditions of removability are satisfied, the cause may be removed to a federal court, notwithstanding the fact that neither plaintiff nor defendant is a citizen or resident of the state where the suit is brought, or of the district within the territorial jurisdiction of the federal court to which it is to be transferred."

In *Virginia-Carolina Chemical Co. v. Sundry Ins. Cos.* (C. C.) 108 Fed. 451, 453, Simonton, C. J., said:

"Can this court, sitting in this district, entertain a suit wholly between citizens of other states than South Carolina, neither of whom reside in this district? Unless this court can entertain such a suit originally, these cases must be remanded. Circuit Courts have jurisdiction over controversies wholly between citizens of different states, or between citizens and aliens, when the amount in controversy exceeds \$2,000, exclusive of interest and costs. Act Aug. 13, 1888, c. 866, 25 Stat. 433, § 1 [U. S. Comp. St. 1901, p. 508]. The concluding part of the section, 'but when the jurisdiction is founded on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of the plaintiff or defendant,' has been uniformly held to confer a privilege on the defendant which he can waive. *Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98. Nor need the waiver be in express words. It is implied unless seasonable objection be made. *Martin v. Railroad Co.*, 151 U. S. 688, 14 Sup. Ct. 533, 38 L. Ed. 311. And so the Circuit Courts of the United States have held that, unless this privilege is exercised, they can entertain a controversy, notwithstanding the fact that neither the plaintiff nor defendant is resident within this district"—citing cases.

In *Memphis Sav. Bank v. Houchens*, 115 Fed. 96, 101, 52 C. C. A. 176, the Court of Appeals said:

"This order of removal was properly obtained, and vested the federal Circuit Court with jurisdiction of the case; for, although neither of the parties plaintiff or defendant resided in the Eastern District of Arkansas, yet it is now well settled that a citizen of a state, who is sued in the courts of a state of which he is neither a citizen nor a resident, by a nonresident of that state, may remove the case to the federal Circuit Court of the district wherein the suit was originally brought."

In *Moon on Removal of Causes*, § 136, the author says.

"While it is necessary that the defendant seeking the removal of a cause from a state court be a nonresident of the state in which the suit is brought, it is not necessary that the plaintiff be a resident of such state. Both parties may be nonresidents, and the defendant have the right to remove the cause to the federal court, if the citizenship of the plaintiff is diverse from that of the defendant."

Motion to remand is denied.

MONTGOMERY AMUSEMENT CO. V. MONTGOMERY TRACTION CO.

(Circuit Court, M. D. Alabama. July 12, 1905.)

1. INJUNCTION—TRESPASS.

Where a street railway's entry into complainant's park was lawful if properly made, and became unlawful only because it was alleged that the entry was by force at the hands of one from whom the possession was wrongfully withheld, a court of equity, in the absence of irreparable injury from the mode of entry and occupation, would not protect the possession of one wrongfully seeking to withhold it, by injunction, but would leave such complainant to redress the forcible trespass by ordinary remedies.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 98, 100.]

2. LEASES—RESERVATIONS—EXERCISE OF POWER.

Where a lease of land for park purposes reserved to the grantor the right to grant a right of way through the park for street railway purposes, mere acquiescence by the lessors in a prior entry of a street railway company into the park at the instance of the lessees, and its use of a part of the premises as a station for receiving and delivering passengers, did not constitute an exercise of the power reserved.

3. SAME—CONSTRUCTION—STREET RAILWAYS—CHARACTER.

An electric railway, operating beyond the limits of a city, and into a town incorporated for the mere maintenance of a park adjacent to the city, was a street railway, within a power reserved in the lease of the land used for the park, reserving to the lessors the right to grant a right of way through the land "for street railway purposes."

4. STATUTES—CONSTITUTION—MANDATORY PROVISIONS—INTRODUCTORY CLAUSE.

Const. Ala. § 45, providing that the style of laws of the state shall be, "Be it enacted by the Legislature of Alabama," is mandatory.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 44.]

5. SAME—COMPLIANCE.

Under Const. Ala. § 45, providing that the style of laws of the state shall be, "Be it enacted by the Legislature of Alabama," Act March 20, 1903 (Acts 1903, p. 116), amending Code, § 1283, the enacting clause of which stated that it was enacted by "the Legislature of Alabama," was not defective because it also declared that "the Legislature of Alabama" which enacted the statute was "the Legislature of the state of Alabama."

6. STREET RAILROADS—AMENDMENT OF CHARTER—STATUTES—APPLICATION.

Where a street railway company was in existence prior to the passage of Act Ala. Oct. 2, 1903, p. 336, section 47 of which provides a method for alteration and amendment of street railway charters, and was therefore authorized to make alterations in its charter, and to change its lines and their termini as provided by Act March 20, 1903 (Acts 1903, p. 116), amending Code, § 1283, the corporation's right thereunder was saved from the effect of the later act by a clause thereof that nothing therein should be so construed as to affect the rights, etc., of any corporation now existing, and chartered under the general or special laws of the state.

7. SAME—RIGHT OF WAY—CONVEYANCE TO RAILWAY.

Where a town was incorporated merely for park purposes, had never been platted, was without streets, and its entire territory had been surrendered to a private corporation, it was nevertheless a town which might be legally made the terminus of a street railway; and, the building of such railway into the town not being ultra vires, the railway had a right to acquire a right of way over private property within the town by purchase or lease from the owners, regardless of whether it had power to condemn a right of way over property in the town.

8. LEASES—RESERVATION—CONSTRUCTION.

Where a lease of land for park purposes reserved to the lessors a power to grant a right of way by deed or grant through any part of the leased premises for street railway purposes, the lessors were only entitled, after the improvement of the park, to grant a right of way to a railway company at such a location as would not unreasonably interfere with the arrangement of the park.

9. INJUNCTION—ASSIGNMENT OF LEASE—RIGHTS OF ASSIGNOR—DEFENSES.

It is no defense to a bill for an injunction by an amusement company against an unreasonable and forcible entry by a traction company in a park of which the amusement company was in possession under a lease from a street railway company, which also had a terminus at the park, that the amusement company is the mere instrument of the railway company, and is insisting on its complaint in order to further the interest of the railway company against a rival in the passenger business at the park. Having the undoubted right to complain of an unreasonable entry and interference with its business, the motive of the amusement company in insisting upon its rights presents no ground which authorizes a court to deny them because their enforcement may give one of the rival street railways an advantage over the other in getting passengers.

In Equity.

This case is submitted on bill, answer, and affidavits on motion for a preliminary injunction. The bill is filed by the Montgomery Amusement Company, a citizen of Georgia, against the Montgomery Traction Company, a domestic corporation, to enjoin the defendant from constructing and using a street railway in a private park used by complainant as a pleasure ground for white persons only, in what is known as the "Town of Bloemfontaine." The rights of the parties arose in this wise: On the 28th of February, 1901, the Legislature incorporated the town of Bloemfontaine. The territory included in its limits had at that time one or two inhabitants, and consisted entirely of marshes and swamps, with the exception of a few adjoining acres of wooded lands. The town has never been platted. No streets have been designated or laid out, and the woods, save as altered for park purposes, remain as before the incorporation of the town. The act conferred the usual municipal powers upon the town council. The incorporation was in anticipation of the use of the property as a park, to give better police protection to those who might resort to it, and with a view to securing local authorities who would be liberal in the execution of the laws regarding amusements expected to be carried on there. On June 10, 1902, Walker and wife, who owned all the lands in the town, leased them to Francis E. Ayers for park purposes and as a pleasure resort for the term of 20 years. The lands thus leased consist of a body of about 80 acres, distant about three miles from the City of Montgomery, adjoining the Line

Creek or Mt. Meigs Road, and lay in the midst of other lands owned by the Walkers, which bound the leased premises on two sides. The only roads then leading to the property were the ordinary county roads. The lease stipulated that Ayers might cut certain descriptions of timber, and should pay for the use of the premises an annual rental of \$405; that at the end of the lease the buildings erected were to revert to the Walkers; and that the property was to be put to no other use than a pleasure ground and park. The Walkers reserved the right to enter the premises to take away dead timber, and also to remove the timber cut down by Ayers, and, in event the rent was not paid, the right to re-enter the premises to take possession. The last clause in the indenture stated: "Nothing in this lease shall be so construed as to prevent the parties of the first part from granting a right of way by deed or lease, through any part of the leased lands for street railway purposes." In the year 1903 the Montgomery Street Railway Company acquired Ayers' interest in the lease. On the 16th of May, 1904, Walker and wife signed a writing which, after stating the transfer of the lease, agreed that the street railway company might cut such timber as might be necessary for a driveway and walk and the erection of buildings and places of amusement. On the 11th day of May, 1904, the street railway company let the premises for a period of 10 years, with the privilege of renewal of the lease 10 years more, to the amusement company, which entered upon the lands, fenced off some 10 acres of it, beautified it as a park, laid out walks and flower beds, erected waterworks, laid water mains, lighted the grounds with electricity, erected pavilions and other buildings, and made a lake by digging out the marsh and damming a stream which ran through it; expending large sums of money, amounting in all to about \$50,000. On the 8th day of May, 1905, Walker and wife, for a valuable consideration, made a conveyance of a right of way 30 feet wide to the Montgomery Traction Company into the leased lands; describing the route upon which that company constructed its street railway. The deed recited that Walker and wife had given the traction company authority to take immediate possession of the described right of way, and that they had reserved the right to grant such right of way in the lease to Ayers. Thereupon that company entered upon the right of way and proceeded to build a street railway thereon. The bill alleges that the defendant entered forcibly and without right, selecting a route which led into the heart of the park, over parts of it which complainant had beautified and adorned, and constructed its railway in a space much used by the crowds who resort to the park, skirting between the buildings and artificial lake made upon the premises, in such manner as to be destructive of complainant's control over the business and the management of the park, and dangerous to the lives of its patrons, etc. The answer set up, among other things, an estoppel on the part of the amusement company, in consequence of what had taken place at the conference between the officers of the two companies as to letting the traction company into the park. The court received affidavits on this point. The substance of these affidavits, as well as the surrounding circumstances at the time the lease was entered into, are set out in the opinion.

Steiner, Crum & Weil and Gunter & Gunter, for complainant.
Massey Wilson and Rushton & Coleman, for respondent.

JONES, District Judge. This case has been ably and elaborately argued. The facts, save as to the estoppel, are without dispute, and of many things not explicitly stated in the record a court sitting in this locality may well take judicial notice. The amusement company assails the right of the traction company to enter upon the leased premises on various grounds, which have been grouped under appropriate heads for convenience of discussion.

1. Estoppel. If the amusement company is estopped, as claimed in the answer, to object to the entry of the traction company, that ends this case. On a preliminary motion, in the absence of fullest evidence, courts are reluctant to pass upon questions which go to

the very root of the litigation. It is only necessary to say in the present posture of this case that the answer does not allege directly, but only by inference, that the contract by which the traction company succeeded to the rights of Massey Wilson and associates, and built its lines through Capitol Heights into the park, would not have been made, but upon the faith of statements made by officers of the amusement company when the entry of the traction company was under discussion. Whatever view is taken of the affidavits, which are in material conflict in other respects, it is clear that no definite conclusion or agreement was reached as to any particular thing. The sale of the property of the amusement company, the keeping up of a place of amusement by the traction company at Pickett Springs, and other things, were discussed. It seems that any agreement as to any entry into the park was dependent upon the legal rights of the amusement company, as it might be advised by counsel. When the last meeting broke up, defendant was informed that complainant could make no legal agreement, and insisted upon an indemnifying bond, etc. Certainly no agreement whatever was reached as to the location of tracks at any particular place on the leased grounds, or as to the reasonableness of the entry actually made. The whole evidence, however, leaves upon the mind the impression that the officers of the traction company were led to believe that no bona fide resistance or objection was intended or would be made by the amusement company to any reasonable entry the traction company might make into the leased grounds. This feature relieves the defendant of the character of a wanton and high handed invader of the premises, certainly as to a large part of the property taken, and undermines much of the force of the earnest argument of complainant's counsel that a court of equity ought not to permit the retention, under the circumstances of this case, of a possession acquired by force and a high hand. If an entry and occupation be lawful when properly made, and become unlawful only because the entry is by force at the hands of one from whom the possession is wrongfully withheld, a court of equity, in the absence of circumstances of irreparable injury from the mode of entry and occupation, will not, by the use of its extraordinary powers, protect the possession in favor of one who wrongfully sought to withhold it, but will leave such a complainant to redress the forcible trespass upon his possession by the ordinary civil and criminal remedies. The facts as now presented not making out an estoppel, it is necessary to consider the rights of the parties on the merits.

2. Power Reserved Not Exhausted. It is objected that the power reserved in the lease to grant a right of way for street railway purposes had been exhausted before Walker and wife made the deed to the traction company, because Walker and wife acquiesced in and consented to the prior entry into the park of the Montgomery Street Railway Company, and its use of a part of the premises as a station for receiving and delivering of passengers. The value of the leased premises to Ayers, to whose rights the street railway company succeeded, with the assent of the lessor, and the ability of the

lessees to make a profit out of the enterprise, depended upon the patronage secured by the park. The number of customers would be fixed by the cheapness, comfort, and speed of travel to and from the city of Montgomery, whose population was the only source from which it was contemplated the patrons of the park would be drawn. The means by which persons could be landed within the grounds was therefore a matter of prime importance to the lessees. The lease and the purposes for which it was made, and the circumstances under which it was made, inevitably vested in the lessee and his assigns, during the life of the lease, wide discretion to determine for themselves how this vital want of the park should best be met. The lessees had the right, so long as they exercised it without permanent injury to the freehold, to solicit and permit the entrance into the park of any vehicle which brought customers into it. They had the same right to admit a street car as they had to admit carriages. They had the same right to permit the construction of a roadbed into the park for a street railway as they had to make driveways for automobiles and vehicles drawn by horse power. The lessors could not have defeated the exercise of this right if they had objected, provided the power was exercised in such a manner as not to permanently injure the freehold. The entry of the street railway into the park is not challenged on that ground. The assent of the Walkers to an entry of a street railway into the park, not made at their instance, and which they could not prevent, cannot work a forfeiture of the right reserved by them. The act here relied on gives no proof of any intent to abandon the right, and furnishes no basis for an estoppel.

3. *Railway within Contemplated Class.* It is urged that the railway of the traction company does not fall within the class of street railways the parties contemplated. Street railways superseded stagecoaches, omnibus lines, and, in large measure, hacks, in carrying passengers to and from points in cities and towns and to suburban places. They went originally only to points reached by public highways. The public convenience and safety alike demanded that the grade of such highways should not be altered to meet the needs of a new method of conveyance which used these highways jointly with travelers by other modes. They did not need to go upon private property. The law did not contemplate that they should. Besides, the value of private property adjacent to these highways practically forbade its acquisition, if the law had permitted it, for use as a right of way. Being thus limited in their sphere of operation and powers, the term "street railway," in legal and popular acceptance, at first included only surface roads built upon streets and public highways for the carriage of passengers in and about cities and towns and adjacent suburban places. Under the influence of changed conditions of population and social life, these surface roads on the streets and highways began to serve the wants of the people in places not in any city or town, but in the vicinity thereof, and sometimes reached out to places not upon any public highway. The Legislature of this state, recognizing the usefulness of street railways, and the changed conditions which had

grown up, conferred upon them larger discretion as to their termini, and gave them in some instances the power to condemn private property for rights of way to reach their termini. So in this state, at least, the meaning of the phrase "street railway" gradually broadened until it included not only surface roads for passengers on streets and highways, but also what are now known as "trolley lines," which reach out from cities to the adjoining country, and frequently run off the public roads—a policy the public authorities now encourage—in order to reach points in the vicinity of cities and towns, though outside of their boundaries, and off the public highways, wherever passenger traffic encourages street railway service. At the time this lease was entered into, a street railway of this kind, the predecessor of the present street railway company, had operated for some time the first practical electric street railway of any length on this continent, if not in the world. One of its termini ended in a park it bought, outside of the city limits, and ended within about a mile of the leased premises. Clearly, in view of the surrounding circumstances, it was of the class of street railways, if not the very railway, which the parties contemplated might enter the park when the power was reserved to grant rights of way for "street railway purposes."

4. Act of March 20, 1903, Constitutional. It is insisted that the charter of the traction company gives it no power to operate its road to or within the park at Bloemfontaine. Its original charter gave it no such authority. If it possesses it now, it must be by virtue of certain proceedings to enlarge its powers under the act of March 20, 1903 (Acts 1903, p. 116), to amend section 1283 of the Code of Alabama. It is argued that the proceedings are invalid because they do not conform to that act. It suffices to say of this objection that while the particulars wherein the proceedings are criticized might possibly invalidate them as an exercise of corporate power on direct attack by the state, the court is of opinion they must be held, on collateral attack, to grant the requisite authority. We pass to the graver objection that the statute itself is invalid. Section 45 of the Constitution of Alabama ordains, "the style of laws of this state shall be, 'Be it enacted by the Legislature of Alabama.'" Complainant correctly urges that this section is mandatory, and not directory; that no equivalent words will suffice; and that any departure from the mode prescribed is fatal to the enactment, since, if one departure in style, however slight, is permitted, another must be, and the constitutional policy embodied in the section would soon become without any force whatever. In support of complainant's view, and in proof of its approval by the legislative and executive departments of Alabama, the attention of the court is directed to a message of the Governor returning a bill without his approval because it omitted from the enacting clause the words "of Alabama." At that time the Constitution declared, "The style of the laws of this state shall be 'Be it enacted by the General Assembly of Alabama.'" In consequence of the omission of the words "of Alabama" in the enacting clause in that bill, the Governor's veto was unanimously sustained. Senate Journal 1890-91, pp. 299-302.

The writer of this opinion was the author of that message, and sees no reason, on reflection, to doubt the soundness of its views. In that case, however, there was a failure to use all the words prescribed by the Constitution. The enacting clause of the bill stated it was enacted by the "General Assembly." What General Assembly? The Constitution was mandatory that the clause state that the statute was passed by the "General Assembly of Alabama." In *Nevada v. Rogers*, 10 Nev. 254, 21 Am. Rep. 738—a leading case—the enactment was adjudged void because the Constitution declared the style of laws shall be "The people of Nevada, represented in Senate and Assembly, do enact," and the enacting clause omitted the words "in Senate and." There, again, was a failure to use the words prescribed by the Constitution. So, too, in *May v. Rice*, 91 Ind. 546, where the Constitution required the style of the enacting clause to be, "Be it enacted by the General Assembly," and the act omitted the words "by the General Assembly." In the case now in hand there is neither an insufficient statement of the authority which enacts the law, nor is there a failure to use the identical words prescribed by the Constitution for the style of laws. This statute explicitly states that it is enacted by "the Legislature of Alabama." The only fault is that the enacting clause goes further than the Constitution commands, and declares that "the Legislature of Alabama" which enacted the statute is "the Legislature of the state of Alabama." That, however, is but a statement of a legal fact and consequence which the Constitution itself inevitably reads into every act. On the faith of the authority this statute is supposed to confer, enterprises have been undertaken, contracts made, and public and private rights have been affected. In the absence of any controlling decision by the Supreme Court of Alabama, whose rulings are binding here as to matters of this kind, this court will not hold that a statute is invalid, under this clause of the Constitution of Alabama, where the enacting clause uses the identical words prescribed by the Constitution for the style of laws, although there be incorporated in the enacting clause superfluous words, when the only possible office or effect of the superfluous words is to state a constitutional and legal fact, which every court is bound judicially to declare is true of every law enacted "by the Legislature of Alabama."

5. Amendment of Charter Valid. It is next insisted that the proceedings had under the act of March 20, 1903, are void, because that act had been repealed by the act "to confer and limit the powers of business corporations, and to provide for their organization and regulation," approved October 2, 1903 (Acts 1903, p. 310), the forty-seventh section (page 336) of which, it is alleged, provides only the legal mode by which the alteration and amendment of the charter of the Traction Company could be had. That company was in existence prior to the passage of that act, and had authority under the act amending section 1283 of the Code, approved March 20, 1903 (Acts 1903, p. 116), and perhaps under the act amending section 1189 of the Code, approved October 1, 1903 (Acts 1903, p. 384), to make alterations in its charter, and to change its

lines and their termini. The last, and therefore controlling, words of the act of October 2, 1903, commonly known as the "New Jersey Act," are "that nothing in this act shall be so construed as to add to, take from, or otherwise affect the rights, powers, duties and liabilities of any corporation now existing, chartered under the laws special or general of this state," etc. It is strenuously insisted that section 47 has no further office and effect than to regulate the mere mode by which a particular corporate right or power, which the section leaves untouched, shall be exercised in the future, and that it does not in any just sense affect or change the "rights" and "powers" of the corporation, and therefore section 47 should be allowed full play and operation against the saving clause, whose only object is to prevent the act's affecting a change of corporate "powers" or "rights" in the case of a pre-existing corporation. We are not here concerned with any vested right of any corporation to avail itself of any particular mode of manifesting its election to exercise any privilege the laws give it. Besides, the reservation as to charters in the Constitution permits the exercise of such power by the Legislature. The only question is, what has the Legislature done? The prior law, authorizing corporations to alter or amend their charters, entered into and formed part of the powers of every corporation organized under the general law. These statutes conferring the right upon corporations to alter their powers and enlarge the scope of their enterprises delegate a function which the sovereign usually reserves to himself, and can never be exercised by a corporation, except by the express sanction of the authority which creates that corporation. The right or power to do such a thing is inevitably, in the very nature of things, a high corporate right or power. Under the former law the existing corporation had the power or right to alter and change its charter and enlarge its powers in the modes the law then provided. The powers thus given by the state continue in being until repealed or withdrawn. How can the power be repealed or withdrawn by an act which expressly declares that nothing in it shall "add to, take from, or otherwise affect" the rights and powers of existing corporations? If we hold that the act approved October 2, 1903, withdraws or changes the right or power then residing in the corporation itself to enlarge corporate powers, we inevitably hold that the statute does "take from, or otherwise affect," the right existing prior to its passage—the very thing the act says it does not intend to do. Corporations existing under prior laws had the right, notwithstanding the passage of this law, to exercise any power they then possessed, in the modes prescribed by the then existing law. The objection that the proceedings here were taken under the wrong law must therefore fail.

6. Traction Company had Capacity to Hold Right of Way. It is insisted, as the park grounds are a mere private place of amusement, to which the general public are not invited, and are maintained only for a part of the community, whose invitation may be withdrawn at any time, that a street railway, which is under obligation to carry all persons impartially, has no power to build a street railway into the park for the transportation of such persons only as

the park receives, and that it has no power to hold by contract, where it cannot condemn, a right of way over private property, especially for such restricted service. The deed to the right of way imposed no conditions which confine its use to transporting any particular class of persons. Whatever may be the anomaly of a town which has never been platted, and is wholly without streets, and whose entire territorial limits have, by the act of the proprietors of the soil, been surrendered to the possession of a private corporation engaged in a wholly private business, the fact remains, in law, that the territory is in a town. It is therefore one of the places which under the law may be made a terminus of a street railway. Building and operating a street railway into such a terminus is clearly authorized by our incorporation laws, and cannot be ultra vires. Conceding that a street railway has no power to condemn a right of way over property in a town, nor, under any circumstances, for the carriage only of a particular class of persons, it does not follow that a street railway may not lawfully hold or acquire a right of way on private property in a town by purchase or lease from the owners. Property so held is used for a corporate purpose, and the corporation has undoubted capacity to take and hold it. When the owner of private property grants a right of way in such a place, he cannot challenge the capacity of the corporation to hold it, which then becomes a matter wholly between the corporation and its creator. One who merely succeeds to the rights and stands in the shoes of the former proprietors, who had sold the right of way, is not in position to challenge the right to hold the property. While the main motive in buying the right of way and building the street railway into the park may have been to transport such passengers as are received into the park, there is no legal disability to hold a deed to operate the line into the park as a common carrier for the accommodation of the public generally. Whether passengers other than those invited into the park may, in view of the circumstances of this grant, go off of the right of way when carried in, and enter upon the leased premises, without the consent of its managers, is another question, as to which no opinion is now intimated. It is mentioned here only to show that the traction company may lawfully operate a street railway into the town, and that from the lawful use of the right of way this court has no power to restrain it, though perhaps it might do so if the traction company abuses the grant by using it only for a private purpose, to the special injury of a particular person legally damnified thereby. We are not concerned here with the exercise of the power of eminent domain. The entry is upon private property in a town under contract with its owner. The purchase of private property in cities and towns for a corporate purpose, although it could not be taken by condemnation at such places, is an everyday occurrence, and falls neither within the spirit nor the letter of the rule which forbids corporations exercising any power not expressly given or necessarily implied.

7. Construction of Reservation. What was in the minds of the parties when they provided, "Nothing in this lease shall be so con-

strued as to prevent the parties of the first part [the Walkers] from granting a right of way by deed or lease through any part of said leased premises, for street railway purposes"? How far was it contemplated that the exercise of that right should interfere with the uses for which the lease of the lands was made, and the right of the lessees to control them and regulate the business to be carried on upon the leased premises? The right reserved was one which might or might not be exercised. If availed of, it might be exercised at any time during the life of the lease. In arriving at a true construction of the intent of the parties, when the words themselves, taken in connection with the context, do not unalterably fix them, we must look to the surrounding circumstances and the prime objects the parties had in mind. The purpose of the lessors was to surrender possession and control of the lands for a park and place of amusement, to be managed and controlled exclusively by the lessees for their own profit, so long as the leased premises were not devoted to any other use, and the lessees paid the stipulated rent, for a period of 20 years. The only right reserved by the lessors was to enter the lands to remove certain kinds of timber, and to re-enter if the rent was not paid, and the right to grant rights of way for street railway purposes through any part of the leased premises. These respective rights were to be exercised during the period of 20 years, during which the exigencies of the business and changed conditions would create situations which would materially shape and determine the respective rights of the parties. The lessees could not arbitrarily say to the lessors: "We need this entire body of lands. You shall not grant a right of way over any of them." The lessors could not arbitrarily say to the lessees: "We reserved the right to run a street railway anywhere over the grounds. You must move your buildings and disarrange your park, no matter what the damage to you, because we have a right to locate a right of way as we please." The power to locate the right of way must take the channels of least injury to both parties at the time it is sought to exercise the power. So long as the leased lands are not actually so used that a location for a street railway would require the amusement company to remove its buildings and structures, or disarrange them and the adjacent ground, or deprive it of proper control and economical management of the lands occupied for a park and place of amusement, the amusement company has no right to object to the location of a right of way through any part of the leased lands. If the reservation here was of a right to allow another amusement company to enter upon the lands to carry on the same kind of business, it is clear that such a reservation, being restrictive of the purposes of the grant, would be defeated if the entire premises were so occupied that to allow the subsequent use would impair or destroy the rights of the first occupant. Whether or not the terms of the reservation import a different intent here, it is needless to inquire, since the facts of the case take it without the operation of the principle. Here a large part of the premises is not needed or used for a park or place of amusement. The plan upon which the park and buildings in it are arranged is such that

the location of a street railway through the greater part of the premises cannot interfere with the park, and is in no sense even obstructive of the purposes of the lease. The bringing of a new line of transportation near the park, or even within it, if the entry is made in a suitable way, is an advantage, not a disadvantage, to a private place of amusement conducted for gain. If those interested in the execution of a power like this cannot agree upon a reasonable location, a court of equity has the undoubted authority to intervene to properly regulate and control the exercise of the power, and the rights of the parties arising thereunder.

8. Surrounding Circumstances. At the time this lease was made, only one system of street railway was in operation about the city. One of its termini ended within a mile of the park of Bloemfontaine. The building of another line of street railway from the city of Montgomery to Pickett Springs was then being discussed, and Pickett Springs was incorporated at the same session of the Legislature as Bloemfontaine, with a view to the maintenance of a place of amusement in connection with the street railway to Pickett Springs. That place is about $4\frac{1}{2}$ miles from the city of Montgomery, and north of it, and about 3 miles from Bloemfontaine. Topographical conditions between the nearest terminus of the Montgomery Street Railway and the park are such that its extension to the lands of the Walkers, which lay beyond the park, would naturally take the route through the leased lands. Putting one's self as far as possible in the position of the parties at the time, in view of the surrounding circumstances, the first thought, naturally, is that the Walkers reserved the right, to prevent the lessees of the park, by means of their control of this particular body of land, from throwing obstacles in the way of any street railway which might desire to come from the city of Montgomery through the leased lands to other property of the Walkers. Obviously the lessee was interested in having the park reached by street railways, and most concerned with street railways which only stopped therein. It is not probable that the Walkers thought the lessees would keep any street railway from coming to and stopping in the park, and, in anticipation of such an attitude, reserved the power to put a street railway into the park. The buildings put upon the premises were to revert to the Walkers at the expiration of the lease, and the value of them at that time would depend largely upon the prosperity of the business of the park. It may be that the Walkers reserved the right to grant a right of way for a street railway, in order to prevent the crippling of the park by its dependency on one street railway in the event, after getting in, it so managed its business as to retard the growth of the park. It may be, also, that they thought the right to allow a street railway to enter the park, where a large passenger business would probably be built up, would be valuable as a property right, which might be sold by them, or be influential in inducing some other road to come through other lands of the Walkers in order to reach the park. These and other considerations might have been in the contemplation of the parties at the time. If the court should hold that the reserved power was intended to apply only to

rights of way for a street railway, which needed to go "through" the park in order to reach some outside point, it would add a limitation upon the power which the parties themselves have not expressed, and which the surrounding circumstances do not create. The conclusion that the Walkers did not anticipate changed conditions, and had in mind only a railway which would need to go through the lands in order to reach some other point, would be based upon the veriest conjecture. The fact is, as appears from the state of things to-day, that the exercise of the power the Walkers reserved finally enabled them to induce a railway from the city of Montgomery to come upon other lands of the Walkers, adjacent to the leased lands, in order to enter Bloemfontaine. It is not permissible for the court to strike down rights which the words of the contract include, and which the surrounding circumstances do not exclude, upon the supposition that the parties were not in fact sufficiently farseeing to anticipate the particular use or advantage which might happen in the future by the lawful exercise of the reserved power. The Walkers having reserved a power, the exercise of which might bring them this advantage, it is not for the court, when conditions have enabled them to realize the advantage, to take it away on the theory or conjecture that the Walkers did not foresee what has now happened, and had other purposes in view.

9. Amusement Company has Rights of Its Own. It is strenuously urged by the defendant that the street railway company is using the amusement company to uphold its rights in a contest with another transportation company—a matter in which the public is interested. However that may be, the amusement company has rights as to the management and control of the property in its possession. When its property has been invaded, it is its right, under the Constitution and laws, to insist upon those rights, and the court cannot deny them recognition because the effect of their enforcement might result in advantage to some one else, or disappoint some public expectation. The bill and affidavits show that the street railway company has made large advances to the complainant, and with the desire "to encourage passage to the park for the purposes of revenue from street car fares," and that the contract between the two companies bound the amusement company "to encourage in every reasonable way travel" over the lines of the street railway during the continuance of the lease. Good faith on the part of the amusement company demanded at least that it should not be a party to a selection and use of a place inside of the park which would give a rival company, which had not participated in the responsibilities and expenses of the park, a favored location inside the park, to carry off passengers whose coming there was one of the chief reasons which induced the contract between the amusement company and the street railway company. It is needless to say that the street railway is not a party, and its rights are not before the court. Its only duty in the premises now is to declare the rights of the parties before it, as the law determines and fixes them.

10. Route Arbitrarily Located into the Park Inclosure. Judging from the map and a personal inspection of the locus in quo, it does not seem to the court that the route selected by the traction company, after leaving the Mt. Meigs Road, and entering the park property by the lower end of the lake, and then running almost at right angles into the park property, is an arbitrary or improper location, or at all destructive of the purposes of the grant or the business of complainant. Such a route, in its initial stages, is far better for all concerned than crossing the lake further up by trestle, or entering upon the park property at the head of the lake. When, however, the location, after running some distance on the unfenced portion of the park, puts a 30-foot right of way into the inclosure of the park itself, where complainant has laid off the ground, improved it, and it is studded with buildings, taking a line which skirts close to these buildings, and between them and the lake, it is an arbitrary and unreasonable exercise of the reserved power, which a court of equity will restrain. The constant running of street cars by electricity in such a place in the park, between the main grounds and the lake, and near the main ingress and egress to buildings and places of amusement, would seriously interfere with the management by the amusement company of its business, and would endanger, at least, old persons and young children in the crowds which roam about the park, in going to and from the lake. The reservation of the power to grant rights of way was never intended to give the lessors power to inflict such injury upon the lessee, or to enable the lessors or their assigns to disarrange and disorder the lessees' control of their own premises and business. The right of the amusement company to control its internal affairs, inside of the grounds, actually occupied and used by it for park purposes, is a valuable property right, which is not left to the control of the lessors, and a court of equity must protect it. The damage which would be inflicted upon the lessee by bringing such a state of things to pass, and the running of cars on the route selected inside of the fenced portion of the park, would certainly amount to far more than \$2,000, exclusive of costs and interest, during the years of the life of the present lease. The objection on the ground that the amount involved is insufficient to give jurisdiction is therefore overruled.

Whatever may be the law in other cases, the court is of opinion, under the circumstances of this case—where the right of way was neither defined nor outlined, and might be located at any future time, upon the possession of one to whom the premises are leased for a particular business, which necessitates the erection of buildings and improvement of the grounds—that one who locates the right of way so as to disarrange the complainant's business, and avails himself of complainant's improvement for his own benefit, at least when another route is equally feasible and convenient, must pay fair compensation for the value of such taking and use during the term of the lease. The driveway from the Mt. Meigs Road to the park, so far as it has been utilized for defendant's roadbed, falls within this principle.

Injunction Allowed. A preliminary injunction will issue against any use by the defendant of the right of way within the inclosure, as set forth in the map made an exhibit to the amended bill, and within 50 feet of the point where the defendant entered the complainant's fence; but, in view of the circumstances under which the entry was made, the complainant must allow defendant, if it so desires, to remove the iron and structures within the enclosed park, and within 50 feet of the entrance thereof, the defendant, in turn, putting the premises in the same condition, after removing the track, as they were before it was built thereon.

In re BECKER BROS.

(District Court, M. D. Pennsylvania. July 31, 1905.)

No. 547.

BANKRUPTCY—RIGHT OF SET-OFF—DAMAGES FOR TORT.

Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], which provides for a set-off of mutual debts or mutual credits, does not authorize the setting off against the claim of a landlord for rent under a lease to the bankrupt of an unliquidated claim for damages in favor of the bankrupt, sounding in tort, and arising independently of the contract of lease.

In Bankruptcy. On exceptions to report of W. L. Hill, referee. Sur petition of bankrupts for allowance of set-off to landlord's claim for rent.

Charles L. Hawley, for exceptions.
W. S. Bevan, contra, for landlord.

ARCHEALD, District Judge. Attempt is made in this case to set off against a claim for rent, which has been duly proved, a counterclaim for damages against the landlord for negligently allowing water to come in upon the premises leased by the bankrupts, by which the bowling alleys which they had constructed there were injured. The referee has found in favor of the landlord on the merits, but he has also decided that the claim for damages is not, in any event, available as an offset, being unliquidated, and arising out of a tort; and, as the latter ruling effectually disposes of the case, and must unquestionably be sustained, it is not necessary to consider the other.

If the case were to go by the state law, it is clear that no such set-off or counterclaim would be maintainable. It does not arise out of any duty imposed on the landlord by that relation, or the covenants of the lease, but is admittedly based on the larger obligation outside of that, by which, as it is said, he was bound to do or suffer no act by which the tenants should be injured or interfered with in the enjoyment of the premises demised. But it was expressly held in *Groetzing v. Latimer*, 146 Pa. 628, 23 Atl. 393, following a number of preceding cases, that matters sounding in tort, and arising out of a different transaction, cannot be used as

a set-off against an unrelated claim. In that case, to make the analogy complete, the plaintiffs sued for rent; and the defendants put in a counterclaim for damages sustained by reason of the unlawful seizure of their property on landlord's warrant, and the consequent interference with and injury to their business. But it was held that this, in effect, was a tort, which would form the subject of an action *ex delicto*, and could not, therefore, be brought in as a set-off.

The case is to be disposed of, however, by a reference to the bankruptcy act, and the question is as to what is there provided. By section 68 (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]) it is declared:

"(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

Also that:

"(b) A set-off or counter claim shall not be allowed in favor of any debtor of the bankrupt which is not provable against the estate."

The bankruptcy act of 1867 had a substantially similar provision, which was itself taken from the earlier English acts, under which it was decided that by "mutual credits" are meant such as must, in their nature, terminate in debts, or a debt be in the contemplation of the parties. *Ross v. Hart*, 8 Taunt. 499, 2 Smith's Lead. Cases, 309; *Naoroji v. Bank of India*, L. R. 3 C. P. 444; *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769. It was accordingly held in the latter case that, in a suit by an assignee in bankruptcy to recover money sent to the defendants by the bankrupt in trust to be applied to a specific purpose, a debt due by the bankrupt to the defendants could not be set off. It is true that in *Booth v. Hutchinson*, L. R. 15 Eq. 30, a tenant, from whom rent was due to the bankrupt estate, was held entitled to set off damages arising out of a breach of the lease. And in *Peat v. Jones*, 8 Q. B. Div. 147, and *Jacob v. Kipping*, 9 Q. B. Div. 113, in an action to recover the unpaid balance due on goods contracted to be sold and delivered by the bankrupt, damages accruing in the one case from the non-delivery of a part of the goods, and in the other from fraudulent representations made in the course of the sale, were allowed to come in. But these cases arose under the more recent English acts, in which the words "mutual dealings"—a much more comprehensive term than "mutual credits"—appeared;¹ and in *Peat v. Jones*, as well as in *Jacob v. Kipping*, it is pointed out that the damages sought to be set off grew directly out of a breach of the obligation involved in the contract of sale. That there was no intention of departing from the earlier construction by anything which is so decided is shown by *Palmer v. Day* (1895) 2 Q. B. 618, where it was said by Russell, C. J.:

"The section [of the English bankruptcy act relating to the subject of set-off], in its present shape, has been held applicable to all demands provable in

¹ Although in *Makehan v. Crow*, 15 Com. Bench (N. S.) 47, a similar ruling was made under the prior law.

bankruptcy, and so to include claims as well in respect of debts as of damages, liquidated or unliquidated, provided they arise out of contract. But whilst the right of set-off has been thus widely extended, it is still subject to the limitation that the 'dealings' must be such that, in the result, the account contemplated in the section can be taken in the way described. In other words, the dealings must be such as will end on each side in a money claim."

Consistently with this it was also held in *Eberle Hotel v. Jonas*, 12 Q. B. Div. 459, that where, in winding-up proceedings, where the bankruptcy rule prevails, the liquidator of the company which is being wound up is entitled to a return of goods in specie, and has brought an action of detinue therefor, the defendants will not be allowed to assert a counterclaim for goods supplied, on the ground of mutual dealings.

These cases consider the question from the reverse standpoint from which it comes up here; that is to say, the right of set-off is not claimed in behalf of the estate, but against it. But that is not material. The principle is the same, and, by it, it is clear that, from whatever side considered, it cannot be regarded as extending to a claim for damages, sounding in tort, and growing out of an entirely different and independent transaction. The right of action, no doubt, vested in the trustee, in the present instance, to recover the damages alleged to have been done to the bankrupts' property. Section 70a (6), 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]. And the composition offered by the bankrupts having been accepted and confirmed, this right has now reverted to them again. Section 70b. So that no difficulty arises upon that score. The bankrupts would therefore unquestionably be entitled to have the claim for rent reduced in the way they ask, in relief of the composition which they are to pay, if only the counterclaim which they set up could be entertained. But for the reasons stated, it cannot be, and the action of the referee in rejecting it must therefore be sustained. The suggestion that, unless the set-off is allowed, the bankrupts will be without remedy, even if it afforded the basis for an argument, is met by the consideration, which has just been alluded to, that by the express provision of the act the bankrupts are reinvested by the composition with all their pre-existing rights, which they can enforce by action, the same as though bankruptcy had not intervened. *Stone v. Jenkins*, 176 Mass. 544, 57 N. E. 1002, 79 Am. St. Rep. 343; 4 Am. Bankr. Rep. 568.

The exceptions are overruled, and the action of the referee in refusing to reduce the rent by the set-off claimed is confirmed, without prejudice, however, to the merits of the claim, which are not passed upon.

HAY et al. v. CUDABACK.

(Circuit Court of Appeals, Third Circuit. June 9, 1905.)

No. 11.

CONTRACTS—CONSTRUCTION—ENFORCEMENT BY ASSIGNEE.

Defendants purchased certain lots, taking title to a trustee, who executed mortgages to secure deferred payments of purchase money. Defendants then entered into a contract with the trustee, by which they agreed to furnish him with all money necessary to pay taxes and the interest and principal of the mortgages as the same became due, and to indemnify and hold him harmless from all costs, charges, and expenses by reason of his executing such bonds and mortgages. Defendants having failed to furnish the money to pay the same, the mortgages were foreclosed by plaintiff, who recovered a deficiency judgment against the trustee, and thereupon the trustee assigned all his rights under the contract to plaintiff, who entered satisfaction of such judgments. *Held*, that the contract was not merely one of indemnity, but also one binding defendants to pay the mortgage debts, which could be enforced by plaintiff as assignee, the satisfaction of the deficiency judgments without payment being a matter of which defendants could not complain.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 134 Fed. 120.

Edward J. Fox, for plaintiffs in error.

John A. McCarthy, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. Hay and Fisler, the plaintiffs in error (the defendants below), purchased certain lots of ground in the city of Niagara Falls, in the state of New York, but took the title in the name of I. J. Forbes King. Hay and Fisler paid down the only part of the purchase price, and the balance was secured by purchase money bonds and mortgages given by King. King was to hold the lots in trust for Hay and Fisler, and convey the same as they might direct. A written agreement dated August 13, 1894, between King, as party of the first part, and Hay and Fisler, as parties of the second part, after reciting the above-stated facts, provides as follows:

"Now, therefore, this agreement witnesseth that the parties of the second part, in consideration of the premises and the agreements hereinafter contained on the part of the party of the first part, agree to furnish all sums of money necessary from time to time to pay the taxes on said lots and the interest and principal on said bonds and mortgages, as the same become due and payable, and to indemnify and save harmless said party of the first part from all costs, charges, and expenses by reason of his executing said bonds and mortgages or any of them."

Hay and Fisler did not furnish King sufficient money to pay the said bonds and mortgages, and consequently two of the mortgages were foreclosed by the holder, William Cudaback (the defendant in error), and deficiency judgments were obtained against King, one for \$1,492.62 and the other for \$277.62, on July 26, 1901. On the day these judgments were entered against King he assigned all his rights, claims, and demands against Hay and Fisler under the

above recited agreement of August 13, 1894, to Cudaback, and Cudaback entered of record satisfaction of the deficiency judgments. This action is based upon the above-quoted provision of the written agreement of August 13, 1894, and was brought to enforce the claim of King against Hay and Fisler, arising from their failure to furnish King money to pay said bonds and mortgages.

The argument of the plaintiffs in error in support of their assignments of error proceeds upon the assumption that the covenant sued on is simply an agreement of indemnity to King against resultant damages, and that this case belongs to that class of cases in which the covenantee cannot recover until he has been actually damaged, and then only to the extent of the injury he has sustained. But this view is quite inadmissible. By the plain terms of the agreement Hay and Fisler covenanted to do two things: First, "to furnish all sums of money necessary from time to time to pay the taxes on said lots and the interest and principal on said bonds and mortgages as the same become due and payable"; second, "and to indemnify and save harmless said party of the first part from all costs, charges, and expenses by reason of his executing said bonds and mortgages or any of them." These are distinct obligations. Now, by the first Hay and Fisler bound themselves to furnish King with money to pay the bonds and mortgages as they became due. As between Hay and Fisler on the one hand and King on the other, the indebtedness for which the latter gave his bonds and mortgages was the indebtedness of the former, and they had agreed to put him in funds to meet the bonds and mortgages as they matured. This Hay and Fisler failed to do, and upon such failure a right of action against them immediately accrued to King to recover the money.

This being our view of the first branch of the covenant in question, it is not necessary for us to express any opinion as to the scope of the second branch of the covenant.

The satisfaction by Cudaback of his deficiency judgments against King is a matter of which the plaintiffs in error have no right whatever to complain. That satisfaction worked no injury to them. King might have paid off those judgments, and then brought his action against Hay and Fisler, but he was not bound to pursue that course. The parties concerned in this matter (King and Cudaback) had a perfect right to pursue the course they did, King assigning his rights, claims, and demands under the agreement of August 13, 1894, to Cudaback, and the latter satisfying his judgments.

We find no error in this record, and therefore the judgment of the court below is affirmed.

HERRON et al. v. COMSTOCK.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1905.)

No. 1,378.

1. FEDERAL COURTS—JURISDICTION—APPEAL—LAWFUL CASE.

Where, in a suit against trustees for an accounting in the federal courts, the Circuit Court of Appeals sustained certain assignments of error, and remanded the cause with directions to enter a decree for complainant for the balance of certain annuities, and to require the trus-

tees to account for the residue of the estate remaining in their hands subject to distribution under the provisions of a paragraph of the will, and when such residue should be ascertained to distribute it to those entitled thereto, the court having jurisdiction of the cause and of the parties, such decree was binding on them, and precluded them from subsequently objecting that the order directing the accounting constituted an infringement of the jurisdiction of the probate court of the state in which the settlement of the estate was pending.

2. SAME.

Where the powers and duties of executors and trustees under a will were severable, and, prior to the filing of a bill in the federal court by a beneficiary under the trust, the administration of the personal estate by the executors had ended, and nothing remained but the management and disposition of the trust real estate remaining unsold for the completion of the trust, the federal court had jurisdiction to decree an accounting by the trustees and direct final distribution and settlement of the trust.

3. SAME—STATE STATUTES—CONSTRUCTION.

Ohio Rev. St. 1892, § 6328, provides that any trustee under any last will, or appointed by competent authority as often as once in two years, shall render an account to the probate court of the county in which he was appointed, etc., provided that the section shall not apply in any case in which the will creating the trust designates any other tribunal for the settlement of the trust, or in which any other tribunal shall have acquired jurisdiction. *Held* that, though such section was applicable to a trust in real property, it did not confer on the probate court control over the property itself, but only authority to biennially settle the trustees' accounts.

4. SAME.

Such jurisdiction did not attach where the subject-matter of the trust had been drawn into the possession and control of a federal court by the filing of a bill for settlement and distribution by one of the beneficiaries of the trust.

5. SAME—COMPENSATION OF TRUSTEES—PROBATE ORDERS—EFFECT.

Where a federal court had taken jurisdiction of the settlement and distribution of a trust in a suit by a beneficiary, it also acquired jurisdiction to fix the compensation of the trustees, and was therefore not bound by intervening orders of the probate court of the state in which administration or the will creating the trust had been granted, fixing such compensation.

6. SAME—EXTRA COMPENSATION.

Where the total amount passing through the hands of executors and trustees was \$229,211.49, and the total amount obtained by the trustees for services, including the last amount, was \$17,619.19, or nearly three times the statutory commissions, it was not error for the court to refuse to allow a further sum of \$2,500 as extra compensation.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

W. C. Herron, for appellants.

Harlan Cleveland, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. Margaret R. Poor, a resident of Cincinnati, Ohio, died August 18, 1882, leaving a will, made in March preceding, and a considerable estate, consisting of both real and personal property. John W. Herron and William H. Fisher

were therein appointed executors. On September 7, 1882, the will was duly admitted to probate in the probate court of Hamilton county, Ohio, and on September 25, 1882, letters testamentary were issued to them. The appointment was accepted, and they qualified as executors.

In view of the questions raised on this appeal, it seems necessary to state with some particularity several provisions of this will. By the first and second paragraphs the testatrix gave certain legacies to the persons therein named, and then by the third paragraph devised and bequeathed all the rest and residue of her estate, real, personal, and mixed, which she owned or had any interest in, to John W. Herron and William H. Fisher, and to the survivor of them, absolutely and in fee simple, in trust, to sell, dispose of, and convey all such as was not in ready money, and to lease, repurchase, and reconvey, and do all other things in reference to the same as to them might seem best for the purposes of the trust. And in several succeeding paragraphs she directed the trustees to invest certain several named sums in productive real estate, or stocks or bonds, for the benefit of the several persons therein named, who were to receive the income thereof, and among whom was the complainant in this bill. In reference to her, in paragraph 5, she gave the following direction:

"I do further will and direct that said trustees pay to my niece, Nellie Preston Barr, ten thousand dollars in money, and that they invest the further sum of fifty-six thousand six hundred and sixty-seven dollars in productive real estate, bonds and mortgages, or interest-bearing stocks or bonds, at their discretion, with full power to change the said investments or any of them as they may think best; and to pay the income therefrom statedly to my said niece, Nellie Preston Barr; and I further direct that until said sum of ten thousand dollars is paid to my said niece, and said additional sum invested for her benefit, as in this article directed, my trustees pay to her at the rate of four thousand dollars per annum, from the date of my decease."

To still other persons the testatrix directed her trustees to pay out and out certain specified sums. Then, in paragraph 14, she gave this further direction:

"I further will and direct that said trustees pay over and transfer all the rest and residue of my estate not herein devised, and all shares thereof at the termination of the estate for which it is devised, and all shares which from any cause shall fail to pass out of the possession of said trustees under any of the provisions of this will, to my six nephews and nieces, Nellie Preston Barr, William Alexander Barr, Mary E. Williamson, Margaret E. Merrill, Ada G. Huston and William B. Finley, to be equally divided between them."

Finally, she appointed and directed as follows:

"I hereby appoint John W. Herron and William H. Fisher executors of this will, and I direct that no bond be required of them, either as such executors or as trustees under any of the clauses of this will."

The trustees accepted the trust.

The property left by the testatrix, not specifically disposed of by her will, consisted in part of stocks and bonds, but in far larger part of real estate in and about the city of Cincinnati. The executors proceeded to perform the duties imposed upon them by the will.

The debts and legacies not included in the trust were paid by them, and the legacies payable out and out included in the trust were also paid by the same persons, in what capacity is a subject to be considered later. The personal property was all exhausted in the payment of the debts and legacies, and some of the rents, as well as some of the proceeds of sales of real estate, as we understand, were required and used for the same purpose. All this had been done as early as 1885. Thereupon steps were gradually taken by the trustees for effecting the investments directed by the will as above stated. In course of time the annuities, which by the will were to be paid to the beneficiaries until the investments were perfected, were not paid in full, for the reason, as claimed by the trustees, that the receipts of income from the trust property were insufficient. The investment which the will directed to be made for the complainant not having been made, and her annuities having fallen in arrear, she filed this bill in the court below on December 24, 1890, setting forth the facts substantially as above stated, and praying that the trustees be required to make the investments as directed by the will, that they be required to pay her the arrearages of the \$4,000 annuity, and that they make report of their proceedings in execution of their trust, and render an account showing the amount remaining for distribution after payment of all the sums directed to be paid by the paragraphs of the will preceding the fourteenth, above set forth, and that, when the residue should be ascertained, the trustees should be decreed to pay over to her the distributive share to which she was entitled, and for general relief. On January 21, 1891, the trustees filed their answer, in which they acknowledged the nonpayment in full of the annuity due to the complainant, and in excuse averred that the income of the estate was insufficient to meet the requirements of their trust; admitted that they had not, prior to the filing of the bill, made the investments directed by the will, but averred that they were then making preparations to do so, and that since the filing of the bill they had completed the investments. And in their answer they set out specifically the parts of the estate assigned to each of the beneficiaries of the investments, among them this complainant; and thereupon they say, "having now carried out the several provisions of the said will, they ask this court to approve the same." They admitted that there still remained a residue of the trust estate for distribution, consisting of real estate in Cincinnati and elsewhere, and they prayed the direction of the court as to whether such residue should be now distributed to the devisees or held until the determination of the life estate of each, and whether in kind, or in the proceeds of sale after conversion. The complainant, after some corrections had been made, accepted as satisfactory the investment made for her, and the court approved it. By the decree of the court, entered October 4, 1892, it was declared also that the complainant was by the terms of the will entitled to receive the annuity in full, and that resort might be had to the corpus of the estate, if the income proved insufficient, but that she had waived that right and accepted the lesser sum, and could not now reclaim the

balance of the annuities. With respect to the rest and residue of the estate, it was by the decree adjudged as follows:

"That the complainant and the other residuary legatees, defendants herein, under item 14 of said will, the court further finds and adjudges are entitled to a present division of the residue of the estate, all the other provisions of the will having, as appears to the court, with the exceptions heretofore noted, prior to item 14 of said will, been carried out, and said defendants, trustees, etc., as aforesaid, are hereby ordered and directed to pay over and transfer to the said residuary legatees, complainant and defendants, their said respective one-sixth ($\frac{1}{6}$) shares and interest in said rest and residue of said estate," with the exception of one share to E. Mary Williamson, which the court reserved for further disposition.

Thereupon the decree of the court proceeds as follows:

"The court further orders, adjudges, and decrees that the complainant is not entitled to so much of the relief prayed for in her bill of complaint and supplemental bill herein as seeks an order from the court directing the defendants, trustees, etc., to make a report and itemized statement and description, and a full account render of all the rest and residue of the estate left and remaining after full payment shall have been made under and pursuant to the various devises preceding item 14 of the will, and as seeks an accounting from said defendants, trustees, etc., as aforesaid, and that said relief be, and the same hereby is, denied, and all said matters relating to the ascertainment of said rest and residue, and an accounting from said defendants, trustees, etc., as aforesaid, is hereby left to the probate court of Hamilton county, Ohio, where the affairs of said estate have heretofore been administered.

"It is further ordered, adjudged, and decreed that as soon as the rest and residue of the estate shall have been ascertained by the probate court of Hamilton county, Ohio, and an accounting had therein that the complainant, the said residuary legatee, is entitled to have paid over, divided, and distributed to her her distributive share of said rest and residue in kind as prayed for in the bill of complaint, and said defendants, Herron and Fisher, as aforesaid, are hereby ordered and directed, in making the distribution as aforesaid of the rest and residue of said estate, to divide the different kinds of property of which it may consist into as nearly six equal shares as possible, and to pay over and to transfer to the said complainant and such other residuary legatees as may desire it their respective shares in each of said kinds of property in kind," with further direction for conveyances.

The complainant appealed from those parts of said decree which denied to her the balance of the annuities and refused an accounting in that court of "the rest and residue of said estate left in their hands." This court on the appeal sustained the assignments of error in both particulars, and remanded the cause with directions to decree for the complainant for the balance of the annuities, and to require the trustees to account for the residue of the estate remaining in their hands subject to distribution under the provisions of paragraph 14 of the will, and, when that residue should be ascertained, to distribute it to those entitled. *Comstock v. Herron*, 6 U. S. App. 626, 55 Fed. 803, 5 C. C. A. 266. In all other respects the decree of the court below remained undisturbed. On the reception of the mandate, the court below, on June 21, 1893, entered the particular decree therein required, and made the following order of reference:

"It is further ordered that this cause be and is hereby referred to B. R. Cowen, who is hereby appointed special master for said purpose, to state an account showing the rest and residue of the estate in the hands of said execu-

tors and trustees after carrying out the various provisions of said will prior to item 14. For said purpose said special master is ordered to make such account of the transactions of the said trustees and executors from the year 1882, the date of their appointment, as may be necessary, also to make and allow such credits and charges as may be proper, and as to the accounts filed and approved in the probate court of Hamilton county prior to the bill herein, if they be expected to, they shall have the same force and effect that they would have upon a final accounting in said probate court, and, as to all items to which no exceptions shall be taken, the same be allowed as filed and approved in said court."

Upon the hearing before the master it appeared that the defendants, sometimes designating themselves as executors, and sometimes as trustees, had at several times, extending to May 24, 1890, presented their accounts to the probate court for Hamilton county, some of which had been confirmed and others had not. And it further appeared that the defendants, as executors, on August 1, 1892, while this cause was pending in the court below, and six months after the filing of their answer therein, filed their petition in the probate court for Hamilton county praying for an extra allowance of \$2,500 for services rendered by them in the case which were described in the petition. It should be here observed that the services mentioned were wholly bestowed by them, as appears from the petition, in the care and management of the real estate which was in their possession as trustees. It was stated in the petition that they had received no extra allowance for such services. This was an inadvertence, no doubt. In the settlement of their accounts in October, 1885, which was subsequent to anything done by them in their character as executors, they asked for and were allowed for extra compensation \$1,000. We refer to this only for the purpose of making it clearer that the extra compensation of \$2,500 was allowed to them for their services as trustees. The order of the probate court allowed this \$2,500 to the defendants as "trustees." In the account there filed July 30, 1892, the defendants credited themselves with \$1,242.93 for certain enumerated services relating to the trust, which seems also to have been allowed by that court, though we have been unable to find from the record that this certainly was so. The master held that this was excessive, and reduced the amount by \$663.63, to which the defendants excepted. It does not appear that any notice was given of the filing of the account of July 30, 1892, or the petition of August 1, 1892, or that the complainant had any knowledge of the proceedings. The item of \$2,500 was presented to the master as a charge against the estate, and was disallowed by him as one fixed by the probate court, but he considered the claim on its merits and disallowed it. The defendants excepted to this action of the master. The court, on the coming in of the report, seems to have considered the whole subject of the defendants' charges for commissions and allowances on broader lines than the master had done, but, following it in its main features, proceeded to make an adjustment of them upon its own view of their merits, and allowed 5 per cent. on the whole sum which had passed through their hands, and, adding the \$1,000 which was allowed by the probate court in 1885, awarded a decree on that basis. The result was practically about the same as

that reached by the master, the difference being only \$163.57, and that in favor of the defendants. The complainant has not appealed. The appeal of the defendants brings up only the disallowances by the master of the sums of \$2,500 and \$663.63, respectively, allowed by the probate court in July or August, 1892, assuming the last named sum to have been allowed. Some embarrassment arises from the fact that there is room for thinking that the court below by its decree allowed extra compensation for the services covered by the order of the probate court, for, if he accepted as a basis for estimating commissions the analogous provisions of the statute of Ohio in regard to executors and administrators, the amounts credited to the trustees were excessive. But the case has been argued here as if these particular exceptions were unaffected by that consideration, and we shall proceed to examine them upon that footing.

The appellants rely upon the proposition that the probate court of Hamilton county had jurisdiction to order the allowances in question in August, 1892, and that the orders were final, and not subject to the control of the Circuit Court of the United States in the suit there pending. And in support of this contention it is strenuously argued that the probate court had possession of the res, and was the proper forum in which to conduct the accounting and all other matters relating to the administration of the estate. We copy the syllabus of the brief of counsel for the appellants as follows:

"The Circuit Courts of the United States have no power, even in a case involving diverse citizenship, to take an estate out of the hands of the probate court having jurisdiction thereof, and order an accounting of the receipts and disbursements thereof."

As applied to this case, this amounts to a denial of the authority of this court to direct the decree which we ordered when the case was here in 1893. This court expressly decided that the accounting should be had in the United States Circuit Court. The decree entered in the court below upon receiving the mandate, and which is copied in the preceding statement, was in accordance therewith. This court had jurisdiction of the cause and of the parties, and power to decree the relief which should be granted, and assuming, for the sake of argument, that it erred in ordering an accounting in the pending cause, the decree, being final, was none the less valid and binding upon the parties. It is pressed upon us that our decision was contrary to the ruling of the Supreme Court of the United States in *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, and, though it is not expressly urged that we should recall our judgment, yet the effect of what is now insisted upon would be to ignore it. But there is no foundation for the contention that the former judgment of this court was in conflict with *Byers v. McAuley*. In that case there was no trust for administration, and the estate concerned was personal property in the possession of the probate court for the purposes of ordinary administration. It was that possession which formed the obstacle to the assumption of control over it by the federal court. The Supreme Court recognized fully the right of a citizen of another state to invoke the jurisdiction of a federal court for the purpose of obtaining the share to which

he is by law entitled of the estate of a deceased person situated in the state where the suit is brought. But it was held, and that was the gist of the decision, that in exercising its jurisdiction it should not invade the possession of a state court taken for the purpose of administration under the local law. But short of intermeddling with the possession of the state court or controlling the administration, it was not doubted that the federal court could properly proceed to granting full relief. And in that case the Supreme Court directed "a decree in favor of those citizens of other states than Pennsylvania who have petitioned the Circuit Court for relief * * * for their shares of the estate, * * * and an order that they recover from the administrator such sums thus found to be due," and this although the complainants were distributees only of the personal estate. In this case there was no obstacle, such as existed in the case of *Byers v. McAuley*, arising from possession of the property by the probate court, and we therefore had no occasion to refer to exceptional cases where the presence of such a fact would require a modification of the relief which the court might otherwise give. There was a will by which, after certain specified legacies should be paid, the whole estate was devised to trustees upon a trust in favor of certain designated beneficiaries. The bulk of the estate consisted of real property. It is also to be observed that the fee simple was devised to the trustees, and that the trust was not imposed upon them in their character of executors; their duties and obligations as trustees were quite distinct from those devolved upon them as executors. The fixing of the time when they should hold the property in one character should end, and in the other begin, was not subject to the uncertainty which sometimes exists when the duties of a trustee are knit to those of the executor. *Phillip v. Manning*, 2 M. & C. 309; *Byrchall v. Bradford*, 6 Mad. 13; *Ex parte Wilkinson*, 3 Mont. & Ayre, 145; *Willmott v. Jenkins*, 1 Beav. 401; 1 *Lewin on Trusts* (Flint's Ed.) *204. Their relations to the estate were no different from what they would have been if the trustees had been different persons from those who were appointed as executors. They might have accepted the one office and renounced the other. Having accepted both, they would take and hold the personal property as executors until the debts and legacies not included in the trust were satisfied. Then, if anything remained, it would go over to them as trustees, and it would be the duty of the probate court to refrain from exercising an authority which belonged only to a court of general jurisdiction. *Wheatly v. Badger*, 7 Pa. 459; *Williams v. Cushing*, 34 Me. 370. But with respect to the real estate, neither the title nor the possession ever passed to the executors. Real estate is not assets which go to the personal representatives of the owner. Neither are the rents and income from it accruing after the death of the owner. 11 *Am. & Eng. Encl. of Law*, 841; *Overturf v. Dugan*, 29 Ohio St. 230.

Upon the probate of the will the fee simple passed to the trustees, and the trust became effective. So, also, the rights and interests of the cestui que trust in the estate became securely and definitely fixed. The probate court had no control over it so far as the

realty was concerned, except that, if the personal property proved insufficient to satisfy the creditors, it had statutory authority to order it sold to the extent necessary. *Campau v. Campau*, 25 Mich. 127. And perhaps it might order a sale of real estate to pay ordinary legacies if the personal assets should prove insufficient, but we should suppose this doubtful in the absence of any statutory power. But in the present case it is sufficient to say that no contingency ever arose in which the probate court had power to take the real estate into its possession or assume any control over it. The debts and legacies were paid without recourse to any statutory proceeding in the probate court. As early as 1885 the debts and legacies had all been paid. The duties of executors were ended. The personal estate was administered, and the trust was freed from all the burdens to which it was subject from the administration of the probate court. Nothing remained but the management and disposition of the real estate remaining unsold for the complete execution of the trust. And when, in 1890, the complainant filed this bill, all the conditions for enforcing the trust, without let or hindrance consequent upon the possession of the property by another court, existed. There is, however, a statute (section 6328, Rev. St. Ohio 1892) which provides that:

"Any trustee of any non-resident idiot, imbecile or lunatic, appointed as aforesaid, and any trustee heretofore or hereafter created by any last will or deed, or appointed by any competent authority, to execute any trust created by any such last will or deed shall, as often as once each two years, render an account of the execution of his said trust, to the probate court of the county in which he was appointed, or in which such last will or deed may be recorded, in the manner provided by law for the settlement of the accounts of executors and administrators; provided, this section shall not apply in any case in which the will or deed creating such trust designates any other tribunal for the settlement of the trust, or in which any other tribunal shall have acquired jurisdiction."

But assuming that this statute is applicable to a trust estate in real property, it gives to the probate court no control over the property itself, but only the authority to biennially settle the trustees' accounts. This authority is, however, denied in any case in which any other tribunal shall have acquired jurisdiction. And this was the condition of things here. Upon the filing of this bill the subject-matter of the trust was drawn into the possession and control of the court. It would have been an anomalous proceeding for the Circuit Court in these circumstances to remit the parties to the probate court for an accounting by the trustees of matters relating solely to the execution of their trust, there being no purpose of undoing anything done by the defendants as executors, or by the probate court in the exercise of its jurisdiction as such. And equally anomalous would it be to permit the trustees, after the Circuit Court had taken jurisdiction of the bill, and they had appeared and submitted thereto and had answered and invoked the direction of the court, to go into the probate court and obtain orders which would intrude into and predetermine the matters and questions belonging to the subject of the suit. The court below did not err in concluding that it was not bound by the orders of the probate court ob-

tained in the circumstances stated. If such a proceeding should be effective, the right of a citizen of another state to bring suit in the United States court would come to little or nothing. The subject-matter of the suit could be subtracted piecemeal, and eventually, either wholly or in part, decided by the state court. Besides all this, the probate court had no jurisdiction whatever of the subject-matter. We presume it is not necessary, but, to avoid any misunderstanding, we think it right to say that no improper motive in resorting to the probate court for the order in question is imputed to the defendants. The supposition that the probate court was the only court competent to deal with such matters had been very persistently maintained by the defendants, and, indeed, was sanctioned by the learned judge who directed the original decree. The petition for the allowance of extra compensation was made by the defendants as executors. The order speaks of it as a petition by trustees, and allows the extra compensation to them; but we attach no special importance to this. The same misnomer of their offices runs through the transactions relating to the estate from the beginning. If any consequence were to be attached to the titles of office assumed on the different occasions, it would lead to inextricable confusion. No doubt the safe and proper way is to impute to the actors the character denoted by their acts, treating them as executors when the thing done is proper for executors, and as trustees when the act is in execution of the trust. This was the distinction adopted in *Wheatly v. Badger*, supra, when Chief Justice Gibson made a very lucid statement of the law applicable to such a situation. In no other way is it possible to carry into their intended effect the several provisions of the will. Applying this test, it is manifest that their applications to the probate court in July and August, 1892, were made in their character of trustees, for, as already stated, they related solely to matters involved in the trust.

In regard to the merits of the claim for extra compensation, the master in his report said:

"Defendants claim that they are entitled to extra compensation for extraordinary services, even in excess of that already retained. But, as has been shown, the percentage of commissions is largely in excess of the statutory or customary allowances for such services.

"The total value of the money and other property passing through the hands of defendants from the Poor estate was \$229,211.49 (page 48, master's report), the great bulk of which was never changed by sale and reinvestments. The statutory fees on that amount would be \$4,707.22. The total amount retained for services, including \$557.16 hereinafter allowed, was \$17,619.19, an amount in excess of the statutory commissions of \$12,908.97, or nearly three times the statutory commissions.

"In view of these facts, the extra compensation of \$2,500 made after the filing of the bill of complaint herein is disallowed."

The court, in its opinion, said:

"The total amount of moneys passing through their hands, either as executors or trustees, is found by the master to be \$229,211.49. The remainder of the property was distributed in kind."

Apparently this was an inadvertence. As the master stated, the great bulk of the \$229,211.49 was never changed by sale and rein-

vestments. But, as before stated, the court's allowance was as liberal as that of the master.

In regard to the action of the master in reducing the commission of \$1,242.93 by \$663.63 to \$579.30, which was 2 per cent. of the amount involved, it is to be observed that this claim was presented as a claim for commissions and not as a claim for extra compensation. In Ohio, while no fixed percentage is fixed by statute, the master says it is customary to allow commissions to trustees in analogy to the statute fixing the compensation of executors, assignees, etc., and this we understand to be the rule, though extra allowances may be made in the discretion of the court for cause shown. The master allowed 2 per cent. upon the amount, \$28,-965.18.

We are unable to find any sufficient ground on which we would be justified in disturbing the action of the master and of the court in rendering the decree in respect to the matters complained of. The costs of the trustees in this litigation in the Circuit Court and in this court have been borne by the estate. We are of opinion that the defendants have no ground in equity to complain of the decree. It is accordingly affirmed, with costs.

LEBENSBERGER v. SCOFIELD et al.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1905.)

No. 1,405.

1. REMOVAL OF CAUSES—ATTACHMENT.

Where an action begun by attachment was properly removed to the federal court pending a motion to dissolve the attachment, both the principal suit and the attachment proceeding were transferred into the federal Circuit Court, which, on the filing of the transcript and docketing the cause there, was as fully possessed of the case as if it had been begun in that court, as provided by Act Cong. March 3, 1875, c. 137, 18 Stat. 470, § 4 [U. S. Comp. St. 1901, p. 511].

2. SAME—LEVY OF ATTACHMENT—JURISDICTION.

Where a suit was brought in a state court by attachment, and, pending a motion to dissolve the attachment, was removed to the federal court, the seizure of defendants' property was a sufficient basis on which the federal court was entitled to found its subsequent proceedings both in the principal suit and as to the attachment, though no jurisdiction of the persons of the defendants had been acquired.

3. PROCESS—ALIAS SUMMONS—SERVICE.

Where, in a suit begun by attachment and removed to the federal court, one of the defendants (a nonresident) came into the state pending a motion to dissolve the attachment, the court had jurisdiction to authorize the issuance and service of an alias summons upon her.

4. REMOVAL OF CAUSES—CITIZENSHIP.

Where both at the commencement of an action in the state court by attachment and at the time of its removal defendants were citizens of states other than that of which plaintiff was a citizen, the fact that, after removal on the ground of diverse citizenship, one of the defendants removed to the state where plaintiff resided, and became a citizen of such state, did not deprive the federal court of jurisdiction.

[Ed. Note.—Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

5. TRIAL—ISSUES—SUBMISSION—DISCRETION.

It is within the discretion of the trial court to direct the separate trial of a material issue to the jury.

6. COURTS—PLEA TO JURISDICTION—WAIVER.

Where, in an action against a nonresident, begun by attachment, she appeared specially and objected to the jurisdiction, and, after summons had been served on her, and she had moved to set the same aside, she obtained leave to withdraw such motion, and was granted time to answer, she thereby waived her objection to the court's jurisdiction of her person.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

C. T. Johnson and H. L. Peeke, for plaintiff in error.

H. E. King, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiff, Lebensberger, brought suit against the defendants named in the title of this cause by petition filed in the common pleas court of Erie county, Ohio, on July 26, 1902, claiming damages to a stock of goods kept by him in the lower stories of a store situated in Sandusky, resulting from the flooding of said lower stories by water coming from a defective toilet room and water-closet maintained by defendants in the next story above. The petition stated that the plaintiff held a lease from the defendants of the two lower stories. The damages claimed by the plaintiff were laid at \$10,908.91. A præcipe was filed for a summons and order of attachment. It does not appear that any affidavit for a writ of attachment was filed at that time, or that any such writ then issued. But a summons was issued and returned stating that defendants were not found. On October 21, 1902, the plaintiff filed his affidavit (called "Second Affidavit for Attachment"), and the writ was issued and served by levying it on property described as that of defendants. On November 1, 1902, the defendants filed a motion to dissolve the attachment, and their affidavits in support thereof; stating that they came for the purpose of the motion only, and not as intending a general appearance. November 29, 1902, the defendants filed a petition and bond for removal into the Circuit Court of the United States upon the ground of diverse citizenship—affirming that the plaintiff was a citizen of Ohio, the defendant Scofield a citizen of New York, and the defendant Moore a citizen of Massachusetts—and the cause was removed. The plaintiff filed a motion to remand, which was denied June 6, 1903. On the same day the plaintiff caused to be issued out of the Circuit Court a summons in that cause to the defendant Moore, and to her also as trustee, which was served upon her at Sandusky on the same day. Appearing specially for the purpose of her motion on July 2, 1903, she moved to set aside the service of the summons upon her affidavit that since the commencement of the action, and on April 1, 1903, she had become a citizen of Ohio, which was the state of the plaintiff. On the following day, July 3d, the motion which had been filed in the common pleas court for the dissolution of the at-

tachment was sustained. At the December term, 1903, the motion of Mary S. Moore to dismiss the cause was overruled. Thereupon, by leave of the court, she withdrew her motion to set aside the service of summons upon her, and upon her application she was given leave to answer within 60 days after December 3, 1903. By leave of the court the plaintiff on March 3, 1904, amended his petition. The cause of action stated therein was in substance the same as that stated in the original petition. In the original the plaintiff apparently relied upon the covenant for quiet enjoyment implied by law. In the second and third it was stated as an express covenant. On May 7, 1904, the defendant Mary S. Moore filed her answer, as an individual and as trustee, in three paragraphs, in the first of which she averred that on April 1, 1903, after the removal of the cause, and before the issuance of summons by the Circuit Court, she became and still remained a citizen of Ohio, and prayed that the action be dismissed for want of jurisdiction. In the second and third she pleaded defenses to the merits of the action. Issue being joined, the cause was tried before a jury at the June term, 1904. A verdict was rendered against Mary S. Moore, as trustee, for \$5,306.61, and by direction of the court a verdict in her favor as an individual. Judgment was entered accordingly. The plaintiff moved to set aside the verdict so far as it related to the defendant personally, and she moved to set it aside so far as it related to her as trustee. Both motions were granted, and the cause continued. At the December term the cause again came on for trial, when the court, against the objection of the plaintiff, directed the separate trial of the issue on the paragraph of the answer relating to the citizenship of the defendant Moore on the 6th day of June, 1903, the date of issue of the summons from the Circuit Court. The jury returned a finding that on that day she was a citizen of Ohio. Thereupon the court, after reciting its own findings, containing substantially a recital of the history of the case, and declaring a further finding that the court had no authority to issue the summons of June 6, 1903, and that the suit did not involve any real or substantial controversy properly within the jurisdiction of the court, entered the following judgment:

"It is therefore considered by the court that the petition of plaintiff herein be dismissed, without prejudice to a new action, and that the jurisdiction of this court over the parties and the subject-matter be, and the same is, fully released by this court, except to enforce payment of costs."

We have been at pains to state the chronological order of the proceedings in order to show the continuity of the action. It was stated by counsel on the argument that publication of notice to the defendants had been ordered by the state court, and was pending at the date of the removal into the Circuit Court, but we have been unable to find anything in the record to confirm that statement.

The plaintiff sued out a writ of error, and the assignments are directed to the action of the court in directing the trial of the issue relating to the citizenship of the defendant on June 6, 1903, and in dismissing the cause upon the finding of the jury on that issue. It is not disputed that at the commencement of the action and at the

time of its removal the plaintiff was a citizen of Ohio, and that the defendants were citizens of other states. And we think the action had at the date of the removal been "brought," within the meaning of the statute relating to removals. As the sum in controversy was sufficient, there can be no doubt that the suit was within the federal jurisdiction, and was properly removed. The whole cause—as well the principal suit as the attachment proceeding—was transferred into the Circuit Court of the United States; and that court, upon the filing of the transcript and the docketing of the cause there, was as fully possessed of the case as if it had been begun in that court. Section 4 Act March 3, 1875, c. 137, 18 Stat. 470, 1 U. S. Comp. St. 1901, p. 511. It would proceed with it from that stage of the proceedings at which it left the state court. Although no jurisdiction of the persons of the defendants had yet been acquired, the seizure of their property on the writ of attachment was a sufficient basis on which to found its further proceeding, not only in the ancillary matter, but in the principal suit, for the obtaining of a judgment in the principal suit was a necessary condition to the special relief which the plaintiff was seeking. If personal service of process upon the defendants could be had, a personal judgment could be rendered against them, on which execution might issue as in the ordinary course. If it could not, then, upon constructive notice by publication, the court would be authorized to render a judgment against them, which, though not binding them for any other purpose, would be sufficient ground for the purpose of subjecting the property seized to the payment of the plaintiff's claim. But the principal suit was one which could be prosecuted to judgment if the defendants could be personally served with process, whatever might become of the attachment, and its maintenance in the Circuit Court did not depend upon the continuity of the attachment proceedings, and its progress there would be subject to the same contingencies as any other case removed from the state court before service of process on the defendant.

The Circuit Court held that the case was properly removed, but held that its summons was void, which was equivalent to saying that, though it had acquired jurisdiction of the cause, it could take no steps to acquire jurisdiction of the defendants, or, again, that the defendants had defeated the action by removing it. The cause was pending in the Circuit Court at the time when that court issued its summons and when it was served. It is true, a motion to dissolve the attachment had been made while the cause was pending in the state court, and was still pending in the Circuit Court at the time the summons was served. But notwithstanding this, the court then had power to get jurisdiction of the defendants, if it could, and the subsequent dissolution of the attachment could not defeat the complete jurisdiction of the principal suit thus acquired. When the cause was removed, the court was bound to proceed. What was it to do? The act of Congress declares that "it shall then proceed in the same manner as if it had been brought there by original process." The first step must be to give notice to the parties. Ordinarily the notice to be given might perhaps be by

publication. But as she had then come into the jurisdiction, actual service could be had. And we think it cannot be doubted that the Circuit Court had power to issue the summons. *Dillon on Removals*, by Black, p. 337; *Fallis v. McArthur*, 1 Bond, 100, Fed. Cas. No. 4,627; *Washington R. Co. v. Cœur D'Alene Ry. Co.*, 15 U. S. App. 359, 364, 60 Fed. 981, 984, 9 C. C. A. 303.

She could not object that actual, instead of constructive, service was made. The mere fact that she had become a citizen of Ohio was of no consequence, and the case is not different from what it would have been if she had been on a temporary visit, or happened to be passing through the Northern District of Ohio. The issue made by the first paragraph of her answer in respect to her citizenship on June 6, 1903, which the court directed to be separately tried, was wholly immaterial, and its determination one way or the other was of no consequence. Her citizenship at the time when the suit was brought and when it was removed was material. But the time for the application of that test had long since passed, and no change of her citizenship subsequent to the removal would disturb the jurisdiction. *Morgan v. Morgan*, 2 Wheat. 290, 4 L. Ed. 242; *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 24 Sup. Ct. 619, 48 L. Ed. 911.

There is nothing in the complaint made by the plaintiff in error that the court erred in submitting this issue separately to the jury. If it had been a material issue, the course to be pursued was a matter resting in the court's discretion. *Toledo Traction Co. v. Cameron* (decided at the April session of this court) 137 Fed. 48; *Wetmore v. Rymer*, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682.

But for the reasons stated, we think the court was in error in thinking it had lost jurisdiction upon the dissolution of the attachment, and are of opinion that it had authority to proceed with the principal suit by virtue of the jurisdiction over the defendant Mrs. Moore by personal service of process.

But there is another ground on which we reach the same conclusion. The jurisdiction of the court, in the circumstances stated, existed by law. It had attached to the cause of action set forth in the plaintiff's petition upon the removal from the state court. All that was necessary to complete the conditions upon which it could proceed to judgment was the service of process upon, or the voluntary appearance of, the defendant. When the summons of June 6, 1903, was served upon her, she appeared specially and moved to set it aside. Later on, by leave of the court, she withdrew this motion and obtained time to answer. Suppose that, having obtained this leave, she had not answered; could there be any doubt that the court could have entered her default and given judgment? In her answer she joined with her defense in respect to the validity of the service of the summons her defenses to the merits of the claim alleged in the plaintiff's petition. We think that this, even if this defense had been still open to her, amounted to a waiver of the manner in which she had been brought in, and a submission to the jurisdiction of the court. Filing a plea to the merits before a judgment on the plea to the jurisdiction of the person has been obtained

is a waiver of the latter. *St. Louis & S. F. Ry. Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; 3 Cyc. 511.

The judgment will be reversed, with costs, and the cause remanded, with directions to proceed to try the cause upon the issues joined on the second and third defenses presented by the answer of the defendant Moore.

JEFFERSON ELECTRIC LIGHT, HEAT & POWER CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Third Circuit. June 9, 1905.)

No. 36.

JUDGMENT—PATENTS—SUIT FOR INFRINGEMENT—RES JUDICATA.

In order that a decree adjudging the invalidity of a patent shall render that question *res judicata* as between the complainant and one not a party to the record, but who in fact conducted the defense at his own expense, he must have done so openly so that he would have been bound by the decree if it had sustained the patent.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1190-1193.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 135 Fed. 365.

Arthur S. Keithley, for appellant.

Thomas W. Bakewell and George H. Christy, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This case was heretofore before this court on an appeal by the defendant below (the present appellant) from an order granting a preliminary injunction. That order was reversed because of the pendency of a plea of *res adjudicata* based upon a decree of the United States Circuit Court of Appeals of the Second Circuit in a suit brought by the complainant here against the Catskill Illuminating & Power Company (121 Fed. 831, 58 C. C. A. 167), adjudging each of the patents in suit to have been anticipated, and the incomplete and conflicting character of the preliminary proofs upon which the court granted the injunction (134 Fed. 392). In the opinion then delivered we said:

"The case, it is probable, will ultimately turn upon this defense of *res adjudicata*. The preliminary proofs relating thereto are very conflicting. The defendant is a mere user of these meters. No irreparable injury, or, indeed, any special injury to the complainant from the defendant's use of the meters is alleged or shown. Under the circumstances, then, we think that the court should have forbore to act until full proofs were before it. Without intending to intimate any opinion upon the merits of the case, we will reverse the order granting a preliminary injunction."

Thereafter the proofs under the plea of *res adjudicata* were completed, and the cause proceeded to hearing upon the plea and a renewed motion for a preliminary injunction, resulting in a decree

overruling the plea and granting an injunction. From that decree the defendant appealed. The case has been argued before us entirely upon the defense raised by the plea, and the only question we are called on to discuss is whether the plea was sustained by the proofs. The plea avers that the issues in the Catskill case (mentioned above) and in this case are the same, and that the parties are the same, inasmuch as said Catskill case was, and this case is, defended by the Diamond Meter Company, which manufactured the alleged infringing devices in that case as well as in this, and that the complainant knew that the Diamond Meter Company was defending the Catskill case, and that the decree therein is *res adjudicata* of everything involved in this case.

Upon an attentive examination of the proofs we have reached the conclusion that the learned judge below was right in overruling the plea. Certain it is that the Diamond Meter Company did not avowedly or openly conduct the defense in the Catskill case. No doubt (as now appears) that company did carry on the defense at its own expense, but this was done with such secrecy as not to expose its connection with the litigation. The allegation that the complainant knew that the Diamond Meter Company was participating in the defense of the Catskill case is not sustained by the proofs. The counsel for the complainant, indeed, had reason to suspect that the Diamond Meter Company was conducting the defense in the Catskill suit, but we think the evidence fails to bring home to them any certain information on the subject. The proofs as a whole satisfy us that the purpose of the Diamond Meter Company was to maintain such an attitude with reference to the Catskill suit that it might have the indirect benefit of the decree if favorable to the defendant therein, and yet not be concluded should the decree be adverse to the defendant. But if the Diamond Meter Company desired that the decree in the Catskill suit should operate as an estoppel in its favor, it was bound by avowal or open action to place itself in such an unequivocal position that the decree would be mutually binding as *res adjudicata* upon itself and upon the complainant. *Litchfield v. Goodnow's Adm'r*, 123 U. S. 549, 8 Sup. Ct. 210, 31 L. Ed. 199; *Andrews v. National Foundry & Pipe Works*, 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139; *Cramer v. Singer Mfg. Co.*, 93 Fed. 636, 35 C. C. A. 508; *Lane v. Welds*, 99 Fed. 286, 39 C. C. A. 528. Having concealed its connection with the Catskill suit while it was pending, it is too late now for the Diamond Meter Company to set up the final decree in that case as an estoppel against the complainant.

The record in the Peoria case has no determining effect. The bill there was filed against the Diamond Meter Company by the complainant after the decision in its favor by the Circuit Court in the Catskill case, and the bill did allege that the Diamond Meter Company defended that suit, and that all questions passed upon in that suit were *res adjudicata* as between the complainant and the Diamond Meter Company. But this the Diamond Meter Company in and by its answer denied. Thus the averment in the bill was fully met by a denial in the answer and the question was left open.

Upon consideration of the whole evidence we concur in the conclusion reached by the court below, and accordingly the decree overruling the plea and granting a preliminary injunction is affirmed.

LANGFELD et al. v. ALBRIGHT.

(Circuit Court of Appeals, Third Circuit. June 29, 1905.)

No. 7.

PATENTS—INFRINGEMENT—COIN PURSE.

The Albright patent, No. 439,085, for a coin purse, construed narrowly, as it must be in view of the prior art, especially of the Rundlett patent, No. 201,201, *held* not infringed by a purse substantially the same in construction and the manner of its use as that of the Rundlett patent.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Ernest Howard Hunter, for appellants.

Edw. W. Magill, Andrew A. Leiser, and Walter F. Rogers, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The bill in this case charges infringement by the defendants of letters patent No. 439,085, dated October 28, 1890, granted to the complainant, Chester E. Albright, for "new and improved purse." The stated object of the invention is to provide a convenient receptacle for specie, which may be securely closed to prevent the escape of coin and readily opened to display the contents and make them easily accessible, "so that any one piece of coin can be picked out from among the others with the greatest facility, and without handling any other than the piece wanted, as from off the bottom of a till." To accomplish this object, the patentee employs a stiff hinged-frame consisting of two members or parts, A, B, and two pieces of leather or other flexible material (D and F) fastened to the frame; the piece D to both parts of the frame on the outside thereof, and the piece F to the upper or inner side of one of the parts, so as to form a pocket opening to the other or uncovered part. The specification states:

"A and B constitute the frame of the purse, and are connected at C by hinges, and these hinges should be made with a stop to prevent A and B from opening farther than in a straight line, as in Fig. 3, or to any greater or less distance, as preferred, so as to prevent the side forming the till from dropping down and losing the coin when the side of the frame containing the receptacles only is held in the hand when the purse is open for the purpose of picking out coin. When open, the purse is surrounded and supported on all sides by this frame, and when shut on all sides but the one between the hinges, which must be left free and unobstructed, so the coin can readily slide, when the purse is open, from the side supported by A onto the side supported by B."

The claims of the patent alleged to be infringed are the first and sixth, which read as follows:

"(1) A purse having a stiff frame divided into two parts by hinges and flexible material attached to the frame, so as to form on one side of the

hinges one or more receptacles for coin and on the other side a till from which the coin can be picked when the purse is open, substantially as described."

"(6) In a purse, the combination of the frame, A and B, connected by hinges, and the flexible material, D and E, arranged and attached to the frame so as to form on one side of the hinges a receptacle for coin with its mouth opening toward the hinges and forming on the other side a till onto which the coin can freely slide when the purse is open, and which till will close the receptacle when the purse is closed, substantially as described."

Obviously the stiff frame divided into two parts connected by hinges is a material feature of Albright's invention, and enters into each of the two claims in question. As shown in the patent, the hinges are constituted by metal pintals which pass through eyes in the metal frame. Now, it may be conceded that Albright shows a patentable invention, although his advance upon the prior art is very slight; but his claims here in suit must be strictly construed to save them in view of the prior art, particularly the patent No. 201,201, dated March 12, 1878, granted to James C. Rundlett. The specification of Rundlett's patent contains the following description:

"The object of my invention is to provide a compact and convenient receptacle for specie, which may be easily opened to display the specie, and may be readily and securely closed, so as to prevent the escape of coin. Referring to the drawing, A is the back piece of the purse, which, in the present case, is oblong, with one end a little wider than the other. To the smaller end of the back piece a front piece is stitched, forming a pocket, B, for the reception of coin. A front piece is stitched to the larger end of the back piece, forming a shallow pocket, C, for receiving the opposite end of the purse when the purse is folded together. A strip of the material of which the front of the larger pocket is made extends along each edge of the back piece, forming lips of flaps, a, which prevent the coin from escaping when the purse is opened, and the coin is allowed to drop out of the pocket B into the open space between the pockets B, C. The pocket B is provided with a narrow flap, b, which stiffens the front piece, and facilitates the return of the coin to the pocket. When the pocket B is tucked into the pocket C, the coin is prevented from escaping. The purse is preferably made of leather, and has no metallic parts. It is soft and flexible, and easily carried in the pocket. I do not limit or confine myself to any particular mode of manufacture, nor to any special material or form, as these may be varied without departing from my invention."

Rundlett's patent shows a purse made of a piece of leather folded at the middle, having on one side of the fold a coin pocket and on the other side an open space upon which the coin may slide from the pocket when the piece of leather forming the base is laid out flat, and around the edge of the open space is a strip of leather forming a lip or rim to prevent the coin from falling off. Rundlett's object was the same Albright sought, and the exposure of the coin upon the open space is effected in the same way in both instances. There is no difference between these two purses either in principle or method of manipulation. If there is any patentable distinction between them it lies in Albright's described frame composed of two parts, A and B, connected by hinges, which hinges, as we have seen, Albright specifies should be made "with a stop to prevent A and B from opening farther than in a straight line," etc. The defendants' purse has no hinged frame. It is made of leather, and consists of a back-piece folded at the middle, and having on each side of the fold

a U-shaped projecting rim of leather re-enforced by an inclosed piece of cardboard and a top piece of leather secured at its edges to the projecting rim on one side of the fold, and forming a coin pocket which opens to the uncovered portion of the leather back-piece on the other side of the fold. It operates precisely as does Rundlett's purse. We perceive no patentable difference between Rundlett's purse and the defendants' purse. If the defendants infringe the Albright purse, Rundlett anticipated Albright. The defendants' purse does not embody the distinguishing feature of Albright's purse, namely, his frame divided into two parts connected by hinges. We are, then, of opinion that infringement by the defendants was not shown.

Therefore the decree of the circuit court is reversed, and the case is remanded to that court, with direction to enter a decree dismissing the bill, with costs.

AMERICAN CARRIAGE CO. v. WYETH.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1905.)

No. 1,419.

1. PATENTS—ANTICIPATION.

The effect of a device as an anticipation is not altered by the fact that it was made to serve a purpose additional to that for which it was used in the second case, where, so far as the latter goes, the two are equivalents.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 89.]

2. SAME—SLEIGH RUNNERS.

The Wyeth patent, No. 400,381, for a sleigh runner for wheeled vehicles, claim 12, the essential feature of which is the use of side plates of iron or steel to fasten the rave and knees together, instead of making a mortise and tenon connection, is void for anticipation and lack of patentable invention.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Wm. G. Howard, for appellant.

H. L. Dodson and A. C. Denison, for appellee.

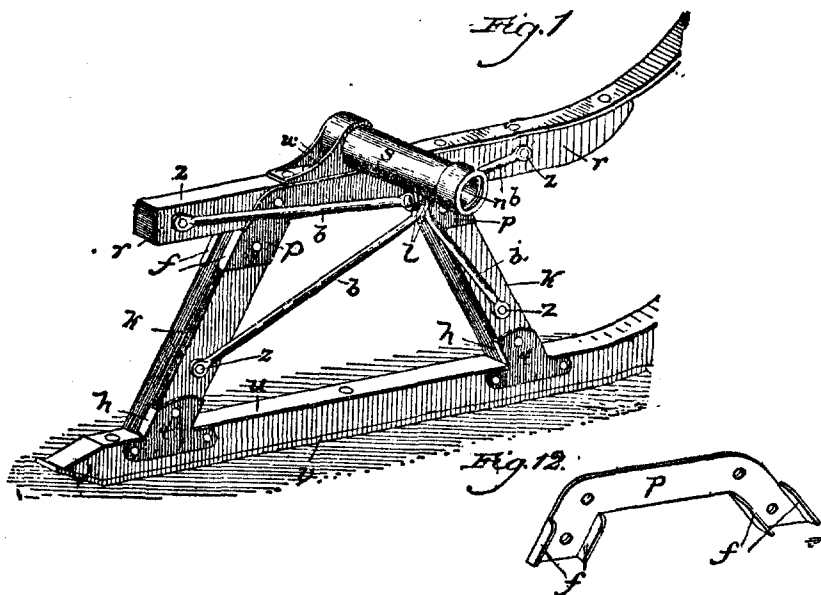
Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. Claiming as assignee the rights secured by letters patent Nos. 400,381, granted to David G. Wyeth March 26, 1898, and 444,405, to the same grantee, the complainant (now appellee) filed this bill complaining of infringement, and praying for an injunction and for an accounting for profits and damages. Upon the bill and several affidavits filed therewith he moved for a preliminary injunction. The defendant answered, and filed opposing affidavits, and the complainant filed affidavits in reply. Upon the hearing of the motion the court sustained the motion, and granted an injunction, but only in respect to the twelfth claim of patent No. 400,381. This appeal therefore presents only the merits of that claim and the question of the infringement of it.

The bill is in the usual form of such bills, and the answer presents the common defenses of want of novelty, anticipation, and non-infringement.

This patent relates to the construction of sleigh runners for wheeled vehicles when the wheels are removed, and is for alleged improvements in such construction. A part of Fig. 1 is here reproduced to show the members of the combination of claim 12, which reads as follows:

"The combination, in a sleigh runner for wheeled vehicles, of two side plates, pp, each having four flanges, f, with unmortised and untenoned knees and rave, kk and r, substantially as set forth."



The claim can be all comprehended from this drawing if we add Fig. 12 to show the inside of the plate and its flanges, which we do.

The two white spaces, f, in Fig. 1, show those two flanges, and all are shown by the same letter in Fig. 12. The rave, and the knees, kk (sometimes called posts), are old and well-known members of sleigh runners, if we except the characteristic that the rave and knees of the patent are not mortised together, but the rave rests on top of the knees. Such novelty as there is must therefore be found in the employment of the plate with flanges and dispensing with the mortised connection of the knees with the raves. But each of these devices was old, and had already been employed in patents relating to this identical subject. Thus a patent issued to Wright July 10, 1883, showed a side plate bolted to the side of the rave and extending down the side of each knee and bolted thereto. The middle part of the plate was carried above the rave to serve another purpose, but the plate was integral, and served the same purposes as in Wyeth's; that is, it held the knees in fixed contact

with the rave, prevented the spreading of the knees from each other at the foot, and prevented the lateral displacement of the lower part of the knees. One of each such plates was put on the inside and another outside, as in Wyeth's, except that on one side the plate extended quite down the length of the knee, while on the other side it extended only part way down, whereas in Wyeth's patent the plates on both sides extend only part way down. The fact that an additional purpose above mentioned was accommodated by Wright does not affect its equivalency with Wyeth's device to the extent which the latter goes. *Dowagiac Mfg. Co. v. Brennan & Co. (C. C. A.)* 127 Fed. 143, 148. And certainly, if it was not desired to carry the plate higher than the rave for another purpose, there would be no invention in bringing it down and carrying it alongside the rave.

We do not, however, mean to imply that the mere attachment of a metallic plate to a wooden structure for the purpose of strengthening the parts or holding them in the desired position or relation to each other would have any quality of invention about it. Such devices are old, and within the common knowledge of everybody. But it is claimed that adding flanges to these plates was a new thought, and contributes greatly to the utility of the invention. We have no doubt of its utility, but it was not a new idea. It is matter of common knowledge, and must be known to even ordinary workmen in iron and other metals, that a metallic plate bent lengthwise to an angle is stiffer and stronger to withstand lateral pressure than the flat plate. So no one can be surprised to find that in this art, as well as others, such forms have been used. Several previous patents show flanged plates used to strengthen wooden parts in vehicles and other structures. We need only refer to the Wright patent, already mentioned. The patentee in describing the plates (he calls them "bars") which re-enforce the posts says, "Said bars are further provided with side flanges, j, j, that overlap the corner of the posts, and serve to strengthen the same and assist in keeping the posts in their proper position." In some of the constructions shown by this and former patents the angle made to the flange is not so much as a right angle, but that is a mere matter of degree, of extent, or size. *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Galvin v. City of Grand Rapids*, 115 Fed. 511, 53 C. C. A. 165; *Eames v. Worcester Pol. Inst.*, 123 Fed. 67, 60 C. C. A. 37.

So in regard to the omission of mortise and tenon to connect the rave and posts, several patents are shown in which in sleighs and other vehicles this was done; and in a patent granted to Westervelt November 29, 1881, No. 250,314, the patentee states that it is the object of his invention "to construct a sleigh in such manner that greater strength shall be secured to the several parts than is possible when the timbers are mortised, and at the same time repairs shall be easily and cheaply made." And accordingly his specifications require that mortises and tenons shall not be used. Thus it is evident that nothing whatever of the combination of the twelfth claim was new, and it is a plain case for the application of the rule stated in our opinions in *Burnham v. Union Mfg. Co.*, 110 Fed. 765,

770, 49 C. C. A. 163, and *Dowagiac Mfg. Co. v. Superior Drill Co.*, 115 Fed. 886, 901, 53 C. C. A. 36, that, in the language of Mr. Justice Day in the former case, "it is well settled that there is no invention in merely selecting and putting together parts of different machines in the same art when each operates in the same way in a new machine producing the same result." This was said of machines, but the rule is equally applicable to a product where the reason for it is the same.

It appears that the complainant obtained an assignment of the Wright patent, and has been manufacturing its goods upon the lines of that patent, rather than its own. We apprehend the Circuit Court fell into an error in relying upon the acquiescence of the public in the validity of the patent in suit as the ground on which to grant the injunction. Inasmuch as the complainant owned and used the Wright patent, it would seem that the acquiescence may have been in deference to the Wright patent, rather than to Wyeth's. The Wright patent had stronger claims for recognition than the other, and we think it very unsafe to rely upon the public acquiescence shown by this record as evidence supporting the patentability of the Wyeth alleged invention. Besides all this, the supposed infringing structure of the defendant appears to be substantially that of the Wright patent, which expired in July, 1900; and it is curious to note that the complainant now charges infringement against substantially the same thing as in another moment he claims was not an anticipation. But it should be added that public acquiescence, though sometimes, in doubtful cases, a matter for consideration, is not available to maintain a patent palpably invalid.

We are urged by the appellant to direct the dismissal of the bill if we reach the conclusion above indicated. But the objection to that course is that the claim brought under examination on the present appeal is only one of many. It may be that other claims may stand on better ground. They have not been discussed, nor has it been necessary for us to consider them. In these circumstances it would be dangerous to order the general dismissal of the bill. But the other patent, No. 444,405, contains but a single claim, and that is in substance the same as the twelfth claim of the former patent, with the addition of a similar connection of the knees with the runner as that between the knees and the rave—a duplication of the same device, as to which see *L. Schreiber & Sons v. Grimm*, 43 U. S. App. 10, 17, 72 Fed. 671, 673, 19 C. C. A. 67; *Dunbar v. Myers*, 94 U. S. 187, 24 L. Ed. 34. If it should finally appear that the conditions are as they now appear, no doubt our opinion will furnish a guide for the disposition of both the claims herein specially referred to. We are clearly of opinion that there was error in granting the injunction, and that the order should be reversed.

It is so ordered.

McCASLIN v. LINK BELT MACHINERY CO. et al.

(Circuit Court, S. D. New York. May 30, 1905.)

1. JUDGMENT—DECREE IN INTERFERENCE PROCEEDINGS—PERSONS CONCLUDED.

A decree in interference proceedings determining priority of invention between two applicants for patents is not binding, as to the date of invention by one of the parties, on one who was not a party, and does not claim under either patent.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1230.]

2. PATENT—ANTICIPATION.

That a prior patent for the same invention was issued to the same patentee does not avoid anticipation.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 79.]

3. SAME—CONSTRUCTION OF CLAIMS—COMBINATION.

Where a claim of a patent is for a combination, it must be for an operative combination; and if an element essential to make it operative is shown and described in the specification, but is omitted from the claim, it must be read into the claim.

4. SAME—INFRINGEMENT—ENDLESS CHAIN CONVEYORS.

The McCaslin patent, No. 503,870, for an endless chain conveyor, claims 2 and 4, cover improvements only on what was known in the prior art, and must be strictly construed and limited to the construction shown, and the patentee is entitled to invoke the doctrine of equivalents only where the changes are colorable merely. As so construed, such claims *held* not infringed by a conveyor in which the mechanism operates in a manner substantially different to accomplish the same results.

In Equity. Suit for infringement of patent.

Ewing, Whitman & Ewing (Thomas Ewing, Jr., of counsel), for complainant.

Parker & Carter and Howson & Howson, for defendants.

HAZEL, District Judge. This action involves the construction of claims 2 and 4 of United States letters patent No. 503,870, dated August 22, 1893, relating to endless chain conveyors, issued to George McCaslin, inventor. The conveyor consists of a series of gravity buckets pivoted in a chain which has wheels running on a track; each bucket being provided with extended lips, which, when the buckets move along a path or track in a horizontal position, overlap in such a manner that the lip on the one bucket overlaps the lip on that next adjacent. The buckets are maintained in a normally upright position by the general action of gravity, irrespective of the vertical and winding character of the track upon which they are mounted or moved. By the general arrangement of the track and buckets, the material being transferred is carried continuously in one direction—that is, from the lower to the upper horizontal track, where it is dumped into bins or chutes—and after discharging the same the buckets move along towards the downward path or starting point. The specification states:

"The object of the invention is, in the main, to provide the buckets of the conveyor with plates or lips which project out and overlap in such a manner that the lip on one bucket overlaps the lip on that next adjacent, whereby, when the buckets are moving along a horizontal or slightly inclined track at the loading point, the coal or other material running into the conveyor from

a chute will not fall between the buckets. Means have before been devised and employed to attain this desirable end, but I find it important to confine the means used to the buckets themselves, for the sake of economy in construction, in space occupied, and in power, and in order, also, to increase the durability of the conveyor. But in order that such conveyor may be adapted for general purposes, and not be confined simply for use as an elevator, it is essential that means be provided for turning the empty buckets on their return so that the lips or plates thereon may properly overlap, and my present invention includes such means."

The drawings attached to the patent show three forms of the apparatus. Figure 1, which is the form alleged to be infringed by the defendants, shows a lower and upper horizontal track, on which the buckets are to be loaded and unloaded, respectively, and ascending and descending tracks, which apparently are integral with the horizontal runs; thus forming an oval-shaped loop or cycle. The specification disclaims the feature for driving the conveyor, and declares that various forms of drivers may be used. In practice the entire structure employed may be rectangular or tortuous. Different materials, including liquids, may be carried by the conveyor, which is so constructed as to enable transference from the loading point, which may be outside of the building, to the place of unloading within, or from one room to another in a factory or building. The system of conveyors is chiefly employed for handling coal in power houses and other large factories and modern industries, and may also at the same time be used to remove ashes from the boiler room. The carrying capacity is measured by the size of the buckets employed. The claims of the patent relied upon are as follows:

"(2) In an endless chain conveyor, the combination with the track, track-wheels and endless chain, of the gravity buckets suspended at intervals in the chain, and provided with overlapping lips as described, and means substantially as described for preventing the collision of the loaded buckets at the point where they pass from the lower track to the ascending track, as set forth."

"(4) In a conveyor, the combination with an endless track, the track-wheels thereon for carrying the chain, and the endless chain, of gravity buckets, c, pivotally suspended at equal intervals in the chain, and each provided with dumping lugs, and lips, c, x, one at each end, the lip on the rear end of a bucket overlapping the lip on the front end of the following bucket when the buckets are moving along a horizontal track, and means substantially as described for tilting the buckets and shifting the lap of said lips when the buckets move onto the descending track, as set forth."

The features of claim 2, describing means to overcome the collision of the buckets, and of claim 4, for tilting the buckets and shifting the lap of the lips so that the buckets may pass freely from a horizontal to a vertical track, or vice versa, are claimed to possess novelty. The elements of claim 2 are for a combination of an endless chain, track, track-wheels, buckets, with overlapping lips at their ends, suspended in series on the chains, and means to facilitate the movement of the buckets from the lower horizontal track to the ascending track, and thence along the upper track toward and down the descending track to the loading point. In the fourth claim the essential feature of the combination claimed is dumping lugs on each bucket, together with means for tilting or shifting

(Fig. 1) or turning (Figs. 3 and 4) the lap of the lips when moving from the upper track to the downward path.

Neither the utility nor the validity of the patent is questioned; the contentions being that the scope of the claims is limited by the prior art, and that the defendants are not infringers. The patent has never been adjudicated, and the interference proceeding in the Patent Office entitled "Hunt v. McCaslin" dealt with the date of the invention, and not with the question of prior devices. Complainant claims to have conceived the invention in August, 1886, and to have then disclosed it to others. The date of the application in suit is April 8, 1893. The interference proceedings, for reasons sufficient to the Court of Appeals for the District of Columbia, terminated in complainant's favor; and his application was found to anticipate Hunt's date of filing, which was September 10, 1892. That decree is not binding upon the defendants, they not having been parties or privies to the proceeding nor claiming under the patent issued to Hunt. *Edward Barr Co. v. N. Y. & N. H. Automatic Sprinkler Co. (C. C.)* 32 Fed. 79; *Western Electric Co. v. Williams-Abbott Electric Co. (C. C.)* 83 Fed. 842; *Wilson v. Consolidated Store Service Co.*, 88 Fed. 286, 31 C. C. A. 533. The patentee gave testimony tending to show that the date of his invention was prior to the Davidson British patent hereinafter mentioned, and in support of his testimony a sketch made by him of the machine was produced. This showing, however, is not persuasive, and accordingly the Davidson patent must be regarded as a proper citation to acquaint the court with the state of the art.

The desideratum of McCaslin was to produce a practical construction which would enable loading from a running hopper or chute while the buckets move along the track, without spilling or wasting any of the material, and also to prevent collision by the interlocking of loaded buckets in passing from the lower to the ascending track. It is undoubtedly true that complainant's overlapping system prevents spilling between the buckets. But a comparison of the several conveyors of the prior art (especially that of McCaslin's earlier patent, No. 486,809, dated November 22, 1892) with that of the patent in suit leads to the conclusion that the claims of the latter must be strictly construed, and that complainant is not entitled to a range of equivalents sufficiently broad to include defendants' method of accomplishing the same result. The complainant was not a pioneer, and the new features of the patent in suit are narrowed by his earlier patent and by the patent to Davidson. That a prior patent for the same invention was issued to the patentee, of course, would not avoid anticipation. *Doig v. Morgan Machine Co.*, 122 Fed. 460, 59 C. C. A. 616; *Underwood v. Gerber*, 149 U. S. 224, 13 Sup. Ct. 854, 37 L. Ed. 710.

To construe the claims in suit, the nature of the patent and the state of the art at the time of patenting, or when the invention was discovered, is important. The range of equivalents to which the patentee is entitled depends altogether upon the character and extent of his improvements, and the degree of merit is measured by the value of his contribution to the public. Applying the basic

rules to the facts of the case, a pertinent inquiry is, has the inventor, by the overlapping lip arrangement, projected into an apparatus concededly familiar to the art something possessing novelty? Has he achieved a practical improvement in a device which prior thereto was incapable of successful operation? Evidence was given to show that the apparatus in suit was commercially superior to the earlier patent, and went into extensive public use. This testimony, though important, has not the force to warrant holding that the prior McCaslin patent was impracticable, and that the later device led from failure to success. Whatever novelty exists in the patent in suit is in the nature, as already intimated, of an improvement upon that which was known to the art.

The testimony of the mechanical experts regarding the scope of the claims is in conflict. According to the complainant, the merit of the patent, briefly stated, consists in an arrangement by which the buckets are enabled to preserve a certain symmetry or alignment while they are in motion and passing toward and down the descending path, so as to permit loading from a continuous running spout, and prevent spilling of material while loading. To attain this object, the patentee added an extended lip at the ends of the buckets, and devised means for overcoming interference and impingement of the lips which is apt to occur in traversing a circular or tortuous track. That gravity buckets arranged in series and maintained in a normally upright position, whereby they may be automatically emptied of their contents by capsizing at different points, and thereafter readjusted, were familiar to the art, is shown by an inspection of patent No. 331,961, dated December 8, 1885, to W. Griesser. In this patent the buckets are lipless, and the arrangement such as to permit them to turn upon curves while in motion without interference. The absence of overlapping lips upon the buckets, however, prevented loading from a continuous streaming spout without spilling the material between the buckets. Patents issued to Hunt show a lipless gravity bucket, and a portable mechanism for preventing the material from spilling. In the Hunt patents the buckets must be loaded at certain predetermined points with the aid of a local feeding device. The patents mentioned do not disclose the essential features of the claims in suit, and are material only to indicate the advance made by McCaslin in his earlier patent, No. 486,809. It is upon this patent that the defendants lay special stress to limit the claims in controversy. The specification of the earlier McCaslin patent describes a gravity bucket conveyor wherein each bucket is provided with a single lip overlapping the next succeeding bucket, together with means for shifting the buckets to enable them to pass around the complete cycle without collision. The construction shown in figure 1 of the earlier patent resembles that of figure 3 of the patent in suit. Indeed, a resemblance between the earlier and later McCaslin patents is not denied. The lap of the lip in the earlier patent was not changed, the buckets being turned over by gravity; nor were means provided for preventing collision between the loaded buckets as they passed toward the ascending track. The object of the pat-

entee was to make the prior art more practicable, by permitting the buckets to be carried from one point to another, irrespective of the configuration of the tracks, and to prevent spilling of the material at the loading point. To accomplish this object, each bucket was provided with a single lip, and upon the side was placed an upwardly projecting bolt, arranged to engage a bar at the loading point, and prevent the rear end of the bucket from tilting too far while being loaded. As stated, the buckets, in passing down the descending track in succession, made a complete turn, instead of being tilted as in the patent in suit, and on reaching the lower horizontal track the stopping device held them in a tipped position until the danger point of collision was passed, when the bucket righted itself by gravity. The claim is here made that the complainant has progressed the prior art in two important particulars, namely, that by his arrangement of double-lipped buckets, without the use of a special loading device, the running material will not spill between the buckets; secondly, that by the employment of his method there may be a complete revolution around the track, without interference between the buckets, by simply tilting them in the manner described. The principal features by which the later McCaslin patent is differentiated from the earlier exists in the use of cams for tilting the buckets, and maintaining the overlap by the employment of the guard rail, instead of mounting the buckets on the chain to practically accomplish the same result. The operation for guiding the movement of the buckets down the descending track, as specially set forth in claim 2 in suit, is not thought to be such as to require holding that the defendants' method is a substantial equivalent. Various ways are shown in the specification for changing the overlap; one having cams on the upper and lower track, located near the vertical path; the other (figures 3 and 4) having a single cam, located at the upper track near the downward pathway, which operates to turn the bucket half over. The horizontal guard rail shown in figures 1 and 4 is a feature of claim 3. According to the specification, it performs the special function of preventing the tilting of the buckets in case two adjacent buckets were unequally loaded. The specification states that if there were no such device the buckets would collide at the point where they left the lower horizontal track and passed onto the ascending track. Defendants contend that the functions of the guard rail should be read into claim 2, as an essential element. I am of opinion that the claim must be construed to include such device, as the means by which the result is attained, namely, the establishment of the overlap of safety, is, to a degree, owing to the presence of the guard rail. *Westinghouse v. Boyden*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136; *Wellman v. Midland Steel Co.* (C. C.) 106 Fed. 226. In the latter case Judge Baker said:

"Where the claim is for a combination, it must be for an operative combination; and if an element essential to make it operative is shown and described in the specification, and is omitted in the claim, it must be read into the claim. Such an interpretation is justified and required by the concluding language, 'substantially as set forth.'"

See, also, *Stilwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co.*, 117 Fed. 410, 54 C. C. A. 584.

In the English Davidson patent of February 2, 1892, No. 2,046, there is shown a device for carrying material from one point to another. The carrying trays are pivotally mounted, and have overlapping lips at each end, and dumping cams are located near the two corners. Although material can only be carried upward to a straight track, or downward onto a straight track, yet the carrying trays, which have lips at their ends, are arranged in series; the purpose being to cause the lips to overlap, and prevent the material from falling between the trays at the loading point. The overlapping and tilting features of the Davidson patent resemble those of the McCaslin patent in suit, though no means are described for preventing interlocking of the trays. In view of the earlier McCaslin patent and the English patent to Davidson, which is considered merely to construe the claims in suit, and not to anticipate, the patentee is simply entitled to the protection of his improvement, and can only invoke the doctrine of equivalents if the method adopted by the defendants is a colorable invasion. Walker on Patents, § 184.

After a careful examination of the prior patents and the evidence construing the claims in suit, I have reached the conclusion that the defendants' system and mode of operation is essentially different from that of complainant. The defendants' device has the familiar endless chain, the links, the wheels, track with its curves, gravity buckets with overlapping lips, and dumping lugs. It has an essential additional feature, to wit, the links of the chain have outside extensions, on which the buckets are pivoted. In other words, the buckets are not suspended in the chain, as in complainant's device, but on projections from the chain. It has no overlapping arrangement at the so-called danger points, and there is no troublesome interference of one bucket with another. No cams are used, or means for tilting or shifting the buckets to change the overlap. Neither has defendants' apparatus a guard rail.

Defendants' witness Prof. Carhart, who is corroborated by the witness Livermore, testifies:

"The defendant gets his buckets around the angle, not by shifting or changing the overlap, but by separating the buckets so that they are further apart than the entire width of one of them. * * * Each bucket swings clear of its neighbor, and is free to change its direction and motion vertically up or down."

The elicited facts show that the primary result of changing the overlap in defendants' mechanism is attained by the sudden downward and forward shifting of the extensions of the chain links, which are connected with the buckets, and which not only cause the lips of the buckets to slightly separate, but cause simultaneous action between the chain and the buckets. This feature is probably more clearly expressed by stating that at the ascending or descending points the buckets, while in motion, are rapidly lifted by the moving action of the link extensions in an upward and forward direction, and one bucket momentarily precedes another, and then,

owing to the movable action of the link extension, rapidly recedes into its normal position; meanwhile continuing in its path toward the loading or unloading point. According to defendants' expert, the connection between the chain and buckets in defendants' apparatus produces a system of nonoverlapping buckets in passing around the curve, while in the apparatus of McCaslin the spacing between the buckets is such that the lips of the buckets constantly overlap, or remain in a position for overlapping, and, in order to change their position, either one or both of the buckets must be tilted from the horizontal position in which they are normally suspended.

The record, as a whole, satisfactorily shows that a difference exists in the mechanism adopted by the defendants. The result of the operation of defendants' device is the same as that of complainant, but the mode of operation is substantially different. *Kokomo Fence Co. v. Kitzelman*, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689. The elements of claims 2 and 4 are not infringed by the defendants. The bill is therefore dismissed, with costs.

BONSALL v. T. J. HAMILTON MFG. CO. et al.

(Circuit Court, S. D. New York. June 16, 1905.)

1. PATENTS—INFRINGEMENT—WARDROBE TRUNKS.

The Bonsall patents, Nos. 604,346 and 642,075, both relating to wardrobe trunks, were not anticipated, and disclose invention. Claim 3 of the former, and claim 4 of the latter, also held infringed.

2. SAME—NOVELTY—GARMENT HANGERS.

The Bonsall patent, No. 661,947, for a garment hanger for use in wardrobe trunks, is void for lack of patentable novelty.

In Equity.

H. S. Mackaye, for complainant.

D. Walter Brown, for defendants.

HAZEL, District Judge. This action is brought to restrain defendants from infringing three United States letters patent owned by complainant, who was the inventor, as follows: No. 604,346, dated May 17, 1898, for improvement in dress skirt and wardrobe trunk; No. 642,075, dated January 30, 1900, for improvement in receptacle for clothing; and No. 661,947, dated November 20, 1900, for improvement in accessible garment hanger. The defenses are anticipation and denial of infringement. Claim 3 of patent No. 604,346, claim 4 of patent No. 642,075, and claim 1 of patent No. 661,947 are involved. Many prior patents relating to wardrobe trunks are found in the record, but none embody the precise elements of the combination of the patents in suit. The claims involved are narrow, and contention is not made for a broad construction. The first-mentioned patent has five claims, and describes a wardrobe trunk adapted for hanging skirts and other garments

upon a hanging device, so that the garments may be packed at full length, instead of placing them in the trunk in the old-fashioned way. The trunk, which has rounded or conoid sides, a flat top and bottom, and one flat end (the interior being a rectangular prism), may also be used as a wardrobe or closet when at its destination. This is better understood by reading the description of claim 3. There a trunk is claimed which has a slide arranged to move forward when the trunk stands on one end, a prop at the front end of the slide, and a cover flap attached to the trunk at one end, which, when open, affords a bearing for the prop at its lower extremity. The utility of the slide and frame upon which movable hangers for garments are hung, in combination with the trunk, is unquestioned. The slide and frame, with garments hanging upon a hanger device, with the prop at its forward end, is adapted to be drawn forward out of the trunk. When so pulled forward the trunk ordinarily is in an upright position, the top half of the cover thrown back, and the lower half, which sustains the prop, lying flat on the floor. By this innovation the trunk, with the clothing displayed upon the rack, may readily be moved about at the option of the user. The primal object of the patentee was to construct a wardrobe trunk which would combine the elements of lightness, strength, and compactness. The wardrobe trunks of the prior art principally have drawers, folding or movable parts, which occupy much space and reduce the capacity of the trunk. Patent No. 642,075 is a modification of the earlier. The improvement consists in attaching the upper end of the propping frame by a sliding socket to horizontal rods extending in the direction of the movements of the slide. This enables moving the frame back into the trunk closely against the garments hanging on the rods. In the earlier patent the propping frame held the clothing firmly only when the trunk was completely filled, while in the later, irrespective of the quantity contained therein, the clothing is securely confined in the trunk. Claim 4 of patent No. 642,075 has three elements, namely, a sliding rack, side rods, and a confining frame adapted to serve as a support for the rack when the same is drawn out. Patent No. 661,947 is for a so-styled graduated hanger, and is specially adapted for hanging men's garments in a trunk of the class mentioned, with a view of preserving their shape, and withdrawing a particular garment without disarranging or removing others packed therein. Are the claims of the patents infringed by the defendants, or any of them?

As to patent No. 604,346: The proofs show that in September, 1889, the defendant Hamilton-Noyes Company, dealer in wardrobe trunks, solicited of complainant, without success, the right to sell the trunk manufactured by him under the patents in controversy. Afterward the defendant Hamilton-Noyes Company brought into the market a flat-top wardrobe trunk, with a sliding frame, without a prop and without a garment hanger, manufactured by the defendant T. J. Hamilton Manufacturing Company. This trunk construction did not prove a commercial success, and thereupon the defendant corporations manufactured and sold a wardrobe trunk in outward resemblance of that of complainant, with

the so-called follower device. Defendants contend that the follower device was not intended as a prop for the sliding frame, as evidenced by the fact that the follower did not touch the bottom of the trunk, and furthermore that in various instances indicated by the evidence, where the follower device touched the bottom flap, the construction was unintentional and defective, and not designed to infringe complainant's patent. This contention, however, is not persuasive, especially in view of the fact that, in the construction by the defendant T. J. Hamilton Manufacturing Company of the later trunk sold by the Hamilton-Noyes Company, complainant's patented trunk was used as a guide. The defendants' follower device was the equivalent of complainant's prop. Although the patent is of a narrow scope, the defendants cannot be permitted to appropriate the essentials of the patentee's invention. The prop feature of the complainant's structure is appropriated when it is shown that the weight of the garments in the defendants' trunk caused the follower device to bear upon the flap. See *Hutter v. D Q Stopper Co.*, 128 Fed. 283, 62 C. C. A. 652. After this suit was instituted the follower devices already constructed by defendants were reduced in size, and admittedly are now incapable of touching the bottom flap of the trunk. Instead of resting thereon, as in complainant's trunk, they swing free. As to such altered constructions (see defendants' exhibits, *Women's Trunk* and *Men's Trunk*), it is practically conceded that infringement of claim 3 is not maintainable.

As to patent No. 642,075, the proofs abundantly show that complainant's Exhibits 8 and 9 (defendants' wardrobe trunks) have a sliding rack, with side rods in combination with the so-called confining frame, adapted to slide on the rods. Opposed to this view, defendants contend that this patent is for the identical structure as that of the earlier patent, and therefore is anticipated by it. Concededly, the general construction of the sliding frame is the same; but the second patent has the additional feature already mentioned, which enables the frame to closely hold the clothing in place. The evidence shows this improvement to have been jointly infringed prior to the commencement of this action by the defendant corporations.

As to patent No. 661,947: The invention, which is not claimed in combination with a trunk, relates to bars and carrying hooks and crosspieces arranged for hanging men's coats on hangers in a wardrobe trunk. Claim 1 reads as follows:

"(1) A substantially horizontal rod, a number of hangers for clothing depending therefrom, each of which is successively longer than the preceding hanger, and means adapted to press on said clothing for securing said clothing and hangers in one position upon said rod."

The object of the patentee was to provide means whereby a convenient number of men's coats may be securely packed in a trunk and retained therein without crushing or wrinkling, and also to enable the user to take from the trunk an article of clothing suspended upon the hanger without removing or disarranging other

coats or garments packed therein. The graduated hangers, arranged in series, have hooks of successively longer shanks, adapted to be hung upon bars affixed horizontally to the upper inside of the trunk. The arrangement enables the thick or upper portion of one coat to be hung close to another without crushing. Hangers, suspended from rods, of course, were familiarly known at the time of the invention, and graduated hangers of various kinds are disclosed by the prior art. In the patent to Brown, No. 183,899, dated October 31, 1876, are shown a number of horizontal rods provided with suspended wires of different lengths, so that maps may be suspended upon a series of hangers. The patent to Fisher, No. 360,577, dated April 5, 1887, relates to wardrobe trunks and hangers of different lengths. The purpose of the Brown patent and that of the patent in suit are substantially the same, viz., to suspend objects at various lengths below a horizontal bar; the difference being that, in the invention in suit, means are provided for pressing the clothing together to secure compactness. The feature descriptive of means for pressing the clothing is thought to be found in the Bonsall patent, No. 642,075. The drawing, Fig. 4 of that patent, indicates a wire socket at the upper end of the bar or rod, adapted to slide, upon which a hanger and presser device may be suspended. According to the specification, the gist of the invention is to provide a "confining member" supported by and sliding upon a horizontal rod. Such members preferably consist of two legs or side bars joined by appropriate crosspieces, but, as stated in the patent, it may also consist of but a single bar, and sliding upon a single rod, and, as thus made, would be within the scope of the invention. The latter feature would be the evident equivalent of the means mentioned in claim 1 of patent No. 661,497, for pressing the clothing, and for securing the hangers and clothing in one position upon the rod. In view of complainant's prior patent, as hereinabove pointed out, the conception of such means was not new at the date of the invention in suit. Therefore the later patent does not disclose patentable invention, the presumption of novelty having been overcome.

A fair preponderance of the evidence shows that the infringement was jointly committed by the defendant corporations—one as the manufacturer, and the other as a seller to the retail trade. The proofs show that the individual defendant was managing agent and principal stockholder of both corporations. That he personally directed the infringement is not controverted.

My conclusion is that the complainant is entitled to the relief indicated in the foregoing decision, namely, a decree against the defendants for an injunction and for profits and damages as to claim 3 of patent No. 604,346, during the time of the infringement of the prop feature of the patent, as hereinbefore indicated, and claim 4 of patent No. 642,075. As to patent No. 661,947, the complaint is dismissed. The complainant being successful in the litigation as to two of the patents, and unsuccessful as to the third, two-thirds of his costs may be taxed against the defendants, and complainant

may be decreed to pay one-third of defendants' costs. Authority to apportion costs in the manner stated may be found in *Tesla Electric Co. v. Scott* (C. C.) 101 Fed. 524.

So decreed.

BONSALL v. HAMILTON-NOYES CO.

(Circuit Court, S. D. New York. June 16, 1905.)

PATENTS—INFRINGEMENT—GARMENT HANGER.

The Tenney patent, No. 669,561, claim 3, for a folding hanger for garments, adapted for use in a closet, drawer, or trunk, was not anticipated, and discloses invention. Also *held valid* as against the defense of prior invention and infringed.

In Equity.

H. S. Mackaye, for complainant.

D. Walter Brown, for defendant.

HAZEL, District Judge. This action was brought to restrain the infringement of letters patent No. 669,561, granted to Irving L. Tenney, complainant's assignor, March 12, 1901, on an application filed June 11, 1900. The invention relates to a folding hanger for clothing, and is adapted for use in either a closet, trunk, or bureau drawer, although, as stated in the specification, the invention is preferably used in connection with the wardrobe trunk patented by Seymour W. Bonsall. The hanger essentially consists of an upper and lower horizontal bar, designated in the specification as folding and attachment bar, respectively, joined by wires or rods at their extremities, thus forming a frame with four sides. The wires are pivotally connected, and are curved at their upper ends so as to encircle the folding bar. Such arrangement of the parts enables the attachment bar, which is provided with hooks for hanging the clothing, to swing or rotate around the folding bar. The object of the invention, as stated in the specification, was to provide means for conveniently hanging ladies' skirts or wearing apparel after folding in a small space, either in a closet or trunk, without wrinkling the fabric. The defenses are anticipation, noninfringement, and, further, that one Hamilton in fact is the original inventor.

The patentable novelty and utility of the hanger device are not seriously questioned, although attention was directed to a number of prior patents to narrow claim 3, which alone is involved. On account of the simplicity of the device, no expert testimony was given in respect to any of the patents, and none was necessary. The involved claim reads as follows:

"(3) An article of manufacture consisting of an attachment bar, means thereon for attaching a garment thereto, a folding bar longer than said attachment bar, arms joining said two bars, and hanging means on said fold-bar outside of the junction with said bar of said arms."

The defendant's device, beyond dispute, has all the elements of the claim in controversy. True, its structure will not conveniently permit revolving the lower bar around the folding bar, it being more

rigidly attached to the dowel. Nevertheless such rigidity and inelasticity do not affect the infringement. The modification pointed out in defendant's device is immaterial. Claim 3 cannot be fairly limited to a swinging or rotating attachment, despite the simplicity and narrow scope of the patent. The specification expressly declares that the "invention covers as well a rigid as a pivotal connection between the folding bar and arm, 4"; and hence, it is thought, defendant's hanger, though employing a rigid bar, may fairly be regarded as a counterpart of complainant's. Such adaptation, containing all the substantial elements of the complainant's patented structure, is strong evidence of its novelty and utility. The prior art does not disclose a hanger for a wardrobe trunk or closet which requires a more illiberal construction of claim 3. The closest approach to complainant's device is the patent to Rundback, No. 497,414. In that patent the garments are not hung at their full length, and when the trunk is open the clothing suspended upon the hanger device is "located at right angles to the body of the trunk, and not in a plane or planes parallel with the body of the trunk," as in the patent in suit.

The principal defense insisted upon is that the defendant's witness Hamilton, an officer of defendant corporation, and not Tenney, was the first person to conceive the hanger device and adapt it to practical use. Upon this point the contention in behalf of the defendant is to the effect that Hamilton early in the year 1900 was engaged in the manufacture of a new style wardrobe trunk, which was placed upon the market for sale in May of that year, and that about five or six months prior thereto a skirt hanger was devised by him and put into use. The witnesses Hamilton and Hartigan, former employes of defendant, are not agreed as to the time when the skirt hanger was first disclosed. Hamilton thought it was five or six months prior to the completion of the wardrobe trunk, while Hartigan at first testified that, to the best of his recollection, the device was put on the market some time in November, 1900. Later, when his attention was called to a former statement made by him in that connection, he corrected his testimony, and stated that the hangers were made in March or April, 1900. On cross-examination he testified that, when Hamilton first disclosed to him his skirt hanger, he had seen the hangers which the Innovation Trunk Company (complainant's hanger) sold. Sufficient evidence is wanting to establish the fact that Hamilton was the original inventor of the device in question. The burden rests upon the defendant to establish the claim of prior invention, and it is a settled rule of law that whoever seeks to antedate another for the same invention must clearly and distinctly ("beyond a reasonable doubt" is the language of the authorities) establish that he earlier conceived and adapted the invention to practical operation. Neither is the evidence in behalf of complainant entirely satisfactory that the hanger device was in fact invented by Tenney about one year prior to his application for the patent in suit. Although absolutely honest witnesses may have testified that the skirt hanger was on sale prior to June

8, 1899, by complainant's licensee, nevertheless such evidence, uncorroborated by contemporaneous writing, or unsupported by more explicit proofs, may not be entirely correct.

My conclusion is that the patent is infringed by the defendant, and accordingly the complainant is entitled to an injunction and accounting, with costs.

So ordered.

TILLAMOOK WATER CO. v. TILLAMOOK CITY et al.

(Circuit Court, D. Oregon. July 12, 1905.)

No. 2,973.

MUNICIPAL CORPORATIONS—CONTRACT WITH WATER COMPANY—CONSTRUCTION.

A contract between a city and a water company, by which the latter is granted a franchise to lay mains and pipes in the streets and to furnish water to the inhabitants of the city for a term of years, which it binds itself to do, but which contains no provision that the grant shall be exclusive, or that the city will not construct waterworks of its own, does not by implication bind the city not to do so, and is not violated by the construction by the city of a competing plant.

In Equity. On demurrer to bill.

This is a suit brought by the complainant, the Tillamook Water Company, a corporation created and existing under the laws of the state of Oregon, to enjoin officers of Tillamook City from proceeding to institute a system of waterworks for said city. The bill shows that on November 16, 1896, Tillamook City entered into a contract with one H. Orchard, whereby it gave to him and his legal representatives or assigns the right to install a water plant and supply Tillamook City with water; that said contract and agreement was ratified by an ordinance of the city, made on said date; that by said contract, in consideration of the covenants and conditions therein expressed, the said Orchard was granted a "franchise, privilege, and easement to place and maintain in the streets and alleys of the city of Tillamook any and all water pipes, mains, and connections which may be necessary or convenient" to enable him to supply the said city and its citizens with water for municipal and other purposes, which said pipes, mains, and appliances were to be so kept and maintained for the period of 30 years from said date; and that said contract provided that he, as "the party of the second part, is to, and does, in consideration of the execution of this contract, covenant and agree to construct and maintain within said city of Tillamook, for said period of 30 years, a system of waterworks supplying pure mountain water." The bill shows that the agreement set forth a specification of the rates which should be charged to consumers, and a provision by which the city covenanted to pay the sum of \$40 per month for its use of water for municipal purposes for the period of 3 years; that the city was given the option to continue to receive water at the same rate at the expiration of said period of 3 years; and that the contract provided that, if at any time after the expiration of four years from its date the city should desire to purchase the water rights, privileges, easements, reservoirs, pipe lines, etc., it should have the option to make such purchase upon conditions specified therein. The bill further alleges that said H. Orchard and his associates immediately began the construction of the pipe lines, and to acquire rights to water and water privileges, and expended, in carrying out the terms of said contract, more than \$15,000; that thereafter he assigned and set over unto the complainant herein all his rights, title, and interest in and to said works and contract; that in pursuance of said contract Tillamook City paid thereafter to the complainant \$40 per month for the use of the water for municipal purposes for the period of time provided for in said contract; that after the expiration of the four-year limit Tillamook City elected to continue the contract and to exercise the option mentioned therein, with the understand-

ing, however, that thereafter it should pay \$30 per month, instead of \$40; that from and after May, 1897, the water plant now owned by the complainant was fully installed, and the people of Tillamook City ever since that date have been supplied with water from its water system; and that the value of complainant's property at the present time is more than \$14,000. Then follow allegations of the acts of the city and its officers, instituted for the purpose of constructing and maintaining a complete system of waterworks for the city, the water to be obtained from sources other than those from which the complainant obtains its supply, and that said action by the city will render the complainant's property valueless and of no profit, and will impair the obligations of the contract between complainant and said city. On the ground of such alleged impairment of the obligation of the contract, the jurisdiction of this court is invoked. The defendants demur to the bill for want of jurisdiction and for want of equity.

W. H. Holmes, for complainant.

T. B. Handley, for defendants.

GILBERT, Circuit Judge (after stating the facts). The question presented by the demurrer is whether the city of Tillamook, by proceeding to construct and maintain a system of waterworks for the purpose of furnishing water to the city and its inhabitants, will impair the obligation of its contract with the complainant. It is not disputed that the municipality is given by the law the authority to create, own, and maintain a system of waterworks. The whole question depends upon the nature of its contract with the complainant. There can be no doubt that the grant of an exclusive privilege to a water company to lay water pipes and furnish the inhabitants of a city with water for a stated period of time, accepted and acted upon by the company, is the grant of a franchise given in consideration of the performance of a public service, and is protected against hostile legislation by the state and by the municipality. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *New Orleans Water Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 7 Sup. Ct. 405, 30 L. Ed. 563. Nor can there be any doubt that, if a municipality has covenanted that during the life of the privilege it will not institute works of its own, it would be an impairment of the obligation of its contract to institute, before the expiration of that period, a waterworks system, to be owned and operated by the municipality. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. But the city of Tillamook gave to the complainant's grantor no exclusive privilege or franchise, nor did it covenant, as in the *Walla Walla Water Case*, that it would not erect, maintain, or become interested in any other waterworks.

The principles which must control the decision of the present case are to be found in *Charles River Bridge Co. v. Warren Bridge Co.*, 11 Pet. 420, 9 L. Ed. 773, 938; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165; *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 20 Sup. Ct. 40, 44 L. Ed. 92; *Skaneateles Water Co. v. Skaneateles*, 184 U. S. 354, 22 Sup. Ct. 400, 46 L. Ed. 585; *Joplin v. Light Co.*, 191 U. S. 150, 24 Sup. Ct. 43, 48 L. Ed. 127, and *Helena Waterworks v. Helena*,

195 U. S. 383, 25 Sup. Ct. 40, 49 L. Ed. 245. In the first of these cases the court declared the general doctrine, which has been followed in all the subsequent decisions, that public grants are to be construed strictly, and that in such grants nothing passes by implication. In the second case, the court said:

"The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town, and contained a covenant on the part of the town to pay certain hydrant rentals; but grants from the public are strictly construed in favor of the public, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege."

In *Bienville Water Supply Co. v. Mobile*, the water company was authorized to construct canals, ditches, pipes, etc., and was charged with the duty of introducing into the city of Mobile such supply of pure mountain water as the domestic, sanitary, and municipal wants thereof might require. On April 14, 1891, the city entered into a contract with the water company, whereby the latter was to furnish for a period of 12 years a designated number of fire hydrants for the use of the city, and agreed not to charge a greater or higher rate for water for domestic use than that specified in the contract. Six years later, and while that contract was in full force, the city proceeded to acquire waterworks, to be owned and operated by itself. The water company contended that the city had no legal right to impair the value of its plant and to destroy or diminish its income; but the court held that, since the water company had been granted no exclusive franchise to furnish water to the city and its inhabitants, the city had the right to build or acquire a system of waterworks for that purpose, and that to do this was no violation of its contract.

In the *Skaneateles Case*, the court, in answering the argument that there is an implication that the grantor of a right to lay pipes and furnish water in a town will do nothing to detract from the full and complete operation of the grant, said:

"There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

In *Joplin v. Light Co.*, a right had been given to maintain an electric light plant for a period of 20 years. The ordinance conferred rights, exacted obligations, and fixed the rates to be charged. Eight years later the city instituted proceedings to erect an electric light plant, to be owned, controlled, and operated by itself. The court held that, by the terms of the ordinance and its acceptance by the light company, there was no implied contract that the city might not become a competitor with the company.

The case of *Helena Waterworks v. Helena* is directly in point. The contract in that case was substantially identical with that which is under consideration in the present case, with the exception that it contained a stipulation that the grant was not to be exclusive of the right of the city to contract with another company.

That stipulation, however, had no bearing upon the decision of the case, for the city of Helena gave no franchise to any other company, but was about to take steps to secure a water supply, to be owned and controlled by itself. The court referred to the fact that the ordinance contained no express stipulation that the city should not build a plant of its own, and, referring to the decisions above cited, said.

"These cases hold that the grant of a franchise does not of itself raise an implied contract that the grantor will not do any act to interfere with the rights granted to the waterworks company, and that in the absence of the grant of an exclusive privilege none will be implied against the public, but must arise, if at all, from some specific contract binding upon the municipality."

The decision in that case is a complete answer to the contention made, in this: that the complainant herein entered into a binding contract whereby it agreed to furnish water to the inhabitants of the city of Tillamook for the period of 30 years. The contract in that case contained a similar covenant upon the part of the Helena Water Company; but the court said that, although the contract bound the company to furnish water to the inhabitants of the city for a term of 20 years, there was nothing in the contract to bind the inhabitants of the city to take water from the company, and that the city had not and could not undertake to make any contract upon the subject of the private supply of individuals and the city, beyond securing a maximum rate of charge for water supply. The court found nothing in the contract to prevent the city from constructing its own plant.

The complainant earnestly contends that the decision of the Walla Walla Water Case, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, is authority for its contention that by implication it has a contract with the city, the obligation of which the latter is about to impair. In that case an ordinance was passed by the city council of Walla Walla, granting the water company for a term of 25 years the right to lay mains and pipes in all the streets of the city for the purpose of furnishing the inhabitants thereof with water, and by the terms thereof the city agreed to pay certain rentals, and bound itself not to make, maintain, or become interested in waterworks, unless the contract should be avoided by the judgment of a court of competent jurisdiction, on the ground of a substantial failure of performance by the company. After this contract had been in force, and the stipulated rentals paid for about 6 years, an ordinance was passed, providing for the construction of a system of waterworks for the purpose of supplying the city and its inhabitants with water. The Supreme Court held that under its contract with the water company, if the city should desire to establish waterworks of its own, it could do so by condemning the property of the company, but that it could not enter into direct competition with the company during the life of the contract, and that as long as the contract had not been avoided by a court of competent jurisdiction, but remained in force, the city had no right to establish waterworks, because it had expressly so covenanted with the water company.

In brief, the contract in the present case provides for no exclusive right in the complainant to supply water to the city and its inhabitants. It contains no covenant by the city that it will not erect waterworks of its own, or that it will abstain from granting such right to a competing company during the life of the contract; and the fact that the contract contains a covenant that the water company shall furnish water to the inhabitants of the city of Tillamook for a fixed period of time does not by implication restrain the city from erecting waterworks of its own, and to do so is not to impair the obligation of its contract.

The demurrer is sustained.

WALKER v. UNITED STATES.

UNITED STATES v. WALKER.

(Circuit Court, M. D. Alabama. August 2, 1905.)

1. UNITED STATES—SUITS AGAINST—LIMITATION.

The limitation contained in Act March 3, 1887, c. 359, § 1, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], authorizing suits against the United States that "no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made," in the case of a suit by a marshal to recover fees or disbursements, begins to run as to each item from the time the service was rendered or the disbursement made, and not from the expiration of the plaintiff's term of office.

2. SAME—SUIT AGAINST CITIZEN—RULES GOVERNING RIGHT OF RECOVERY.

When the sovereign comes into court to assert a pecuniary demand against the citizen or subject, the court has authority and is under duty to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man.

3. ESTOPPEL—ACTS OF GOVERNMENT OFFICERS.

If officers of the United States are authorized to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, their acts or omissions may in a proper case work an estoppel against the government.

[Ed. Note.—Estoppel against state or United States, see note to *State of Michigan v. Jackson, L. & S. R. Co.*, 16 C. C. A. 353.]

4. UNITED STATES—COMPENSATION OF OFFICERS—RECOVERY OF PAYMENTS.

Where a marshal has in good faith rendered accounts against the United States, covering services of his deputies, which have been audited and allowed by the proper accounting officers, and paid in accordance with the rules which have always previously been recognized as governing such allowances, and with knowledge that the greater part of the money would be paid over to the deputies rendering the services, the government is not entitled to recover the sums so paid from the marshal after years have elapsed, and he has gone out of office, and is without remedy to recoup his loss, and during which time no objection has been made to such payments by the executive departments or by Congress, which continued to appropriate money therefor, even though the allowances may have been made under an erroneous construction of the law.

On Motions for Judgment.

On the 8th of April, 1898, B. W. Walker, late marshal for the Middle district of Alabama, brought suit against the United States in the Circuit Court,

under the act of March 3, 1887, to recover \$2,268 upon certain disallowed claims for mileage, fees, and expenses between February 14, 1890, and September 16, 1893. The United States interposed the plea of the statute of limitation of six years. Afterwards, on the 2d day of July, 1899, the United States set up a counterclaim for \$842. All the claims were referred to a master to state the accounts. He reported on the facts only; his conclusions of law being waived by consent. The case and counterclaim were submitted on the report, and agreement as to certain facts, and the admission by Walker that he was not entitled to recover for the services set forth in Exhibit B to the master's report. Walker moved for decree in his favor upon the matters set forth in Exhibit A to the master's report, and for the disallowance of the government's counterclaim. The government made a counter motion to reject Walker's claims, and for judgment in its favor on its counterclaim. The facts are fully set forth in the opinion.

Chas. P. and Edwin F. Jones, for petitioner.

W. S. Reese, Dist. Atty., opposed.

JONES, District Judge. The proviso to the first section of the act "to provide for the bringing of suits against the government of the United States," approved March 3, 1887 (24 Stat. 505, c. 359 [U. S. Comp. St. 1901, p. 752]), under which this suit is brought, declares:

"No suit against the government of the United States shall be allowed under this act, unless the same shall have been brought within six years after the right accrued for which claim is made."

Petitioner's counsel contend that:

"The mere items of the account are but the details of the daily duties of the marshal, and continue until his term of office expires; that the government always regards the compensation of the marshal as subject to revision during his term of office; that he has the right, up to the time he ceases to be marshal, to present any omitted claims for services, and the limitation does not begin to run until he ceases to be marshal."

The court, under well-settled principles, has no authority to engraft exceptions upon a statute of limitations which the statute itself does not make. Adopting the petitioner's view would require the court to hold that the limitation does not run against claims for services by the marshal so long as he remains in office, notwithstanding the command of the statute that the limitation shall begin to run from the time the right accrued. *Kendall v. United States*, 107 U. S. 125, 2 Sup. Ct. 277, 27 L. Ed. 437. Each item of service rendered by Walker prior to the 8th day of April, 1892, is clearly barred.

In seeking the principle which must control the fate of the counterclaim, it is important to bear in mind the law and the facts of the particular transaction out of which that claim arose, and the time and circumstances under which it is brought forward. The law did not contemplate that the marshal could discharge his important duties without help, and therefore created the office of deputy marshal. It did not contemplate that either of these officers should perform public services without remuneration, and consequently made proper provision therefor. At the time of the transactions here involved that remuneration did not take the form of a salary, but consisted of a fee or allowance for each service in the marshal's

settlements at stated periods with the Treasury Department. In the matter of his compensation, the deputy marshal, although a public officer performing public services, occupied the anomalous position of a stranger to the government. *Douglas v. Wallace*, 161 U. S. 349, 16 Sup. Ct. 485, 40 L. Ed. 727. Nevertheless the law bound the marshal to include the fees earned by his deputies in his accounts, and to collect them from the government, in order that he might not retain more than the maximum compensation allowed by law, and that he might have a fund out of which to pay his deputies for their services. It has always been the rule that the marshal shall collect such fees, and pay over to his deputies their proportion. The agreed facts do not disclose whether Walker's deputies bound themselves in any way to repay to him the portion paid over to them, if the government, after allowing and paying these fees to the marshal, should seek to recover them from him; and it is unnecessary, therefore, to inquire whether in the absence of such a contract he could, under any circumstances, recover what he had paid them, through mistake of law, for services rendered by them. We may assume that, as between them, he bears the loss. In the discharge of his legal and moral duty, Walker prepared and rendered his accounts, including therein these particular fees, during each year of his incumbency of the office. He made no concealment or misstatement, and there was no fraud. Every one acted honestly and in good faith, relying on a long, and during the time these payments were made an unbroken, practice of the government to allow and pay for these particular services. The court to which the accounts were presented approved them, and the proper officials of the Treasury Department allowed them, and Walker collected the money from the government, and paid three-fourths of the amount of these fees to his deputies from time to time as he made settlements, and retained the balance, as was his duty to do, under the law as then construed by every department of the government which had acted or spoken on the subject. The government knew, when the money was paid to Walker, that the greater part of it would be immediately paid out to others, who in fact, whatever may be the legal theory, had rendered services to the government, to pay for which this very money was paid to him. The government repeatedly and uniformly paid these fees in a consecutive course of dealings with him for four years, and then, after a delay of five years after Walker's retirement from office, for the first time makes known its intention to correct what was at least a common error by ripping up all these settlements and compelling him to refund the money. It knew full well that every day's delay in making known to Walker its changed attitude would add to his difficulty in saving himself harmless, if, indeed, it was ever in his power after paying over the money to his deputies. If a like transaction had occurred between Walker and anybody else, he could successfully reply, when sued to recover the money:

"You are estopped. You knew that in the course of our business dealings we had repeated settlements, in which I dealt with you, not only for myself,

but for third persons to whom I was under obligation to pay for services which you recognized were for your benefit, and that out of the money you paid me, and on the faith of your acts, I was constantly paying over a part of it to these third persons. I rendered you fair and honest statements. You had my accounts examined by your representative, and we had settlements, to which we both then agreed, and on which you paid the balances in my favor. I accepted these settlements as finalities. It is now too late for you to reverse your attitude towards me as to those past and settled transactions."

After much deliberation, the court has reached the conclusion, whatever may be the general rule, that under the facts of this case the United States stands, as to its counterclaim, upon no better footing than would the private citizen, though doubtless it may recover money paid under mistake of law by its officers. It is conceded that the money the government now seeks to recover by its counterclaim was illegally paid out, that the United States cannot be defeated or barred of its rights by the mere laches of its agents, that it cannot be estopped by the unauthorized acts of its accounting officers, that it is not subject to the statute of limitations, and that the unauthorized acts of his agents never bind the sovereign. It is, however, equally true, when the sovereign becomes an actor in a court of justice, especially in an action which proceeds on equitable principles, that his rights must be determined upon those fixed principles of justice which govern between man and man in like situation, and that the sovereign will be bound, as an individual would be, by his own acts, or by (what is the same thing) acts of his agents lawfully done within the purview of the authority he commits to them.

United States v. Arredondo, 6 Pet. 712, 8 L. Ed. 547, was a suit, under an act by which the United States consented to be sued, to determine whether certain lands in Florida were private property, or passed to the government by the cession from the King of Spain. The Supreme Court said:

"By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man on the same subject-matter."

When the sovereign sues, he brings with him no privileges which exempt him from the common fare of suitors. *King of Spain v. Hullett*, 1 Clark & F. 333; *Rothschilds v. Queen of Portugal*, 1 Young & C. 594. In the latter case, a question arose as to the right of the Rothschilds to retain interest out of a fund in their hands against the Queen. Baron Alderson said:

"Now, if the conduct of her most faithful majesty, through her lawfully authorized agents, was such as to induce the Rothschilds as reasonable men to suppose that by such delay they were acting in conformity to her majesty's wishes, they would justly be entitled to charge her with that interest."

In *The Newbattle*, 10 Ct. App. Prob. Div. L. R. 33, the owners of the *Marie Louise* asked that the Belgian government, which had instituted proceedings in admiralty to recover damages for a collision with one of its ships, be required to give security for the payment of damages to the defendants, who brought a counterclaim.

The order was granted, and affirmed on appeal. Brett, Master of the Rolls, said:

"If a sovereign prince invokes the jurisdiction of the court as a plaintiff, the court can make all proper orders against him. The court has never hesitated to exercise its powers against a foreign government to that extent."

Cotton, L. J., said:

"When a government comes in as a suitor, it submits to the jurisdiction of the court and to all orders that may be properly made. Regard must, of course, be had to the fact that in this case the King of the Belgians is a sovereign prince, but the order, nevertheless, is a proper one. It is a reasonable principle that a plaintiff, whose ship cannot be seized, and against whom a cross-action has been brought, put the defendant in the position as if he (the defendant) were a plaintiff in an original action against a defendant whose ship could be arrested as security."

The Supreme Court of the United States upholds the rights of its citizens against its own government, when it enters its courts against them, quite as far as the courts of England go in enforcing the rights of English subjects in suits against them by foreign princes. Indeed, it would seem it has gone a little further. There is no statute which authorizes the courts of the United States to seize property of the United States or to enforce liens thereon; yet, in *The Davis*, 10 Wall. 17, 19 L. Ed. 875, property of the United States on board of a vessel, which was seized by the marshal before it came into the actual possession of any officer of the United States, was subjected to a lien for salvage, against the objection of the United States. The Supreme Court said:

"The United States, without any violation of law by the marshal, was reduced to the necessity of becoming claimant and actor, to assert her claims to the cotton. Under the circumstances, we think it was the duty of the court to enforce the lien of the libelants for salvage before it restored the cotton to the officers of the government."

A like doctrine, upon like reasons, was applied in *The Siren*, 7 Wall. 159, 19 L. Ed. 129.

The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the government. *Lindsey v. Hawes*, 2 Black, 560, 17 L. Ed. 265; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *U. S. v. Bank of Metropolis*, 15 Pet. 392, 10 L. Ed. 774; *Sinking Fund Cases*, 99 U. S. 719, 25 L. Ed. 496; *U. S. v. Barker*, 12 Wheat. 559, 6 L. Ed. 728; *Cooke v. U. S.*, 91 U. S. 398, 23 L. Ed. 237; *Duval v. U. S.*, 25 Ct. Cl. 60; *Hartson v. U. S.*, 21 Ct. Cl. 456. The principle that the sovereign is bound by his own acts, and those of his lawfully authorized agents within the purview of their authority, is a wholesome one, and requires the courts to

visit an estoppel upon the sovereign in a proper case, where he invokes judicial action. While the application of the doctrine is attended with difficulty under our institutions, where sovereignty of the United States does not reside in any one person or collection of persons, that difficulty is no reason for rejecting the operation of the principle, if the facts of the particular case will admit of its application.

After Walker went out of office and settled his accounts, the relation between him and the government was no longer that of subordinate and sovereign in the administration of a function of government. Thereafter, they occupied the status of creditor and debtor, and that status was such that he could not be made to answer, except by reopening repeated and closed settlements. This creditor owed this debtor the same duty, not to prejudice him by delay in making known his purpose to go behind the settlements and recover money paid under them, that a private person would under similar circumstances. The attention of the government was called to the fact that these payments were being made in Tanner's suit in the Court of Claims in 1891, in which it was cast. The United States certainly knew the facts in 1893, when the Supreme Court reversed the decision of the Court of Claims. It waited five years after Walker went out of office before it manifested any dissatisfaction. It must be kept in mind that this is not a mere case of debtor and creditor, and mere delay on the part of the government to sue the debtor. If that were the whole case, the principle that the government is not bound by the laches of its agent would be fatal to the debtor's right to complain. Here there is much more. By formal and executed settlements the defendant occupies the status toward the government of a creditor whose debt had been paid, and the government occupies the relation to him of a debtor who had discharged its obligation. The relation of debtor and creditor cannot be revived, except by a changed status between the parties. The government, in order to succeed, must be entitled to change its status to Walker, and Walker's status to it. This can be effected only by reopening and vacating the executed settlements. Some affirmative act is necessary on the part of the government to effect that changed status. Whenever an affirmative act is necessary on behalf of the United States to effect or enforce a pecuniary right against an individual, the officer or department whose duty it is to do that act represents the United States as to that matter, and it is bound by his action or nonaction. *United States v. Barker*, 12 Wheat. 559, 6 L. Ed. 728; *United States v. Bank*, 15 Pet. 377, 10 L. Ed. 774.

The reopening of closed and executed settlements involves matters of discretion and judgment, and may jeopardize pecuniary interests of the government. Such questions are governmental or political in a sense, and are primarily committed to the executive departments. The laws of the United States certainly authorize some of its executive departments to determine its policy as to the reopening of executed settlements, and put upon them the duty to

determine whether it is to the interest of the United States to change its status as to them. If the department to which is committed the duty to determine whether the government will reopen a closed and executed settlement, and thus to treat as a debtor one whom it has heretofore treated as a paid creditor, delays or postpones its decision to reopen such matter until it cannot be done without prejudice and injury to one who, believing himself a creditor, and whom the United States has treated as such, in reliance upon these settlements has gone on paying out money to people for whom he really collected it from the government, it would seem, on principle, that such delay in deciding or moving under such circumstances, by such a representative of the United States, would estop it. This is something very different from the mere negligence or failure to act, which is only the laches of an agent, for which the United States is not responsible. It is not laches in any sense. It involves no element of failure to discharge or unauthorized discharge of duty. On the contrary, it is the taking of a position on behalf of the government by lawfully deciding a matter which the sovereign commits to the determination of that agent. That determination, of course, has no element of *res adjudicata*, and therefore may be changed by the government at will; but, as long as the status made by the executed settlement and the failure to reopen it exists and remains in force, it is the status or act of the United States. If there be delay in changing this status to the prejudice of the party who settled with the government, it is the delay of the United States. It is not necessary, however, to rest the disposition of the counterclaim, on that ground.

On the faith of the action of the government officials, Walker has paid over, from time to time through a series of years, without notice of objection from any quarter, a large part of the money to third persons for services by them rendered to the government, and in whose behalf it was his duty to present the account to the government. He has now no recourse against those third persons. The money, it turns out, was illegally paid to him. The fact has been known to the United States for years. The United States has remained inactive for years. It is the United States which now sues. It is the United States which seeks to put Walker at a disadvantage by avoiding his just claims by the statute of limitations, and yet to compel him to pay money it knew, at the time it paid it to him, he would almost immediately pay out to third persons for services they had rendered to the United States, being induced thereto by the usage and acts of the officers of the United States in time and again acknowledging and paying him such claims. Certainly, if no other department of the government could take an attitude which could bind the United States, Congress, which represents its sovereignty as to such matters, could pursue a course of conduct with reference to it, which would be that of the United States, and bind it. The history of its legislation, and its entire attitude, show that Congress, at the time these payments were made, considered them lawful, and did not disapprove them. Con-

gress enacted the law by which deputy marshals performed services for the United States in the name of the marshal. Congress knew that the deputy marshals were compensated for their services by a portion of the fees earned by them, and that its auditing officers had for years allowed and paid the fees here in dispute. Congress, with knowledge that the United States was allowing and paying these claims, and that the marshals in turn were constantly collecting and paying them over to deputy marshals, appropriated money, year after year, to pay the expenses of the courts, which it knew were made up in part in payment of these very fees. There was nothing to put even the most prudent man on inquiry, or to suggest that the claims were improper or illegal, or that the government would retrace its steps and at some future time seek to hold Walker accountable for receiving and paying out money, which all of its departments, time after time, admitted was due to him, and as to which, whatever may have been his technical relations, he was in fact and in morals only a conduit to pass the money to the persons to whom it belonged. It is not money which the government *ex æquo et bono* is entitled to recover from him. Whether or not the payments, at the time they were made to Walker, were in fact authorized by the existing statutes is not now material. They are transactions which have been executed and closed, and Congress, the legislative power, which could treat them as legal at that time, and thereby make them legal, did treat them as legal at that time.

In *United States v. McDaniel*, 7 Pet. 15, 8 L. Ed. 587, it is said:

"Usages have been established in every department of the government, which have become a kind of common law and regulate the rights and duties of those who act within their respective limits, and no change of such usages can have a retrospective effect, but must be limited to the future. A usage cannot alter the law, but is evidence of the construction given to it, and must be considered as binding on past transactions."

While this language, in view of the case before the court and subsequent decisions, cannot be construed as a declaration that money paid out without legal authority in transactions which have been settled and closed, and in accordance with the usages of the government, cannot afterwards be recovered, it is most convincing to show that the reopening of a settled and closed account, when it would result in hardship and injustice, may be prevented, if the facts and circumstances give rise to the principle of estoppel.

If this action of Congress, the usages of the executive departments, and the approval of the courts upholding the validity of these payments during the whole period of the repeated settlements with Walker, did not then represent the attitude of the sovereign as to this matter, and do not now estop the United States from recovering money honestly received by Walker and paid out by him, in reliance upon its attitude, to third persons to whom the government expected it to be paid, and against whom he has now no redress, it is difficult to conceive of any case where the sovereign may not make his courts the mere instruments of his will to amerce his own citizens for pursuing a line of conduct which was the natural and inevitable result of the sovereign's long and deliberate course of deal-

ing with them. The sovereign has no prerogative to compel his courts to depart from the fixed principles of justice when he enters their portals to adjust his business transactions with his own citizens.

It must be admitted that the estoppel as to the portion of these fees which was retained is not as strong as that relating to the portion which Walker paid out. It would seem, however, that the United States should not now be permitted to recover that portion any more than the other. These payments, when made, were treated by Congress as valid, as we have seen above, and the settlements were closed and executed before Walker went out of office, and he accepted them as finalities. The evidence does not enable the court to determine whether, if this portion of the fees be refunded by Walker, he may not be correspondingly prejudiced as to his compensation as marshal in some of the years he was in office. The amount was calculated in the sums which made up the maximum compensation he was entitled to retain during each of those four years. If the amount be now taken from him, he cannot recoup his loss, as he could at the time, by retaining a corresponding amount of other fees earned in those years. The only evidence before the court is that owing to disallowances including payments about the Mobile & Girard Railroad, Walker's aggregate compensation for the whole term of nearly four years was \$550 less per annum than the maximum allowed him by law each year. This does not prove that in some of these years he did not account to the government for more than \$6,000 of fees; the portions here involved being included in that amount. It would seem the burden is on the government, in such a transaction as that now before the court, to show that the accounts could be reopened to the extent it asks without doing injustice in this particular to Walker. Besides, if the court correctly apprehends the principle which controlled the government's counterclaim in *Badeau's Case*, 130 U. S. 439, 9 Sup. Ct. 579, 32 L. Ed. 997, it is impossible to distinguish this matter from that.

In *Johnson v. United States*, 124 U. S. 254, 8 Sup. Ct. 446, 31 L. Ed. 389, the Supreme Court said:

"It would be an exceedingly dangerous doctrine that settled accounts, where the United States have acted on the settlement and paid the balance found due on the basis of that settlement, could be opened or set aside merely because some of the prescribed steps in the accounting, which it was the duty of the head of the department to see had been taken, had been in fact omitted, or if they could be opened and set aside on account of technical irregularities in the allowance of expenses years afterwards, when the remedy of the party against the United States is barred by the statute of limitations, and the remedies of the United States on the other side are intact, owing to its not being subject to any act of limitations."

While that is not exactly this case, this observation of the court illustrates the danger of the doctrine which the government pushes in this case. Here, owing to the statute of limitations, the government has avoided just claims of Walker which exceed the demand involved in the counterclaim. To allow the government under

such circumstances to kill his claims with the bar of the statute, and then to take advantage of its sovereign character to recover money from Walker, who received and paid out the money in good faith, and who cannot protect himself by the statute of limitations, would be manifestly most unjust. Walker's conduct does not bring him within the principle of *McElrath v. United States*, 102 U. S. 441, 26 L. Ed. 189. He, unlike *McElrath*, accepted the final settlements made with the auditing department in full of the accounts then presented, and did not commence suit against the government to avoid its ruling as to any matters involved in those settled accounts. His attitude does not, as did that of the plaintiff in *McElrath's Case*, "invite the court to go behind the settlement." The result is that all the claims of Walker accruing prior to the 8th of April, 1892, must be rejected, and those accruing after that date must be allowed; and the counterclaim of the government must be disallowed.

This opinion will be filed in the case as the statute requires, and the clerk will enter upon the minutes the following findings of fact and conclusions of law, and the judgment of the court thereon:

Came the petitioner by his attorneys, also came the United States by the district attorney, and the cause and the counterclaim are submitted for decision upon the pleadings, the master's report filed herein on the 30th of June, 1905, the agreed state of facts on file, and the admissions of the parties in open court.

Finding of Facts.

Thereupon the court finds the facts to be as follows: On the 8th day of April, 1898, Walker brought suit against the United States to recover the sum of \$2,268 upon certain disallowed claims for mileage, fees, and expenses claimed to be due him between February 14, 1890, and September 16, 1893. These various claims are itemized and set forth in Exhibits A and B to the master's report. Walker was duly appointed and qualified as marshal for the Middle district of Alabama on October 21, 1889, and continued to discharge the duties of the office until June 30, 1893, when his successor qualified. During that period he had various settlements with the Treasury Department up to and including September 16, 1893. None of the items or claims embraced in his suit were included in any of Walker's settlements with the Treasury Department, but consist entirely of items omitted from his accounts on those settlements. On the various settlements made with him, Walker accepted the amounts allowed in full of the accounts presented. The petitioner, by himself and deputies, actually and necessarily performed each and all the services set forth and specified in Exhibit A to the master's report at the instance and request of the United States; and the sums charged respectively therefor are the legal fees and charges authorized by law, which Walker is entitled to demand and receive from the United States for the services, which aggregate the sum of \$1,132.84 and are still unpaid. The account containing the items, as well as those specified in Exhibit B, was properly certified and presented to the accounting officers of

the Treasury Department, and disallowed before suit brought. The government's counterclaim, filed in this court July 2, 1899, is made up of amounts paid by the government for services of Walker and his deputies in and about 421 warrants of commitment, at \$2 each, on the various dates and in the cases specified in Exhibit C, amounting in all to the sum of \$842, which, as the counterclaim alleges, were paid to him "through errors and misconstructions of law by the accounting officers of the government." These items went into Walker's regular accounts, and were included in his settlements with the Treasury Department, and the amounts thereof were paid over to him from time to time as he made his various settlements, up to and including September 16, 1893, and have never been refunded by him. The services for which claim is made in each of these cases were actually rendered. Exhibit C to the master's report correctly sets forth the amount paid to the plaintiff as to these commitment warrants, and the dates and cases in which the payments were made. No claim is made by Walker in his suit for allowance for commitment warrants. No such allowances were made or paid to Walker, after March 6, 1893, the date of the decision in *United States v. Tanner*, 147 U. S. 661, 13 Sup. Ct. 436, 37 L. Ed. 321, wherein it was held that such payments were illegal. Walker paid three-fourths of the amount received by him upon these commitment warrants to his deputy marshals before the government filed its counterclaim; and at that time all remedy of Walker, if he ever had any, to recover from his deputy marshals the amount demanded of him by the government on this account, was barred by the statute of limitations. No demand was ever made upon Walker to refund these commitment fees, or dissatisfaction expressed to him by any officer of the government as to their allowance and payment, until the filing of the government's counterclaim. He presented and was allowed these claims for commitment warrants in good faith, believing them to be legal under the long-continued practice of the accounting officers of the Treasury Department. Exhibits A, B, and C to the master's report correctly state the dates, services, amounts, and case in which the various claims were made for services, mileage, and expenses, which are involved in this suit and counterclaim. The yearly compensation received by Walker during any one year of his term of office is not shown. The only evidence is that "Walker did not receive the maximum compensation of \$6,000, allowed by law during his term of office from 1889 to 1893, but by disallowances and payments to agents of the Mobile & Girard Railroad received a less sum, the deficiency being for the four years about \$2,200"; and this the court finds to be true.

Conclusions of Law.

1. The court finds as a matter of law that the United States is estopped and precluded from maintaining its counterclaim, amounting to \$842, and that it cannot now rightfully demand the payment thereof from the petitioner.

2. That the petitioner's admission in open court that he is not entitled to recover of the United States the claims set forth in Exhibit B to the master's report is correctly made in point of law, and that as a matter of law petitioner is not entitled to recover any of the claims set forth in Exhibit B.

3. That petitioner's claims set forth in Exhibit A, more particularly specified and described in the auditor's certificates mentioned therein, to wit, Nos. 119,133, 120,807, 122,904, 125,880, 128,907, 131,451, 133,292, 133,461, 135,282, and 137,418, are barred by the statute of limitations of six years.

4. That the claims set forth in Exhibit A to the master's report, and more particularly specified in the auditor's certificates contained therein, to wit, Nos. 139,735, 142,073, 145,858, and 149,120, amounting in the aggregate to \$217.86, are not barred by the statute of limitations, but constitute a valid obligation of the United States, which it is legally bound to pay the petitioner.

Judgment.

Now, in consideration of the premises, it is considered, ordered, and adjudged by the court as follows: (1) That the counterclaim interposed in this suit by the United States be, and the same is, hereby rejected and disallowed. (2) That the claims of the petitioner set forth in Exhibit B to the master's report be, and the same are, hereby disallowed and rejected. (3) That all the claims preferred by petitioner for services rendered prior to April 8, 1892, and which are particularly specified and described in the auditor's certificates Nos. 119,133, 120,807, 122,904, 125,880, 128,907, 131,451, 133,292, 133,461, 135,282, and 137,418, which are made a part of the master's report in Exhibit A, are barred by the statute of limitations, and the same are hereby rejected and disallowed. (4) That the petitioner's claims, specifically set forth and described in the auditor's certificates Nos. 139,735, 142,073, 145,858, and 149,120, amounting in the aggregate to \$217.86 principal, are not barred by the statute of limitations, and constitute a valid obligation of the United States, which it is legally bound to pay to the petitioner. And it is thereupon further ordered, adjudged, and decreed that the said B. W. Walker do have and recover of the United States of America, in the mode provided by law, the sum of \$217.86, together with the costs of this suit from the time of joining issue upon the plaintiff's right to recover, which are now allowed and taxed at the sum of \$30; the same being the amount of fees paid to the clerk of the court.

In re NEW YORK CAR WHEEL WORKS.

(District Court, W. D. New York. January 30, 1905.)

No. 1,570.

BANKRUPTCY—PROVABLE CLAIMS—VALIDITY OF NOTES OF CORPORATION.

Notes executed by a bankrupt corporation to the claimant for the amount of a sight draft which had been drawn by another corporation on the bankrupt and cashed by the claimant, but which had not been accepted, *held* to have been based on a valuable consideration, and to be valid against the bankrupt estate, where it appeared that the drafts were drawn in renewal of others which the bankrupt had accepted, and cashed by the claimant in accordance with a long-established custom, from which it had a right to infer that they represented an indebtedness of the bankrupt, and also that, on the execution of the notes, claimant surrendered to the bankrupt valuable collateral, which later passed to its trustee.

In Bankruptcy. On question certified by referee.

Opinion of William H. Hotchkiss, referee, on motion to expunge the claim of the North American Trust Company, and to compel restitution of the first dividend previously paid:

The claim of the North American Trust Company was on November 4, 1903, duly allowed at \$94,198.50. Later a dividend of 10% was paid the claimant. Later, after a second dividend had been declared, but before it was paid, this motion was made; it taking the form of a petition filed March 4, 1904. Payment of the second dividend was thereupon withheld, and the controversy proceeded with. The claim rests on three promissory notes uttered by the bankrupt corporation, all dated June 23, 1902—the first for \$25,917.64, the second for \$25,917.64, and the third for \$77,752.93; the first and second showing credit indorsements of \$17,482.36 and \$25,917.64, respectively. At the time of its allowance the security held to such notes was estimated as worthless.

The present motion, which is made by the trustee on information not in his possession at the time of the allowance, rests on the contentions that the notes do not represent money loaned by the claimant to the bankrupt, but an indebtedness of the P. H. Griffin Machine Works (a trade-name of P. H. Griffin, the president of the bankrupt) assumed by the bankrupt. In brief, the trustee challenges the consideration and alleges *ultra vires*. From these simple propositions the trustee has, as the record will show, wandered rather far afield. The breadth of his inquiry and the liberality allowed in the matter of evidence suggest that the facts bearing on this issue be now clearly, and, if possible, briefly, stated. In no other way may the fog which seems to have settled over counsel and court be lifted.

First, the maze of corporations whose names fairly punctuate this record. The New York Car Wheel Works is the bankrupt, and will hereafter be termed the "bankrupt." The North American Trust Company is the claimant, and will be termed the "trust company" or the "claimant." The Niagara Bank of Buffalo will be termed the "state bank." The City National Bank of Buffalo will be termed the "national bank." The International Car Wheel Company will be termed the "holding company." The Boston Car Wheel Company, the Manistique Iron Company, the Canada Iron Furnace Company, and the St. Thomas Car Wheel Company, which were companies allied to the bankrupt, will be termed the "—— company." Besides, the trustee in bankruptcy, who is also the receiver of the national bank, will be termed the "receiver," and the P. H. Griffin Machine Works, already referred to, will be termed the "machine company."

Second, it is essential to find the exact status of the parties on June 29, 1901; this date being selected because concededly the failure of the national bank on that day was the first step in a series of transactions relied on by the trustee to establish his position. On that day the New York Car Wheel Works was a going concern—a corporation which had been for some time exclusively managed by its president, Mr. Griffin, and, so far as this record

shows, able to meet its obligations as they matured. Likewise the trust company, the national bank, and the state bank were doing a regular banking business—the first at New York, and the others at Buffalo. So, also, Mr. Griffin was doing business in the regular way, though using the machine company as a trade-name, without, so far as appears, any question as to his solvency. It seems to be sufficiently established that it was the course of business of the machine company to draw largely on the bankrupt at its London office, and sell such drafts to the trust company through either the national or the state bank, and that, as between the present bankrupt and the claimant trust company, such practice had become a business custom. This custom seems to have included the selling in the same way of more drafts with which to pay the previous drafts on presentation in London. That the drafts were thus met with the proceeds of new drafts was admittedly known to the claimant, though it asserts that this was that it might have two names on its paper. It appears also that the custom involved the acceptance of the drafts by the bankrupt in London, and that all drafts purchased by the claimant prior to June 29, 1901, except those in transit, had been so accepted. The failure of the national bank, followed almost immediately by that of the state bank, destroyed the credit equilibrium necessary to a transaction of this character, and the drafts bought by the claimant and then in transit, aggregating in American money something over \$149,000, were not accepted by the bankrupt when presented at its London office, and, as produced in evidence, show no acceptance since. It does not appear as clearly as might be wished to whose credit the moneys advanced by the claimant were placed on its books, but there is enough in the case to warrant a finding that it went to the credit of the machine works—i. e., to Mr. Griffin individually—rather than to the present bankrupt. No other obligation of the bankrupt to the claimant appears to have existed at that time. It seems to follow, therefore, that on June 29, 1901, the machine works, and not the bankrupt, was the actual debtor, and that all the claimant then had against the bankrupt was a cause of action, asserted by the trustee to be of more than doubtful validity, to compel an acceptance of the drafts in transit, on which payment was subsequently refused. But the claimant then held as collateral certain shares of the stock of the Manistique, the Canada, and the St. Thomas Companies, as well as a large block of the stock of the bankrupt, pledged by Mr. Griffin, and later acquired 1,000 shares of the stock of the Boston Company, all of which shares it held when the bankrupt gave the notes, the renewals of which now constitute its claim. There is some confusion in the record as to the ownership of the Manistique, Canada, St. Thomas, and New York stocks, so held as collateral, but they appear to have been the property of Mr. Griffin.

The transaction whereby the claimant acquired the Boston stock is vigorously challenged by the trustee; he asserting that such stock belonged to the bankrupt, and was transferred to the claimant in cancellation of a past-due indebtedness of the machine company, and that such transfer is therefore now voidable at the instance of the bankrupt's creditors whom he represents. This, indeed, is a case within the main case. For, if the claimant's cause of action to compel acceptance by the bankrupt in London was not a sufficient consideration for the giving of the bankrupt's notes, it might be doubted whether the surrender to it of the stocks, other than the Boston stock, was a consideration adequate to sustain the claimant's position here. The Boston Company's stock was issued to the bankrupt, and seems (though there is not enough in the record to warrant a definite finding) to have been its property. Mr. Griffin, its president, some time after the failure of the two banks, and before December 23, 1901, delivered this stock, indorsed by the present bankrupt in blank, to the claimant. There is nothing in the record to show whether or not he did it as president of the bankrupt, or as president of the state bank; if so, whether or not he had authority so to do, or whether it did it merely as an individual apparently owning it. It was so delivered in exchange for a release by the claimant of the liability of the machine company as drawer, and of the state bank as indorser, of four or five of the drafts previously mentioned.

Such, then, were the relations of the parties on December 23, 1901, when the bankrupt issued five notes to the claimant, the renewals of which, less

credits, are the substance of the proof of debt here, and received in return the various stocks, including the Boston stock referred to above, and the drafts sold through the state bank, previously mentioned.

On this state of facts I intimated to counsel at an earlier stage of this hearing that the petition to expunge should be denied. Later the case was opened, and more evidence taken. It adds little to the facts necessary to determine this controversy. Had a jury been present, much of it would necessarily have been excluded. However, that the whole record may go to the judge for review, all of it not excluded in rulings at the end of this memorandum is received. The more important facts brought out by this supplementary evidence have to do with the disposition of the stocks turned over to the bankrupt by the claimant. This was in pursuance of an arrangement in which the great bulk of the bankrupt's then creditors joined, for the purpose of preventing an immediate winding up of the bankrupt's affairs, and to give it opportunity to pay its debts from its earnings. Some stress is laid on the fact that the claimant then received \$250,000 of the collateral bonds on a \$149,000 debt, while other creditors received but dollar for dollar. But I fail to discover how that tends to establish either want of consideration in the notes themselves, or an ultra vires act on the part of the corporation issuing them. Such evidence has therefore been stricken out. The 20% payment on the bonds was made up largely of \$100,000 realized from the sale of the Boston stock. The other stocks turned over by the claimant to the bankrupt, and by the latter to the holding company, were relatively of little value. The evidence is not sufficiently accurate to warrant the giving of any exact amount. Other pertinent facts will be stated in the discussion of the legal proposition involved.

The law bearing on this case has been exhaustively and ably briefed, and little independent investigation has been necessary. I confess to have been much shaken in my earlier belief that this petition should be denied by the brief of the trustee's attorney. Further investigation, however, seems to confirm the first impression.

Reduced to a narrow compass, the trustee claims: (1) that the transfer of the Boston stock was an ultra vires act by the bankrupt's president, and is therefore void as to the claimant; (2) that, this being so, there was not an adequate consideration passing between the claimant and the bankrupt for the notes of December 23, 1901; (3) and, as a branch of this latter contention, that the acceptance of the London drafts by the bankrupt was also ultra vires, and therefore void; (4) also that the issue of the notes of December 23, 1901, was an ultra vires act on the part of the bankrupt, and the same are therefore void in the hands of the claimant. It is difficult to discuss these four propositions singly, each overlapping or including the other. So far as may be, however, this will be done.

(1) What right, asks the trustee, had Mr. Griffin, as president of the corporation, to use its property to secure a release of his own obligation and that of a bank in which he was interested? Doubtless, if the stock was the property of the bankrupt, his act was ultra vires as to the bankrupt. On the other hand, there is nothing in this record to charge the claimant with either knowledge or notice that such was the fact. Undoubtedly, as held in *Wilson v. Met. Elev. R. Co.*, 120 N. Y. 145, 24 N. E. 384, 17 Am. St. Rep. 625, a person receiving from an officer of a corporation securities of that corporation is presumed to have received such securities with knowledge of the rights of the corporation. But all that the record shows is that the certificate was issued to the bankrupt corporation. On the other hand, it appears that it was regularly indorsed in blank by such corporation; and there being nothing to show whether the indorsement was in the handwriting of Mr. Griffin or another, under seal or by stamp, how it was made or by whom it was made, in the absence of such proof the presumption is the other way, namely, that the indorsement was authorized by the officers of the corporation, and for its benefit and advantage. *Rider, etc., Co. v. Roach*, 97 N. Y. 378. If so the claimant was warranted in treating it as Mr. Griffin's stock, and dealing with him accordingly. The claimant lays much stress upon *Cheever v. Pittsburgh, etc., R. Co.*, 150 N. Y. 59, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646—a case which well illustrates how the minds of different men look

upon an issue such as that now at bar, the Court of Appeals there dividing four to three. The majority opinion holds, in substance, that where a promissory note is issued by a corporation, being drawn and attested by its secretary and signed by its president, and, after being regularly indorsed by its payee, is negotiated for value to a third party by a partnership of which the corporation's president is the acting member, these facts are not sufficient to put such third party on inquiry, and make it bad faith on his part to purchase the note. Though the property here transferred was but a quasi negotiable, the rule is doubtless the same. Daniels on Negotiable Instruments (4th Ed.) § 1708g. So far as it is in point, therefore, this case supports the claimant rather than the trustee. But the facts in this record differ materially from those in the Cheever Case. Here the third party had been dealing with the corporation's president in both his representative and individual capacity for years. It knew him to be the executive head of a number of large industrial enterprises. It had already received from him stock apparently his own as collateral to his and the bankrupt's obligations. As president of the state bank, he was vitally interested in reducing its contingent liabilities. At this time the claimant also must have known that Mr. Griffin was largely interested in the Boston Company. He presented a certificate of that company's stock, regularly indorsed. These in the centers of finance pass from hand to hand with almost as great facility as bank notes—this on the presumption that possession and indorsement in blank evidence ownership. In these facts the claimant had the right to believe that it was Mr. Griffin's stock. While in considerable doubt, therefore, I am constrained to hold that there is not enough in this record to warrant the conclusion that the claimant acted in bad faith, in that it was put on inquiry. Another might easily reach the opposite conclusion. See dissenting opinion in Cheever v. Pittsburgh, etc., R. Co., supra. My decision, therefore, is intended to go no further than "Not proven," which, in courts, whatever be the effect of inferences or suspicions on the conclusions of individuals, must always result in the judgment, "Not so." The claimant also asserts that, even if it should be held that it knew or was put on inquiry that the Boston stock was the property of the bankrupt, the transaction, though thus ultra vires, is now closed, and the bankrupt, having clearly benefited thereby, should not now be heard to assert want of authority, and, still, further, that the door is shut to this plea by the bankrupt's subsequent ratification of its president's act. These points need not now, however, be discussed.

(2) If the conclusion just announced is correct, the trustee's second contention is also unsound. The Boston stock was valuable, netting \$100,000 on a sale shortly after being acquired by the bankrupt. If the claimant had a good title to this stock, it, in turning such stock over to the bankrupt with other stocks of more or less value besides, surely gave adequate consideration for the notes now at issue. Of this there can be no question, and the vigorous attack made on the Boston stock transaction serves to indicate that this is also the trustee's view. Further, I am not satisfied that the claimant has failed to show other valuable considerations for these notes. As a part of the transaction, it engaged to give and did give its services in securing the consents of creditors in large aggregate amount to the extension agreement then accomplished, and its officers agreed to become and became members of the bankrupt's board of directors during a large administration of affairs by its creditors. Whether or not there was consideration in the waiver of its claim to compel the acceptance of the London drafts, need not be here decided. It is suggested, however, that the surrender of a doubtful claim, provided it is colorable, is a sufficient consideration for a new promise. White v. Hoyt, 73 N. Y. 505; Zoebisch v. Von Minden, 120 N. Y. 406, 24 N. E. 795.

(3) The third contention of the trustee must also fail, at least as far as this controversy goes. Clearly the acceptance of the London drafts was for the accommodation of the machine company. It follows on settled principles that, as between the machine company and other parties chargeable with knowledge or notice, such acceptance was ultra vires and void. Cook on Corporations (5th Ed.) § 774. But this is not an action in which the present claimant seeks to compel the bankrupt to accept the drafts, and thus fix the liability it refused to recognize in July, 1901. The point is made only as an incident to

the main contention, that there was no consideration for the notes of December, 1901. Having already found that there was consideration, further discussion of this point is unnecessary.

(4) The other contention of the trustee may be quickly disposed of. Even conceding consideration, the notes of December 23, 1901, if not *intra vires* as to the payee, which still holds them, must fail. The trustee claims that the transaction was out of the ordinary course of business. The present bankrupt was insolvent, on the verge of bankruptcy, and known to be such by the claimant. While in that condition it issued to the claimant notes for over \$149,000. These notes, it is asserted, were executed and delivered without action thereon by the stockholders or even the directors of the corporation. Thus the corporation created a large apparent indebtedness, as is claimed, on the sole authority of its president, assisted by another officer acting under his direction. But even so, what followed? The consideration given was immediately transferred by the bankrupt to the holding company, and by it mortgaged or pledged to the present claimant as trustee, and later from time to time sold, and the money realized therefrom paid to the bankrupt's creditors. As a result, immediate bankruptcy was avoided, and the corporation continued in active business for nearly two years. What it wanted was a chance to recover its fortunes. It is apparent that, as the circumstances then were, this chance could only be won by securing possession of the Boston stock. Even granting that the bankrupt might have recovered this stock after action was brought, what would such recovery have availed? The corporation would have been in bankruptcy years before final judgment. Will such corporation now be heard to assert that the issue of these notes was unauthorized? The contract is executed, not executory. There was no bad faith on the part of the payee of the notes. The bankrupt reaped the benefits of the arrangement. *Woodruff v. Erie Ry. Co.*, 93 N. Y. 609; *Linkhauf v. Lombard*, 137 N. Y. 417, 33 N. E. 472, 20 L. R. A. 48, 33 Am. St. Rep. 743. It makes no difference that the chance thus gained did not have a successful issue. The corporation and the trustee representing it are therefore now estopped to set up *ultra vires*. So, it seems to me, is the trustee as the representative of creditors. It is elementary that he stands in no better position than they did. But creditors postdating December 23, 1901, would have no standing in an action on these notes. Earlier creditors, so far as this record shows, have either all been paid in full, or were parties to the extension agreement. The latter have received, largely from the avails of the Boston stock, 20% of their claims. To be sure, it does not appear that they had notice that the Boston stock was the property of their debtor. On the whole case, however, I do not believe they could overcome a plea of estoppel, were the issue between them and the claimant in another court. The trustee, as their representative, is therefore also estopped. Further, under the rule of *Rider Life Raft Co. v. Roach*, 97 N. Y. 378, it may be suggested that it was incumbent on the trustee to show affirmatively that the issue of the notes was without the authority of the corporation. This he has not done. So far as this record goes, they were therefore not *ultra vires*.

The claimant also asserts the well-settled rule that, where a party seeks to rescind a contract, it must offer to restore the other party to its position before the contract was made. I do not understand, however, that there is any issue of actual fraud here. This is not a case founded on rescission. Surely it would be unjust to permit one party to an *ultra vires* contract to defeat an action based on that informity by proof that the other party could not restore him to the position he occupied before. The numerous authorities on rescission cited by the claimant are not, therefore, in point.

On the whole case, therefore, I hold with the claimant. It may be that all the facts, if capable of proof, would warrant the rather sweeping inferences and conclusions stated in the trustee's brief. They are not proven—perhaps are beyond his reach. The difficulty with which he and his counsel have labored is one of time. Two years have elapsed since the transactions he complains of. Evidence then available may be scattered. Rights then existing may have been lost by neglect. If, as he claims, the bankrupt's president converted the Boston stock to his own use, the trustee has his remedy elsewhere. The issue here is simply as to the validity of these notes. For the

reasons stated. I think that validity established. The trustee will therefore pay the second dividend to the claimant, together with such interest on the amount (\$9,419.85) as it has earned in the depository since the date of declaration.

From what goes before it will be seen that in reaching this conclusion only the following evidence received tentatively has been excluded: (a) The testimony of the witnesses Wedder, Burnet, and Perkins, by deposition taken in New York, so far as the same relates to what was done with the stock given by the claimant for the notes after the same were delivered to the bankrupt; thus sustaining the claimant's objection on page 3 of proceedings on July 8, 1904, with an exception to the trustee. (b) The testimony of the same witnesses as to what was received for such stocks when they were subsequently disposed of by the holding company, except so far as such testimony tends to establish their value; thus sustaining, in part, the claimant's objection on the same page, with exception to both the claimant and the trustee. (c) The testimony of the witness Vedder in the same deposition as to whether any of such stocks came into his hands as treasurer; thus sustaining the claimant's objection, with exception to the trustee. (d) The testimony of the witness Aldrich as to the transaction whereby he, as receiver, disposed of certain stock of the Manistique Company, save so far as such testimony tends to establish its value; thus in part sustaining the claimant's objection on pages 3 and 4 of the proceedings of July 6, 1904, with exception to both the claimant and the trustee. (e) The testimony of the witness Aldrich as to the claimant receiving more than dollar for dollar of the holding company's bonds, thus sustaining the claimant's objection on page 7 of the proceedings of July 6, 1904, with exception to the trustee. (f) The testimony of any other witnesses, or of these witnesses elsewhere in the record, to the effect indicated in "a," "b," "c," "d," and "e," above, if duly objected to, with, in that event, exception to the party against whom the ruling is given.

Fred D. Corey, for trustee.

Cox, Kernan & Kimball, for claimant.

HAZEL, District Judge. The facts are sufficiently set forth in the opinion of the referee in bankruptcy, and I concur in the conclusions therein stated. Mr. Burnett, witness for claimant, substantially testified at the hearing that the sight drafts which were subsequently secured by the transfers of stock in the Boston Car Wheel Company, and evidenced by the promissory notes upon which the claim herein is based, were given in renewal of previous bills of exchange drawn in the same manner. Prior bills of exchange had been accepted by the bankrupt in London, and, according to the proofs, were received or discounted by the claimant in the ordinary course of business dealings. It had become a custom in the course of dealings between the North American Trust Company and the P. H. Griffin Machine Works for a number of years to draw on the bankrupt at its London office. The bills of exchange drawn in the manner indicated by the proofs were sight drafts in renewal of the original drafts. In the circumstances presented, which are mentioned more in detail in the opinion of the referee, it is difficult to conceive of any substantial reason why the trust company should have been suspicious when the original bills of exchange were drawn. True, a party to whom negotiable paper is presented for discount or sale before maturity by an officer of a corporation is bound to exercise caution and circumspection in order to escape the charge of bad faith when a defect in his title is urged. *Cheever v. Pittsburgh Railway Co.*, 150 N. Y. 59, 44 N. E.

701, 34 L. R. A. 69, 55 Am. St. Rep. 646. The title of the trust company, however, in the sight drafts, in view of the unchallenged original transactions, is not subject to attack unless it acted in bad faith. The mere negligent acceptance or purchase of the bills of exchange does not impute to the claimant a presumptive knowledge of any unlawful diversion of the proceeds by Mr. Griffin. The situation of the parties at the beginning of their relations was such that the trust company could rightfully presume that the drafts were drawn on the bankrupt pursuant to bona fide transactions existing between the drawer and drawee. The subsequent arrangements to secure the payment of the indebtedness are wholly dependent upon the original transaction, and upon a course of business dealing which the parties themselves adopted prior to the purchase of the sight drafts in question. Nothing occurred before the failures of the City National Bank and the Niagara Bank to put the claimant upon inquiry. There were no suspicious circumstances attached to the initial transaction to warrant the claimant in refusing the renewal drafts which evidently were a continuation of the original indebtedness. As the evidence falls short of showing the drafts in the beginning of the relations with the trust company to have been without consideration, it necessarily follows that the contention of the trustee that the transfer of the Boston stock was ultra vires must fail. Having concluded that, upon the main issues involved, the referee has correctly decided the questions submitted for review, a further discussion will not be necessary.

The question submitted, whether the claim of the North American Trust Company hitherto allowed by the referee should be expunged, is answered in the negative.

WHITE-SMITH MUSIC PUB. CO. v. APOLLO CO. (two cases).

(Circuit Court, S. D. New York. June 21, 1905.)

Nos. 8,126, 8,127.

1. COPYRIGHT—SUIT FOR INFRINGEMENT—TITLE TO SUPPORT.

Where the composer of a piece of music has placed it in the hands of a publishing company for publication and sale, it may reasonably be inferred that he intended to authorize the company to copyright the same; and where it does so in its own name, and he afterward ratifies its action, it is vested with the legal title to the copyright, which will support an action for its infringement.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 68.]

2. SAME—INFRINGEMENT—MUSICAL COMPOSITION.

A musical composition, as an idea or intellectual conception, is not subject to copyright, but only its material embodiment in the form of a writing or print may be copyrighted; and a copyright of such a printed composition is not infringed by a perforated record or sheet designed for use with mechanism to play the composition on a musical instrument.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 63.

Matters subject to copyright, see note to Cleland v. Thayer, 58 C. C. A. 273.]

In Equity. Suits for infringement of copyrights.

Dickerson, Brown, Raegener & Binney (Charles E. Hughes, Edwin H. Brown, and Alexander P. Browne, of counsel), for complainant.

Wilcox & Brodek (Charles S. Burton and Munday, Evarts & Adcock, of counsel), for defendant.

HAZEL, District Judge. These actions were brought to restrain the alleged infringement of copyrights in the musical compositions "Little Cotton Dolly" and "Kentucky Babe Schottische," composed by Adam Geibel. The bill avers that complainant was the publisher and proprietor of both copyrights, the musical compositions having been assigned and transferred to it by the composer. The answers are denial of infringement and of complainant's title to the copyrights in question. The elicited facts, which are not in serious conflict, apply to both cases, and the records in each are substantially the same. The legal principles involved, though important, are not, in view of prior adjudications, difficult of application. Complainant contends that the copyrights mentioned have been unlawfully infringed by the defendant, which concededly has sold the copyrighted musical compositions in the form of perforated records or sheets adapted to mechanically reproduce the music upon the pianoforte, pianola, and other musical instruments. The general question raised is whether the perforated music sheets for use in connection with mechanism for playing musical instruments is an infringement of complainant's copyrighted musical composition. The proofs show that perforated music sheets corresponding to staff notations are produced in various ways by persons skilled in the art, technically called the "cutter" or "arranger." Perforated matrices are prepared either from a printed sheet of music, from a perforated music roll, or by means of an automatic recording device, which simultaneously operates to produce a matrix while music is being played upon the piano. In the preparation of the matrices, as distinguished from a music roll prepared by a recording device, perforations or slots of varying width, are indicated; their positions and character are longitudinally and transversely arranged and accurately defined by a system of measurements correlative with the staff notations. The impracticability of reading a perforated sheet of music for the purpose of singing or playing the composition represented by the perforations is not seriously disputed, although complainant claims that the automatic records, like the staff notations, may be deciphered and learned. The evidence, however, quite conclusively establishes that the single purpose of the perforated sheets is to mechanically reproduce musical sounds, and that they are not, like the sheet music, addressed to the vision, or intended to be read.

Before discussing the principal point involved, it is proper that the question of disputed title of the copyrights be first considered. The defendant contends that the musical composition "Little Cotton Dolly" was licensed to the complainant as publisher, subject to

the payment of royalties, and was not transferred with the view of divesting the composer of the title therein. The court has considered this question, and the phraseology of the agreement of June 18, 1897, by which it probably might be concluded that only the right to publish the composition had been previously granted. Such an interpretation of the contract, however, in view of the oral evidence and acts of the parties, is not warranted. The proofs show, *inter alia*, that the composer authorized the copyrighting of the musical composition in the name of the complainant. The composition was delivered to the complainant by the composer in May, with the understanding that it should be published, and subsequently, in writing, he expressly authorized complainant to copyright the same. At this time, however, the composition had already been copyrighted by complainant in accordance with the laws of the United States respecting copyrights. Giving consideration to all the facts and surrounding circumstances, no repugnancy is perceivable between the agreement mentioned and any prior arrangement or understanding that complainant should possess the composition as its proprietor. The question is whether in fact there was such an assignment or transfer of the musical composition before copyrighting as to carry with it the privilege given by the statute to the composer. As the testimony upon this point is not entirely free from indefiniteness, we must look to the acts of the parties to ascertain their intention. It is not a strained presumption, giving effect to the transaction and the proofs, that complainant or its agent, Mr. White, who afterwards assigned the same to the complainant, was vested with the legal title as proprietor of the composition. It may reasonably be inferred that the composer, having placed the composition with the publisher for publication and distribution, intended to authorize him to obtain a copyright in his name, or in that of the corporation in whose behalf the assignment appears to have been taken. *Mifflin v. White*, 190 U. S. 263, 23 Sup. Ct. 769, 47 L. Ed. 1040; *Belford v. Scribner*, 144 U. S. 505, 12 Sup. Ct. 734, 36 L. Ed. 514. It was held in *Callaghan v. Myers*, 128 U. S. 658, 9 Sup. Ct. 177, 32 L. Ed. 547, that a written assignment may be necessary to convey title after obtaining a copyright, but a publisher undoubtedly may become the owner by parol transfer of the rights of the author or composer. Moreover, it clearly appears that the composer, Geibel, had knowledge of the copyrighting by the complainant prior to the agreement for royalties, and acquiesced therein. The later agreement contained nothing derogatory to the prior transaction or transfer of the composition, and would seem, in view of the facts, to be a ratification of that which had gone before. Hence it is sufficiently established by the evidence that the complainant had the exclusive right, as proprietor, to multiply copies of the copyrighted musical composition, and to expose the same for sale.

As stated, the important question for consideration is whether defendant's method of representing and reproducing the musical compositions infringed the copyrights of the complainant. The principle thought to control, based upon the Revised Statutes, is

found in *Perris v. Hexamer*, 99 U. S. 674, 25 L. Ed. 308. It is there stated:

"A copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. It follows that, to infringe this right, a substantial copy of the whole or of a material part must be produced."

By section 4952 of the Revised Statutes [U. S. Comp. St. 1901, p. 3406], the author or proprietor of any musical composition, upon compliance with the provisions of the copyright act, is given the exclusive liberty of copying and vending the same. Are the perforated music sheets or rolls, which are designed to mechanically represent or reproduce the copyrighted musical composition, copies thereof, within the meaning and intent of the statute? What did Congress intend by the words "musical composition"? These questions, though not entirely new, are interesting and important. The words "musical composition" undoubtedly relate to the intellectual conception of the composer; but manifestly a careful reading of the copyright law, in connection with the authorities construing the act, indicates that protection only of the material semblance in which the musical composition finds expression is afforded. *Ditson v. Littleton*, 67 Fed. 905, 15 C. C. A. 61. The musical composition, as an idea in the concrete, is not copyrightable as such. That which gives the conception corporeal and tangible existence is the subject of copyrighting. To hold otherwise, indeed, would be a wide departure from the obvious intention of Congress in extending to the author, inventor, designer, proprietor, etc., the protection secured by statute. But it is vigorously insisted that the proofs show that the perforated music sheet is in fact a record of the musical composition. Many witnesses of musical distinction have testified that the perforations are a form of notations without bars or measurements, and hence not only correspond with the tones of the musical composition, but that a perforated music roll or sheet is actually a record thereof. Opposed to this contention is the suggestion that under the constitutional power of Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries," a copyrightable musical composition must be a writing, and not, as already intimated, a mental conception not reduced to material form. The meaning of the word "writings," as employed in the Constitution, has been expressly defined in *Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349, to include "all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression." The restricted definition of the word "writings" does not, it is thought, permit the inclusion in section 4952 of the Revised Statutes [U. S. Comp. St. 1901, p. 3406] of a musical conception, or the inclusion of collated musical sounds or expressions of a musical composition. The words of the statute have reference to the tangible object that appeals to the sense of sight, and that which is susceptible of being reproduced by printing, copy-

ing, publishing, etc. It is contended that the enactment of January 6, 1897, § 4966 [U. S. Comp. St. 1901, p. 3415], indicates that Congress in the earlier provision, used the words "musical composition" with a view of securing protection to the author for his musical conception. The later provision inhibits the public performance of a copyrighted musical composition without the consent of the proprietor, unless the same has previously been dedicated to the public. *Werckmeister v. American Lithographic Co.* (C. C. A.) 134 Fed. 321. These two provisions, however, are not conflicting, and I perceive no reasonable objection to their standing together. I am of opinion that the reference to musical compositions, as employed in section 4952, is restricted to a writing, as that word is defined in the *Sarony Case*, supra. Moreover, the perforated sheets of music or records are not copies of the musical composition protected by the copyright laws. The significance of the word "copying," as applied to the subject under consideration, has been several times legally construed. *Kennedy v. McTammany* (C. C.) 33 Fed. 584; *Boosey v. Whight* [1899] 1 Ch. Div. 836; *Stern v. Rosey*, 17 App. D. C. 562. In the *Kennedy Case*, which was decided in 1888, Judge Colt held that perforated music rolls or strips of paper are not infringements of copyright sheets of music, and that such perforated sheets are designed not to occupy the field of sheet music, but are a mechanical invention to mechanically perform tunes. The *Boosey Case* was under a statute which did not in terms mention "musical composition," but the work of the composer was referred to in the English copyright act as sheet music, and in the decision appears to have been treated as if it were a book. Lindley, Master of the Rolls, speaking of the perforated sheets and the meaning of the word "copy," said:

"I have consulted Johnson's, Richardson's, and Murray's Dictionaries to ascertain the meanings attributed to the word 'copy'; and I do not myself think that the perforated sheet can be said to be a copy of the sheet of music, unless the word 'copy' is used in a very loose and inaccurate sense."

In the *Stern Case*, decided in 1901, it was held (Justice Shepard writing for the court) that the ordinary meaning of the words "copying," "publishing," etc., cannot be enlarged to include the reproduction through the agency of the phonograph of the sounds of musical instruments playing the music composed and published by the complainants. There apparently is little difference between the facts of the *Stern Case* and the facts here, except that in that case the alleged infringing record consisted of a disc or cylinder for reproducing sounds by means of the phonograph. The court further said:

"It is not pretended that the markings upon waxed cylinders can be made out by the eye or that they can be utilized in any other way than as parts of the mechanism of the phonograph."

The principles of the cases mentioned, which manifestly were enunciated after careful consideration, are fully applicable. The distinction insisted upon by counsel for complainant between a

sheet of music and a musical composition is somewhat chimerical; assuming, as already indicated, that the protection given by the law is for the material form of the author's origination. The precise arguments here presented may not have been as forcibly and comprehensively insisted upon in the former adjudications, involving, as I think, the same subject-matter, but the primal questions were fully considered and decided. Taken together, they are something more than mere persuasive precedents. A settled rule of statutory construction is recognized, which the record does not require me to ignore or reject. In these circumstances, the importance of uniformity of decision in courts of co-ordinate jurisdiction is apparent, and ought to prevail. The proposition that to the author belong his meritorious conceptions and ideas, and the fruits of his labors, is not debatable. The beneficial results, however, to which he is entitled, are protected and are specifically defined by statutory enactment. Such enactment, being in derogation of common-law rights, does not require an altered construction beyond the ordinary import. *Brown v. Barry*, 3 Dall. 365, 1 L. Ed. 638; *Holmes v. Hurst*, 174 U. S. 85, 19 Sup. Ct. 606, 43 L. Ed. 904; *Banks v. Manchester*, 128 U. S. 251, 9 Sup. Ct. 36, 32 L. Ed. 425; *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892.

My conclusion is that the defendant, in making, using, and vending the perforated music rolls which reproduce the musical compositions "Little Cotton Dolly" and "Kentucky Babe Schottische," for which copyrights were granted, did not violate the equitable rights of the complainant as sole proprietor.

Decree may be entered accordingly, with costs.

LA BOURGOGNE.

(Circuit Court of Appeals, Second Circuit. June 23, 1905.)

No. 174.

1. ADMIRALTY—APPEAL—MATTERS REVIEWABLE.

A decree in admiralty in proceedings for limitation of liability adjudging the rights of the parties and referring the cause to a commissioner to take testimony on claims for damages is reviewable on an appeal taken after the entry of a final decree on the commissioners' report, although the time for taking an appeal from the first decree had expired, such decree being in its nature interlocutory.

2. SHIPPING—LIMITATION OF LIABILITY—FREIGHT PENDING.

By the terms "freight pending" and "freight for the voyage," as used in Rev. St. §§ 4283, 4284 [U. S. Comp. St. 1901, p. 2943], is meant the earnings of the voyage, whether for the carriage of passengers or merchandise, and where passage or freight money is prepaid under contracts by which it becomes the absolute property of the shipowner whether the voyage is completed or not, it must be regarded as earned, although the vessel is lost, and must be surrendered by the owner to entitle him to a limitation of liability under the statute for claims growing out of such loss.

[Ed. Note.—Limitation of shipowner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

3. SAME—"VOYAGE" DEFINED.

The earnings of the voyage which a shipowner is required by the statute to surrender in order to obtain a limitation of liability for losses occurring on such voyage are those only of the particular voyage which exposed the passengers or property to risk; and where a steamship was engaged in making regular trips across the Atlantic from Havre to New York and return, discharging her passengers and cargo at each terminal port, each of the trips between such ports constitutes a voyage, within the meaning of the statute, and in proceedings for limitation of liability for claims arising out of the sinking of the ship in collision while on her way from New York to Havre the owner is not required to surrender the earnings of the preceding trip from Havre to New York.

4. SAME—FREIGHT FOR THE VOYAGE—GOVERNMENT SUBSIDY.

In proceedings by a French steamship company under Rev. St. § 4284 [U. S. Comp. St. 1901, p. 2943], for limitation of liability for claims arising out of the sinking of one of its ships while on a voyage from New York to Havre, the "freight for the voyage" which the petitioner is required by the statute to surrender cannot be construed to include any part of an annual subsidy paid to the company by the French government, in consideration for which the company agreed to build and maintain a weekly steamship service between Havre and New York, the vessels to be built in France and to be of a character, size, speed, and equipment specified, and subject to the use of the government in case of war or other extraordinary political circumstances, and to transport gratuitously all mails and specie for the use of the state. In such case it is impossible to determine what part of subsidy is to be considered as compensation to any single vessel for transportation of the mails on a single trip.

5. SAME—CLAIMS FOR LOSS OF LIFE—LAW GOVERNING.

Under the general law that the territorial sovereignty of a state extends to a vessel of such state when it is upon the high seas, the law of France, which authorizes a recovery for loss of life against a vessel in fault therefor, governs in proceedings by the owner of a French vessel in the courts of the United States for limitation of liability for claims arising out of the sinking of such vessel in collision on a voyage across the Atlantic, and claims for loss of life resulting from the collision may be proved against the fund paid in if the vessel is held in fault.

6. COLLISION—STEAMSHIPS—EXCESSIVE SPEED IN FOG.

Evidence *held* to support a finding of the trial court that the steamship *La Bourgogne* was in fault for the collision with the British ship *Cromartyshire*, by which she was sunk off Sable Island, in a dense fog, in failing to reduce her speed after she encountered the fog to the "moderate speed" required by the international navigation rules.

7. SHIPPING—LIMITATION OF LIABILITY—PRIVITY OF OWNER.

A steamship company, which establishes rules and regulations requiring the masters of its vessels to maintain only the moderate speed required by the international rules in case of fog, and has not knowingly tolerated or encouraged the violation of such rules or neglected their enforcement, and which has exercised due care in securing officers of experience and ability, is not debarred from the right to a limitation of liability for damages caused by a collision for which its vessel was in fault by reason of maintaining excessive speed in a fog, on the ground that the collision occurred with its privity or knowledge.

Appeals from the District Court of the United States for the Southern District of New York.

For opinion below, see 117 Fed. 261.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, granting petition for limitation of liability for damages and loss occasioned by a collision between the steamship *La Bourgogne* and the ship *Cromartyshire* off Sable Island, in a dense fog, at 5 a. m., July 4, 1898. The opinion of Judge Townsend, sitting in the District Court, dealing with the questions here presented, is reported in 117 Fed. 261. Upon this opinion a decree was entered granting the prayer for limitation of liability, holding *La Bourgogne* in fault for the collision, etc., as indicated in said opinion, and sending it to a commissioner to take testimony as to claims for alleged damages. Subsequently, upon the report of the commissioner the same court, Judge Thomas sitting, made a final decree in the same terms substantially as the former decree, and disposing of various questions arising upon commissioner's report. From this decree appeals were taken, which are here presented.

Robert D. Benedict, for Deslions and others.

A. Gordon Murray, for Perry and others.

Edward K. Jones, for petitioner.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The record is very voluminous. An examination of the briefs of the various appellants indicates that the important questions presented upon the appeals are as follows: First. Should not the petitioner be compelled to pay to the trustee the following sums: (a) The freight and passage money received by the petitioner for the passage from New York to Havre. (b) The freight and passage money received for the preceding passage from Havre to New York. (c) The amount of money received from the French government as compensation for carrying the mails on the two passages. Second. Should the claims for damages by reason of loss of life have been excluded? Third. Was the *Bourgogne* in fault for the collision? Fourth. Was the disaster in question "done, occasioned, or incurred without the privity or knowledge of the owners"?

A preliminary question is raised by motion to dismiss the appeals, which was, by direction of this court, heard with the main

argument. Petitioner contends that this court has no jurisdiction of the appeals of the several parties, because the same were not taken within the statutory period after the entry of the decree by Judge Townsend. It is not disputed that appeals from the decree made by Judge Thomas were all taken in time. We are of the opinion that the situation is similar to that which arises so frequently in patent causes, where the court, upon pleadings and proofs, finds that the patent is valid, that the prior art discloses no anticipation and no prior public use, and that the device of defendant infringes the patent, and sends it to a master to investigate and report upon profits and damages. From final decree, after the master's report is in, disposing of the whole cause, appeal is taken, and upon that appeal, although taken long after the entry of the interlocutory decree, the decision of the Circuit Court as to validity, prior use, etc., is reviewed.

1. As to the freight and passage money from New York to Havre. In the case of *The Main*, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381, it was held that the words "freight pending," in section 4283, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2943], and "freight for the voyage," in section 4284, were "evidently intended to represent the earnings of the voyage, whether from the carriage of passengers or merchandise. If these words were used instead of the words 'freight for the voyage,' it would probably more accurately express the intent of the Legislature." Very many authorities are cited in the briefs bearing upon the question when freight or passage money is earned, and what is the effect of a disaster resulting in total loss of merchandise or passengers. They are not especially persuasive, because in none of them except *The Corona* (*Pacific Coast Co. v. Reynolds*, 114 Fed. 877, 52 C. C. A. 497, certiorari denied 187 U. S. 640, 23 Sup. Ct. 841, 47 L. Ed. 345) was the contract of carriage the same as the one now before us. In that case the Court of Appeals for the Ninth Circuit, after referring to the general rules that freight is not earned till the goods are carried to and delivered at the place of destination, and that freight paid in advance may, in the absence of a special agreement to the contrary, be recovered back if the voyage be broken up, adjudged that an item of \$3,867 for prepaid freight, wharfage, and advance charges must be deducted from the amount the petitioner should be required to pay in order to secure limitation of liability. As to an item, however, of \$7,770 passage money, it was held:

"As the passage money in question was prepaid under an express agreement that the owner of the ship should not refund it, notwithstanding a failure to deliver passengers at the places of destination, we think it clear that it must be regarded as earned."

The court further held that the sum thus directed to be paid in should not be diminished by the amount expended by the owner in forwarding passengers to their destination, nor by the amount of certain sums voluntarily given to some of the passengers. The case of *The Scotland*, 105 U. S. 24, 26 L. Ed. 1001, was distinguished because it disclosed no such agreement; while in the case of *The*

Corona "the amount prepaid for passage was, by the express stipulation of the parties, made absolute and unconditional, and should, in our opinion, be regarded as earned."

We fully concur in these views expressed by the Court of Appeals in the Ninth Circuit, and find in the case at bar a similar agreement both as to freight and passage money. The bills of lading all contained the clause: "11. Also that the freight prepaid will not be returned, goods lost or not lost." The first clause in the passage ticket reads: "Passage money to be paid in full before the departure of the steamer and at all events belongs to the company." And in the sixth clause it is provided that: "The company will not be liable for loss or damage occasioned by accidents, fire, perils of the sea, or unforeseen circumstances, or by barratry, fault or negligence of the captain, pilot, sailors, members of the crew or passengers." We are of the opinion, therefore, that the petitioner should pay over to the trustee 100,703.08 francs for prepaid passage money and 12,716.43 francs for prepaid freight, New York to Havre, aggregating 113,419.57 francs, with interest from the date of the disaster.

2. As to the freight and passage money collected for the crossing from Havre to New York. The statute uses the phrase "freight for the voyage," and claimants contend that the voyage in question was the round trip from Havre to New York and back again to Havre. Very many authorities are cited by both sides, and the District Court has discussed the question at some length. As was to be expected, an examination of the citations shows that the word "voyage," like so many other words, is somewhat elastic. The meaning to be given to it in any particular case is largely dependent upon the facts of that case. We are dealing now with the word as used in a statute which provides that the shipowner's liability for loss of freight, etc., on a particular voyage may be limited when he gives up the earnings of the same voyage. The voyage which exposes the property to risk is the voyage the earnings of which are to be paid in. As was said in *The Main*, 152 U. S. 123, 14 Sup. Ct. 486, 38 L. Ed. 381, "The real object of the act was to limit the liability of vessel owners to their interest in the adventure"; i. e., to the "adventure" in which the persons or property transported was put at risk. In determining precisely what such adventure is under this statute, we concur with the District Judge in the conclusion that the controlling circumstances are not to be found in the shipowner's agreements with individual shippers, nor in the length of time for which a crew may be hired or the ship provisioned; nor is it important what nomenclature may be adopted in the shipowner's logbooks or in the daily talk of its officers, nor how it keeps its accounts, nor how often the ship is inspected. The fundamental question seems to be this: Considering the merchandise and passengers which are shipped as a whole, when does the ship reach a port where such merchandise and passengers are no longer any part of them, exposed to the risks of transport by that ship? Now, it may very well be that an empty ship will take on a cargo, complete or partial, in a particular port, and may visit in

succession other ports, in some or all of which it discharges more or less of its original cargo, taking on other cargo in its place, which it carries to one or other of the ports it subsequently touches at, until finally it reaches a port of complete discharge. Whether the whole or some particular portion of that continuous transit should, in the case of disaster between two of the ports touched at, be considered the "voyage" of the statute, may present interesting and difficult questions; but in our opinion the case at bar is free from difficulty. La Bourgogne is one of a fleet of steamers which are operated solely as an "ocean ferry" between the ports of Havre and New York. Each trip or crossing of each steamer is by itself a complete maritime transaction. A steamer lying at Havre, empty except for her own equipment and stores, takes on board a cargo under contract with shippers to deliver it in New York. No merchandise is shipped to be carried by that steamer to New York and back again to Havre. In like manner she takes aboard her complement of passengers under contract to take them all to New York, and to land them there. When she sails from Havre she exposes this cargo and these passengers to the risks and peril of that crossing; but when she reaches New York she discharges all her freight and lands all her passengers, and becomes herself an empty ship again, ready to take on other cargo and other passengers for another crossing. When cargo and passengers are safely landed in New York, all their risks of the crossing are over; the adventure as to them and for which they paid freight and passage money is fully terminated; and it seems unreasonable to hold that the money thus paid by them should be made applicable as a fund for the relief of other cargoes and other passengers, who subsequently leave a place of safety in New York to be embarked independently in another maritime adventure from New York to Havre. Passage tickets are often issued covering a trip out and back, but that means only back by the same ferry, some other steamer, or the same steamer on some subsequent crossing, will usually carry them. And even if in some instances a few individuals may return by the next trip of the same steamer, that does not alter the situation. They do not remain on the ship. They are landed in a place of safety ashore. Their connection with the ship is terminated, and the adventure on which they originally embarked is at end. We concur with the District Judge in the conclusion that the freight and passage money for the voyage from Havre to New York need not be paid over to the trustee.

3. As to the subsidy received from the French government. The contract under which this was paid has been put in evidence. It shows that the contractor (the petitioner here) undertook to operate a weekly steamship line from Havre to New York, 52 voyages going and returning, each year; that it agreed to employ new or suitable steamers in number always sufficient to insure a complete performance of the service. The character, size, speed, equipment, etc., of the steamers are carefully provided for. The contractor engages to transport gratuitously all of the mails upon the line from Havre to New York. (Presumably this covers mails

from New York to Havre, although the language is not entirely clear.) The contractor also engages to transport gratuitously all gold, silver, and copper coins for the use of the state. The loss of one of the ships shall not be an excuse for interruption of service. The contractor shall only be authorized to temporarily replace the steamer lost by a steamer accepted by the minister, and shall be allowed a delay of 30 months to place a steamer in service fulfilling all of the conditions of the specifications. In the event that by reason of accident befalling one of the vessels the voyage commenced cannot be completed, the postal agent on board shall be authorized, if it can be done, to secure the transport of the mail by the first French or foreign steamer bound for their place of destination. The expense of this special transportation shall be retained from the payment of the subsidy attaching to the interrupted voyage. If the mails cannot be sent forward, "the passage not accomplished under the conditions of the present article shall occasion a proportionate reduction from the subsidy." Various penalties are provided for, and also premiums for speed in excess of the requirement of the contract, and there are provisions as to the disposition of the ships in case of war. The compensation for the whole service is fixed at 5,480,000 francs, payable in equal monthly installments. We are of the opinion that this subsidy cannot be considered as freight paid for transport of the mails. $\frac{1}{52}$ of the whole being arbitrarily apportioned to each round voyage. It must be treated as an entirety. It is the lump sum which the French government has seen fit to pay in order to stimulate the creation and maintenance of a fleet of steamers of a certain class, no old steamer being allowed in the service unless it "has been Frenchified before May 22, 1883," and every new steamer to be built in France for the promotion of French industry; all sailing under the French flag for the promotion of French commerce. In one sense it may be said that by making each double crossing the steamer making it earned a part of the whole sum, but what part it so earned we cannot say. The compensation covers not only the crossing steamers, but also those held in reserve to take the place of any which may break down, and, as to all of them, "in every extraordinary political circumstance, even outside of the case of maritime war," the right secured to the government to "purchase or take for freight one or more steamers," the details of whose speed, capacity, and construction it has arranged for to suit itself. It seems impossible to say what fraction of the 5,480,000 francs is to be considered the compensation to any single steamer for undertaking to transport the mails on a single trip from New York to Havre.

4. The claims for damages by reason of loss of life. The disposition of these claims is already settled by decision of this court. "The territorial sovereignty of a state extends to a vessel of the state when it is upon the high seas, the vessel being deemed a part of the territory of the state to which it belongs; and it follows that a state statute which creates a liability or authorizes a recovery for the consequences of a tortious act operates as efficiently

upon a vessel of the state when the vessel is beyond its boundaries as it does when it is physically within the state." *International Nav. Co. v. Lindstrom*, 123 Fed. 475, 60 C. C. A. 649. The *Bourgogne* upon the high seas was a part of the territory of France, and the record shows conclusively—indeed, the proposition is not disputed—that, if the *Bourgogne* were in fault for the collision (the French courts held she was not), the claims for damages by reason of loss of life could have been maintained in the French courts against the fund paid in, in limitation of liability. The decree appealed from should be modified accordingly.

5. The alleged faults of the *Bourgogne*. The English court, upon evidence mainly from the *Cromartyshire*, supplemented by three witnesses from the *Bourgogne*, and partly also upon calculations based on the injuries apparently sustained, found that the steamer was going at "full speed reduced." The French court found that she was going "at twelve knots, about." The District Judge has reached the conclusion that the speed was about 10 knots. A careful examination of all the testimony produced here has satisfied us that, although there may have been a reduction, she was certainly not going any slower, and probably was going faster, than 10 knots. It is unnecessary to rehearse the evidence. The statement in the opinion below is sufficient indication of the grounds for this conclusion. The character and extent of the wound received by the *Bourgogne* are suggestive of a high speed on her part. Undoubtedly the fog was exceedingly dense; that fact is uncontradicted; and the steamer had not "reduced her speed to such a rate as would enable her to stop in time to avoid collision after an approaching vessel came in sight, provided such approaching vessel were herself going at the moderate speed required by law." *The Chattahoochee*, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801. We are emphatically of the opinion that such a speed under the circumstances was excessive, and, since it probably prevented an earlier fog-horn blast being heard from the *Cromartyshire*, it cannot be held not to have been a proximate cause of the collision. We express no opinion as to any fault of the *Cromartyshire*. We are not trying her cause, and none of her witnesses (except the captain) have been examined in this cause. Indeed, there is some question raised as to the admissibility of his examination. Moreover, with allowance of the death claims, even one-half of the damages found in this proceeding will greatly exceed the sum transferred to the trustee in limitation of liability.

6. As to the contention that the disaster occurred with the "privity or knowledge of the owner." None of the officers of the defendant were on the *Bourgogne*, nor did any of them direct, interfere with, or approve her navigation. There was undoubtedly no direct privity or knowledge of this disaster on the high seas, thousands of miles from the home office of the defendant. The contention, however, is that petitioner never made proper regulations to govern its masters as to navigation of its vessels in a fog; and that it encouraged, or sanctioned, or knowingly tolerated a persistent violation of the rules of navigation (in that particular) on the part of

its officers. As we have seen, the line is operated under a contract with the French government, which imposed certain penalties for delays and stoppages "not justified by the circumstance of vis major," and provided for the presence on each steamer of a so-called "agent of Postes." The petitioner issued to all its captains a set of rules and regulations called "Reglement du Service a Bord." Article No. 395 of such rules reads as follows:

"In conformity with the rules of international regulations having for object the prevention of collisions—'All vessels under steam which approach each other so that there may be risk of collision, must diminish their speed, or stop and go backwards, if necessary. All vessels under steam must, during foggy weather, preserve a moderate speed.' The captain under these circumstances must diminish the speed of his engines and, in agreement with the agent of Postes, the captain must make known by procès verbal the delays which such manœuvres may have occasioned."

It is argued that this rule is insufficient, because it would be a sufficient compliance with it if, in a dense fog, a captain diminished speed somewhat from the maximum, although the diminution was not sufficient to bring the steamer down to "moderate speed." This is not a fair construction of article 395. Possibly, if the international rule were not quoted, there might be room for argument that the article lacked explicitness; but with the full text of the international rule incorporated as it is, no captain could be in doubt that the diminution he was directed to make should be such as would conform his speed to the navigation which the international rule prescribed. However positive and precise a rule may be, it will not avail the person who has prescribed it, if he encourages, or sanctions, or knowingly tolerates its violation. It is contended that petitioner did thus sanction or knowingly tolerate excessive speed, and claimants seek to establish that proposition by proof that the steamers of this line so frequently violated the rule of "moderate speed in a fog" that it must be assumed that petitioner's officers knew of such violation, and, by not taking any steps to put a stop to such a reprehensible practice, must be held to have tolerated or encouraged it. There may be a widespread impression that the various Atlantic liners, which seek for and obtain the patronage of the traveling public by means of the quick passages they make, are able to make such passages only by running at excessive speed in a fog. Nevertheless the court cannot take judicial notice that any particular line thus constantly violates the law, nor can it hold the owners of the line in damages upon the theory that they are persistent lawbreakers without proof of the fact. The evidence produced to show infractions of the "moderate speed" rule so frequent as to bring knowledge thereof home to the officers of petitioner is as follows: During the 11 years preceding the loss of the *Bourgogne* there appear to have been three occasions when steamers of petitioner's line were in collision with other vessels in a fog, and were held by the court which investigated the accidents to have been going at excessive speed: *La Bretagne* with the *Tellus*, May 7, 1887; *La Normandie* with the *Charlotte Webb*, May 18, 1889 (58 Fed. 427); *La Touraine* with the *Sully*, September 10, 1894. These three detached occurrences are not especially,

important, and they lose all persuasiveness when it is seen that subsequent to the last of them there are only two reported occasions when steamers of petitioner's line were in collision with other vessels in a fog, and in both cases the courts held petitioner's vessels to be going at moderate speed, and free from fault. La Bourgogne with the Ailsa, February 29, 1896, 86 Fed. 475, 30 C. C. A. 203; La Champagne with the Ville de Rio, July 4, 1898. Claimants called six witnesses who had made voyages on the company's steamers, with the following results: Peters was in the employ of petitioner from 1886 to 1889 as cook, deck steward, and second steward, and made about 88 voyages on the Gascogne, Bourgogne, and Navarre. He testified that about six or seven voyages out of ten there were periods during which the weather was foggy; that the steamers never slowed down; that in mid-ocean they went full speed, but in the English Channel the speed was now and then reduced; that it was the same on the Hamburg Line and the Red Star Line, on which he had served. He had always seen them in mid-ocean, when it was foggy, going full speed to make the time. Levanoux, a flour merchant, had crossed frequently by the French line since the fast steamers were built in 1886 till 1893, his last trip in 1893 being made on the Bourgogne. On that trip there was a fog, lasting how long he could not say, but he didn't notice any slackening of the speed, which he had noticed before the fog was full speed, and doesn't recollect any diminution indicated in the posted daily runs. His recollection is that the same was true as to the daily records on other trips. He had noticed delay in arrival on this side occasioned by fog, but as to arrivals at Havre he "could not answer so very well." There were some variations in time of arrival. His observations were made in a casual way. Baruch, an importer of embroideries, had crossed on steamers of this line most every year since 1895. He testified that during those voyages there were periods of fog, sometimes three, sometimes four, days, and that there was no slowing down. Riker, an importer of millinery goods, had made two trips a year since 1889; had noticed periods of fog, which might last from 12 to 24 or 36 hours, but never noticed any lessening of speed during such fogs; nor could he see that it made any difference in the daily runs. Steiner, who is engaged in business in New York, had made six voyages by the same line at intervals between 1885 and 1900. The only time he recollects fog was during a passage by L'Aquitaine in 1900. One day was quite clear, and the next they met a very thick fog, but at the end of the day had made as many knots as the day before, when it was clear. Burras, a buyer of flowers and feathers, had crossed by the line twice a year for 16 or 18 years, and never noticed any change of speed or in the announcement of daily run during periods of fog.

Of the witnesses called by petitioner, Felsenberg, a commission merchant, had made three voyages by the same line—one by the Bourgogne (her last voyage out before she foundered)—and noticed they slackened speed during fog when they came to the Banks, and they had about two days' thick fog. As to the daily runs, he re-

membered that when the weather was dark or foggy the number of knots was not so great. On the trip by the Bourgoigne they reached Havre Sunday morning, only a few hours late. Pagnon, a silk importer, who had crossed by petitioner's steamers more than 60 times, testified:

"I have seen very often—not to say always—a reduction of speed in case of dense fog. Sometimes I counted myself the revolutions of the engine. In the old time, when they had side-wheelers, it was very easy to count. The revolutions were less numerous. At that time I remember pretty well that when there was a reduction of 20 per cent. we considered it fair. With the screw steamers very often I have seen, and I can be a witness to it, a sensible reduction; 15 to 20 revolutions, as far as I can remember. I think I have seen more too. I have seen those steamers stop in case of fog. * * * Q. How about reduction of speed, if you have observed any, on the Banks or about the Banks, or in mid-ocean? A. Yes, very often. I have seen reduction under the same circumstances. I have seen diminution of speed, coming nearly to a stoppage, in a place which is called by the French navigators the 'Banque-reau'—the small banks, which are north of the large banks. I have seen a steamer there stop entirely on account of the fog, and when the fog disappeared then we saw a few fishermen there. * * * In fact, I don't think I have seen any part of the ocean where they did not diminish in speed in case of severe fog. And sometimes it happened to me to spend twelve days in a journey which we could have made in that steamer in nine days, because constantly we were going at reduced speed, except when there was a little opening. * * * Q. What are the limits that you give to a sensible reduction? A. I think I said also 20 per cent. and more, but usually, I think, 20 per cent. At 70 revolutions 20 per cent. would make it 56, and sometimes it went lower. Q. Are you prepared to swear that you can say that there has been reduction of speed more than 20 per cent. in fog? A. Sometimes, sometimes; yes. I went so far as to state that I have seen the boat stop. Q. I wasn't asking about stopping. I was asking about reductions of speed of the engines. A. I have seen it go, very slow; that is all I can swear, very slow; say not half; very seldom. I have seen them go carefully, feeling their way, and anxious and desirous to avoid any mishap. Q. These cases have been, as I understand you, in the English Channel, or approaching the lightship? A. And also in the Banks, where they often would have a great many fogs, you know. Everywhere where there is fog."

Benson, agent for a silk house, had crossed by these steamers more than 60 times, had several times looked at the indicators in dense fog, and found that the speed had been reduced; the indicator was very often to half speed, or even lower than that, down to what they call slow; and he remembered that during fogs there was a decided difference in the day's run. Metz crossed in the Bourgoigne in May, 1898. She was then commanded by Capt. Deloncle, who went down with her. He noticed that "she was going at a slow rate during a fog of about an hour's duration." Two of the captains testified that they always slowed down in a fog, increasing the speed whenever the fog lightened up, as, in their experience, it frequently did.

As the District Judge remarked: "The determination of the question as to what is to be done in all the varying stages between a light haze and a dense fog rests upon a great variety of circumstances and conditions." There is no fixed speed prescribed by the international regulations. It should be varied according to the distance at which objects can be observed by the navigators and look-outs, who are better situated to appreciate the density of the fog

than are observers from the promenade deck, or the door of some saloon. The estimates as to speed given by passengers who are not experts are generally unsatisfactory. Upon the proof as it stands we cannot find that the petitioner's officers knowingly tolerated or encouraged the running of its steamers at excessive speed in fogs, or were negligent in failing to enforce the rules. Certainly they used due diligence in securing officers of experience and ability. We concur in the conclusion that the disaster was "done, occasioned, or incurred without the privity or knowledge of the owners."

7. It is contended that the ship was in actual violation of statutory rules as to equipment (life boats, floats, rafts, life preservers, boat-disengaging apparatus, etc.). We do not think it necessary to add anything to the opinion of the District Judge on this branch of the case. Counsel for one of the claimants criticises the statement that it was admitted in the District Court that section 4493, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3058], is not applicable. Whether or not there was such an admission is unimportant, since section 4400 [U. S. Comp. St. 1901, p. 3015] expressly declares that "vessels of other countries" (which the *Bourgogne* was) shall not be subject to the provisions of section 4493.

8. In view of the findings above set forth, there was no error in overruling the exception to so much of the commissioner's report as found that the S. S. White Dental Company had no claim.

Various minor questions as to admissibility of evidence, etc., need not be discussed here. We concur with the District Court in the disposition made of them.

The decree is reversed, and the cause remitted to the District Court for modification in accordance with this opinion. Inasmuch as both sides appealed and neither prevailed as to all the points argued, there should be no costs of this appeal.

DOWDELL et al. v. UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF CALIFORNIA et al.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1905.)

No. 1,201.

COURTS OF ADMIRALTY—PROCEEDINGS FOR LIMITATION OF LIABILITY—POWER TO REOPEN AFTER FINAL DECREE.

Where proceedings in a court of admiralty, by a shipowner for limitation of liability have been terminated, so far as the parties before the court are concerned, by a final decree, the court has no power to reopen the proceedings for the purpose of allowing other claimants, who have not appeared therein, to come into the case and prove their claims. If for any reason the decree is not binding on such claimants, their remedy is by an independent suit.

[Ed. Note.—Limitation of shipowner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

On Petition for Writ of Mandamus.

William Denman and Richard P. Henshal, for petitioners.

Knight & Heggerty (Wm. F. Herrin and P. F. Dunne, of counsel), for owner, against application.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. In the month of March, 1901, the Pacific Mail Steamship Company, owner of the steamship *City of Rio de Janeiro*, filed its petition in the District Court of the United States for the Northern District of California, alleging, among other things, that said steamship was lost and many of her passengers drowned or injured, and that said losses and injuries occurred without the privity or knowledge of said steamship company, without any fault or knowledge on its part, and praying that it be adjudged free from all liability for said losses and injuries, and, in the event that it be adjudged liable at all, that its liability be limited to the value of said steamship and her freight pending. Other facts in regard thereto appear in *Re Pacific S. S. Co.*, 130 Fed. 76, 64 C. C. A. 410.

Petitioners herein are claimants injured by the wrecking of the steamship *City of Rio de Janeiro*. They claim to have been "out of the jurisdiction" at the time "of the attempted service of process" in said proceeding. Among other things, it is alleged in their petition "that at no time has said petition of said Pacific Mail Steamship Company been dismissed," or its stipulation with sureties "been withdrawn," but "at all times since the 15th day of October, 1901, have your petitioners herein been enjoined" from prosecuting their claims, save in "said proceeding to limit liability"; that no monition was ever issued citing petitioners to appear and make proof of their claim, etc. On May 9, 1905, petitioners filed in said proceeding their claims against the Pacific Mail Steamship Company in personam, which they claimed to have sustained, and demanded of the District Court, and of the judge thereof, that the court designate

a commissioner before whom they should make proof of their claims, and that said court and judge refused to comply with said demand, and petitioners claim that they have no plain, speedy, or adequate remedy in the ordinary course of law.

The contention of counsel for petitioners in brief is that, until the claimants are defaulted after proper notice, they are entitled to have their claims adjudicated in the limitation proceeding, and that under the act of Congress they can only adjudicate there, and nowhere else. The clear meaning and purpose of the law was to fix and declare a certain limit of liability on the part of the shipowners, and to determine whether the vessel is liable at all in a single proceeding, and not to leave it to be litigated, and possibly determined, in different ways in different courts. The prosecution of separate suits, if allowed to proceed, would result in the subversion of the whole object and scheme of the statute. *The Garden City* (D. C.) 26 Fed. 766, 771; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 595, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038.

A court of admiralty, in which is pending a proceeding for the limitation of the liability of a shipowner, may enjoin the prosecution of suits in state courts against the shipowners. *In re Whitelaw* (D. C.) 71 Fed. 733, and authorities there cited; *The Tolchester* (D. C.) 42 Fed. 180, 185. And in proceedings of this character, which have been designated as "equity proceedings in admiralty," to prevent a multiplicity of suits, it has frequently been decided that the powers of an admiralty court are as extensive, and its remedies are as effective, as are those of a court of chancery when its jurisdiction is invoked in an equitable proceeding, and that all persons having claims, whether in rem or in personam, against a ship or its owners, can have their rights determined therein. This principle was clearly recognized by this court in *Re Pacific Mail S. S. Co.*, supra; *In re Meyer* (D. C.) 74 Fed. 897; *The Annie Faxon*, 75 Fed. 312, 320, 21 C. C. A. 366.

It is now well settled that proceedings in a United States District Court, under admiralty rule 54 of the Supreme Court, sections 4282-4285, Rev. St. [U. S. Comp. St. 1901, pp. 2943, 2944], Act Cong. June 26, 1884, c. 121, 23 Stat. 53 [U. S. Comp. St. 1901, p. 2804], and section 4289, Rev. St., as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80 [U. S. Comp. St. 1901, p. 2945], to limit the liability of shipowners for loss or damage to personal goods, supersede all other actions or suits for the same damages in the state or national courts upon all matters properly presented therein, and in the nature of the case, where the jurisdiction of the District Court has attached, it is exclusive. *Black v. S. P. R. Co.* (C. C.) 39 Fed. 565; *Oregon R. R. & Nav. Co. v. Balfour*, 90 Fed. 295, 298, 33 C. C. A. 57, and authorities there cited; *Butler v. Boston Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017. But these general principles, upon which petitioners rely, have reference only to the pending proceedings in the court under the petition for limited liability.

There is nothing in any of the cases cited by counsel that the proceedings shall, after the court has obtained jurisdiction over the parties appearing therein, be kept open, or, in other words, sus-

pended, to await the appearance of other claimants, who from any cause have failed to appear therein. Where a monition and publication is made according to the rules and practice in admiralty proceedings, it becomes notice to "all persons" having any claims, whether they receive actual notice thereof or not, and, if they fail to appear within the time designated, they are liable to lose the opportunity of presenting their claims in that proceeding or in any other; for, as was said by the court in the case of Broderick's Will, 21 U. S. 503, 579, 22 L. Ed. 599:

"Parties cannot * * * claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitudes to which they are subject."

The effect of a default to appear in an admiralty proceeding is ordinarily the same as in other actions at law. *Miller v. United States*, 11 Wall. 268, 301, 20 L. Ed. 135. See, also, *In re Morrison*, 147 U. S. 14, 26, 13 Sup. Ct. 246, 37 L. Ed. 60; *Evers v. Watson*, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520. But if they can show, as they claim they can, that no monition or publication was ever made, it may be that they would not be deprived, even at this late day, of bringing an independent action. Be that as it may, and conceding for the purposes of this opinion that petitioners may be able to prove that they have been defaulted without proper notice, the question remains whether the District Court had any jurisdiction to grant the relief asked for by petitioners. Judge De Haven clearly and tersely gave his reasons for denying the application as follows:

"Application for the appointment of a commissioner to hear proof of claims of Elfrida D. M. Dowdell and others against the Pacific Mail Steamship Company, in the proceeding commenced in this court by that company on March 19, 1901, for a limitation of liability for damages on account of the loss of the steamship City of Rio de Janeiro. That proceeding was in my opinion ended by the final decree heretofore entered therein, and is therefore not now pending in this court. If it should be conceded that the decree is not binding upon the parties making this application, the fact that it put an end to the proceeding for the limitation of the Pacific Mail Steamship Company's liability would still remain, and the applicants for this order left free to prosecute whatever demands they may have against the Pacific Mail Steamship Company by an independent action or actions. The application is denied."

We are of opinion that this ruling was correct. The District Court, after having closed up the proceedings in so far as the parties before the court were concerned, and entered its final decree, from which no appeal was taken, had completed its work, and thereafter had no power or authority to "open up the proceedings" for the purpose of allowing other claimants, who had not appeared therein, to come into the case, have another commissioner appointed to fix the value of the claimants' loss, and determine their rights in that proceeding. If an action in admiralty is, for any cause, dismissed, it is no longer in court, and the parties thereto are no longer before the court, and its jurisdiction therein is at an end. *The Illinois*, Fed. Cas. No. 7,003, and authorities there cited.

It is true that the petition of the steamship company had not in terms "been dismissed," but by the decision of this court it had been declared, under all the facts and circumstances of the case, to be without merit, and directions were given to the District Court—"To enter judgment against the petitioner denying its application for a limitation of liability, and in favor of the respective claimants for the full amount of damages it had heretofore awarded them, with interest and costs." *In re Pacific Mail S. S. Co.*, supra.

The District Court having followed those directions, and the proceedings having come to an end before the application of these petitioners was made, the District Court properly denied their application.

Mandamus denied.

BRADLEY v. ECCLES et al.

(Circuit Court of Appeals, Second Circuit. May 21, 1905.)

No. 234.

PATENTS—INFRINGEMENT—PACKING FOR THILL COUPLINGS.

The Bradley patent, No. 609,928, for a combination in a thill coupling, with a draft eye having spherical recesses in its jaws, and a draft iron having a spherical knuckle of an interposed spherical packing, which constitutes the only novel element, is a narrow one, in view of the prior art, and must be limited to the precise form of packing shown, which is a single piece of hard leather, molded before application into such shape as will cover the knuckle completely, but with an open longitudinal joint, which permits it to be sprung open so as to slip over the knuckle, whereupon it resumes its spherical shape. It is not infringed by the use in such a coupling of flat pieces of leather, notched on the edges so that when the jaws are closed they are pressed around the knuckle, into a spherical shape.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This cause comes here upon appeal from an order of the Circuit Court, Northern District of New York, granting an injunction against the sale of "any piece of leather together with the other parts of the thill coupling of patent No. 609,928, to the same vendor or user, either jointly or separately." The patent in question was discussed by this court in a former suit between the parties. It was held valid, and the type of washer then complained of (a Chinese copy of that shown in the patent) was held to be an infringement. *Bradley v. Eccles*, 126 Fed. 945, 61 C. C. A. 669. Reference may be had to this prior opinion for a full description of the patent and of the prior art.

See 133 Fed. 308.

W. A. Megrath, for appellants.

Howard P. Denison, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The alleged infringement now complained of is the sale, with the couplings, of flat pieces of leather

having notches centrally upon their lateral edges, so that, when the purchaser desires to use them, he places them between the jaws of the coupling, adjusts them, bends them over so as to cover the spherical knuckle, and then places the knuckle in place, and clamps the movable jaw down onto the fixed jaw, with the packing between. Thereupon, if adjustment be properly made, the packing assumes the exact form shown in Fig. 3 of the patent. Under the construction given to the patent when it was here before, these flat pieces of leather cannot be held to infringe. We then held that the patentee must be confined to the precise form of packing set forth in the patent, saying:

"That is, a hard leather packing, molded before application into such shape as will cover the knuckle completely, integral, but with an open longitudinal joint [slit] which permits it to be sprung open so as to slip over the knuckle, whereupon it resumes its spherical shape. * * * The patent must be confined closely to the precise device of the claim. * * * The specification states that 'the packing may be composed of separate halves,' but no such form is included in the claim, nor would the prior art allow the patentee to so include it."

The complainant in this suit realizes that the charge of infringement cannot be sustained unless our prior opinion is in some respects modified. His brief contains this statement:

"When this case was before the Court of Appeals the patent was sustained, but the claim was erroneously and unjustly limited by the opinion to a spherical packing, integral, molded before application; and complainant therefore requests the court at this time to take cognizance of this fact, and correct the limitations imposed by that opinion."

In support of this contention it is suggested that there is nothing whatever in the claim which says that the device must be integral, or that it may not be made of two separate halves, or that it must be molded into a spherical form before application. This suggestion is correct—there is no such restricting language in the claim—and the phrase used in our former opinion, "The patent must be confined * * * to the precise device of the claim," would have been more accurately expressed, had it used the words "precise device shown." But it is manifest from the opinion that the claim was limited, not because of its language, but because the prior art left no room for invention unless it was restricted in the manner indicated. The opinion expressly stated that, although the specification stated that the packing might be composed of separate halves, such modification could not be sustained, in view of the Murray Canadian patent, showing a thill iron with ball coupling between inverted cup-shaped packings. In his brief now filed, complainant asserts that the Murray Canadian patent shows two flat disks. That patent is not printed with the papers on this appeal, but the excerpts from it, which were laid before this court on the former appeal, contained the following:

"Between the ball, d', and * * * I locate the inverted, cup-shaped packing, f, preferably made of leather or rawhide, or similar elastic material. * * * In the bottom of the semispherical recess, a', * * * is laid a cup-shaped packing, f', similar to the one marked f."

With a device of the prior art so close to the one patented, we were satisfied that the claim could not be sustained unless it were restricted in the manner indicated, and we are still of the same opinion.

In like manner, it was the showing made of the prior art which induced this court to restrict the claim to spherical packing molded before application. It must be remembered that some six years prior to the patent in suit the same patentee had taken out one for a thill coupling, the iron parts of which, including the spherical knuckle on the thill, fitting into a similarly shaped recess in the draft eye, are substantially the same as in the patent in suit. We were satisfied that there could be no invention merely in applying a washer between these metal parts, and quoted from the opinion of the judge who heard the cause at circuit:

"Pieces of rawhide, cloth, or leather of any description, placed in the spherical recesses beneath the wrist or knuckle of the thill or pole, and also above before the draft eye is closed and fastened, will form a sort of substitute for the packing described. So pieces of flat leather so placed, the one piece above and the other piece below, if cut of the right size and thickness, will constitute an inferior substitute."

The brief now filed by complainant contends that "there was nothing in the record of that case which gave Judge Ray any authority for making that kind of a statement." To a certain extent, this contention is correct. No witness testified to any particular experiment with flat pieces of leather (the patentee stated generally that he had been unsuccessful with washers until he devised his present improvement), and therefore there was no evidence in the record before Judge Ray to show that such washers would be inferior substitutes; but such washers, whether efficient or inefficient, were nevertheless a part of the prior art, with which the device of the patent was to be compared in order to see if it exhibited patentable invention. There are some elementary details of everyday domestic mechanics of which a court will take judicial notice. No sworn testimony is needed to inform it that the use of leather washers to relieve friction, prevent rattling, secure even pressure, and avoid wear and tear between metal surfaces, has been the common property not only of mechanics, but of all persons possessing ordinary intelligence, for many generations. If the bearing surfaces are square or circular or triangular—cylindrical, conical, or spherical—ordinary common sense would suggest that the scrap of leather to be employed must be of such shape and size as reasonably to conform thereto. If the surfaces are close together, the leather must be thin. If far apart, it should be thicker. This knowledge was the common property of every one who, with the ironwork of the first Bradley patent before him, might undertake to relieve the rattling of its parts; and, if all the patentee had done was to put a flat leather washer of suitable size and shape between those parts, this court would not have found invention in such a contrivance, even though, after it was forced into place by the closing of the draft eye upon the spherical knuckle, the leather assumed the shape shown in the patent. The patentee, however,

went a step further. He testified that "after repeated experiments [he] devised a way for pressing up a leather packing into the form shown in the drawings," "provided with a longitudinal opening upon one side," so that they "are easily and readily replaced," and one is "always sure of perfect alignment." The specification states that the packing is made of a flat piece of hard oak leather, and "bent and molded by pressure to the required spherical form, * * * so that this split packing will retain its shape, and can be sprung over the wrist [spherical knuckle]," and "twisting and wringing of the packing in the draft eye * * * is entirely avoided." His expert testified:

"The * * * packing, being previously formed under high pressure into substantially the same contour as the knuckle, * * * is capable of being sufficiently sprung or opened to properly assemble the same upon the knuckle, after which it readily springs into engagement. * * * The molding of a packing into a spherical form out of stiff leather, and adapting it for use upon a spherical knuckle, is new, so far as I am advised. It is undoubtedly an advance in the art to construct such a packing, and unquestionably requires special machinery for so constructing it."

This "advance" is but small, and the patent, as we held before, is a "very narrow one." Nevertheless it seemed to us to possess utility. With a flat piece of leather, even though cut to suitable shape and size, there would necessarily be difficulty in adjusting it to the knuckle, holding it down with the fingers evenly on all sides. There would seemingly be liability to slip, to get out of place, to wrinkle or buckle (if the leather were thin) at the moment when the restraining fingers had to be withdrawn upon the closing of the draft eye, with risk of pinching the fingers in the closing jaws of the draft eye. All these difficulties were removed by the packing previously molded out of leather hard enough to retain its shape, and, in view of the fact that it had at once commended itself to the trade—500,000 sets being sold in a short time—this court reached the conclusion that such packing was patentable, despite the disclosure in the prior art of the ironwork of the earlier patent, and the common use of washers. We may have erred in finding invention in so narrow, and possibly obvious, an improvement; but, in limiting the claim as indicated in the former opinion, we are not, upon a reconsideration of the whole case, persuaded that the decision was either erroneous or unjust.

The order of the Circuit Court is reversed, with costs.

ANDERSON v. METROPOLITAN FINANCE CO.

(Circuit Court, S. D. New York. June 16, 1905.)

PATENTS—VALIDITY—MEANS FOR CASHING SALES ACCOUNTS.

The Anderson patent, No. 704,168, for means for cashing sales accounts, *held* not so clearly void on its face as to warrant its being so declared on demurrer in view of the presumption of validity arising from the granting of the patent.

In Equity. Suit for infringement of letters patent No. 704,168 for means for cashing sales accounts, granted to Frank E. Anderson July 8, 1902. On demurrer to bill.

Joseph A. Stetson, for complainant.

Hawkins & Delafield and Seward Davis, for defendant.

HAZEL, District Judge. The patent is for "means for cashing sales accounts," and consists of arranging documents in series, by which cash loans and the security of bills payable at a future time are claimed to be greatly facilitated. I am not prepared to say that the asserted inequity of the bill, in view of the grant of the patent by the Commissioner of Patents, is so clear that there is no possibility that complainant cannot succeed. The patent, despite its unusual features and purposes, may occupy a useful field, and may have created a novel and beneficial arrangement for the procurement of credit upon securities, or it may facilitate the general method by which documents are passed from one to another when credit is established and when sales accounts are cashed. I am unable to determine these asserted propositions without having before me illuminative facts. As to whether the means described in the specification and claims are practicable is also a matter of proof. *Beer v. Walbridge*, 100 Fed. 465, 40 C. C. A. 496; *Electric Vehicle Co. v. Winton Motor Carriage Co.* (C. C.) 104 Fed. 814; *Milner Seating Co. v. Yesbera*, 111 Fed. 386, 49 C. C. A. 397. Moreover, the Commissioner of Patents, who, in the first instance, is charged by law with the execution of the statute under which the patent was granted, has evidenced his approval of complainant's application for a patent, and, as stated in numerous cases, it is the settled doctrine of the federal courts to give weight to the contemporaneous construction of not only courts, but of the department whose duty it is to carry the law into effect. *Schell v. Fauche*, 138 U. S. 572, 11 Sup. Ct. 376, 34 L. Ed. 1040.

The demurrer is overruled, with costs, leave being granted to the defendant to answer within 20 days.

COMMONWEALTH OF KENTUCKY v. POWERS.

(Circuit Court, E. D. Kentucky. July 7, 1905.)

1. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—DISCRIMINATION IN SELECTION OF JURY IN CRIMINAL CASE.

A person charged with crime in a state court has the right to be tried by a jury selected from persons possessing the statutory qualifications of jurors, without discrimination against those who belong to the same political class as himself because they belong to such class; and such right is one secured to him by the clause of the fourteenth amendment of the federal Constitution prohibiting a state from denying to any person within its jurisdiction the equal protection of the laws.

2. REMOVAL OF CAUSES—MOTION TO REMAND—ISSUES OF FACT.

Distinct and unambiguous allegations of fact in a petition for removal, not denied by any pleading filed by plaintiff, except in so far as contradicted by the record, are to be taken as true, on a motion to remand, or other proceeding challenging the jurisdiction of the federal court.

3. SAME—DENIAL OF CIVIL RIGHTS—ACTS OF STATE.

Rev. St. § 641 [U. S. Comp. St. 1901, p. 520], which provides for the removal of any civil suit or criminal prosecution against any person who is denied or cannot enforce in the judicial tribunals of the state any right secured to him by any law providing for equal civil rights, while not as broad as the provision of the fourteenth constitutional amendment for the equal protection of the laws, since it is confined to the action of judicial tribunals, is not restricted to cases where civil rights are denied by legislative action of the state, but applies as well where by rulings in other cases, or in the same case prior to final hearing, a rule of judicial decision has been established which will presumably so affect the judicial tribunals of the state as to cause a denial of civil rights to a defendant, or prevent their enforcement.

4. SAME.

The right of removal under Rev. St. § 641 [U. S. Comp. St. 1901, p. 520], given to a defendant who is denied or cannot enforce his civil rights in the judicial tribunals of the state, is not affected by the fact that such rights may be enforced ultimately by proceedings in error in the Supreme Court of the United States. The remedy by removal is given by the statute to all who bring themselves within its provisions.

5. SAME.

A petition for removal filed by a defendant in a criminal prosecution, taken in connection with the transcript filed in the federal court, showed that petitioner had been tried three times on the charge in a circuit court of Kentucky, and that each time he had been convicted, and the judgment reversed by the state Court of Appeals; that the crime charged grew out of a political contest; that, on the second and third trials, petitioner had been discriminated against in the selection of the jurors by those charged under the state law with the duty of drawing the panel and summoning veniremen, with the result that all the jurors by whom he was tried were in each case members of the opposite political party to himself; that, on objections properly taken to the panel and jury on that ground, and on motions for new trial, the court refused to consider evidence offered to prove such discrimination, and ruled that the petitioner had no right to object thereto, inasmuch as the jurors chosen possessed the statutory qualifications. By Ky. Code Cr. Prac. § 281, as construed by the Court of Appeals, such rulings of a trial court with respect to juries are made final, and are not subject to review. *Held*, that by such discrimination petitioner was denied the equal protection of the laws secured to him by the fourteenth amendment to the federal Constitution, and that the petition showed a right of removal under Rev. St. § 641 [U. S. Comp. St. 1901, p. 520], providing for such removal by any person who is denied or cannot enforce in the judicial tribunals of the state any right secured to him by any law providing for equal civil rights.

On Motion for Writ of Habeas Corpus Cum Causa.

R. B. Franklin, C. J. Bronston, N. B. Hays, and Lawrence Maxwell, Jr., for the Commonwealth.

R. D. Hill, Richard Yates, Frank S. Black, J. C. Sims, H. C. Howard, and R. C. Kinkead, for defendant.

COCHRAN, District Judge. This is a criminal prosecution by the commonwealth of Kentucky against Caleb Powers for the offense of having been an accessory before the fact to the willful murder of William Goebel, assassinated January 30, 1900, at Frankfort, Franklin county, within the Eastern District of Kentucky, which prosecution was begun and for some time has been pending in the courts of said commonwealth, but which said defendant, Powers, claims has been removed to this court by appropriate proceedings. It is before me now on his motion for the issuance of a habeas corpus cum causa to take him from the commonwealth's custody, where he has been since two days after the beginning of the prosecution, and place him in that of the United States, to await further proceedings therein in this court. The commonwealth of Kentucky, by its Attorney General and employed counsel, objects to this motion. The ground of its objection is that jurisdiction of the prosecution has not been removed from the state court to this court by said removal proceedings. It is in effect a motion to remand.

The statute under which said proceedings were had is section 641, Rev. St. U. S. [U. S. Comp. St. 1901, p. 520]. This statute originated in section 3 of the original civil rights act of April 9, 1866 (14 Stat. 27, c. 31), was re-enacted in section 18 of the act of May 31, 1870 (16 Stat. 144, c. 114), re-enacting said civil rights act after the adoption of the fourteenth amendment, July 21, 1868, and was carried from thence into the revision of 1873-74 as section 641 thereof. By section 5 of the jurisdictional acts of March 3, 1887 (24 Stat. 555, c. 373), and August 13, 1888 (25 Stat. 436, c. 866 [U. S. Comp. St. 1901, p. 515]), it was provided that nothing in said acts should be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned in said section 641; section 642, providing for the issuance of the writ of habeas corpus cum causa sought herein; section 643, providing for removal of civil suits and criminal prosecutions in a different state of case than that provided in section 641, to which reference will be made further on, and other statutes not necessary to be referred to here. That portion of section 641 material to quote is as follows:

"When any civil suit or criminal prosecution is commenced in any state court, for any cause whatever, against any person who is denied or cannot enforce in the judicial tribunals of the state or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States * * * such suit or prosecution may, upon the petition of such defendant filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next Circuit Court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state courts shall cease and shall not be resumed except as hereinafter provided."

The remaining portion of the section provides for filing the transcript of the record in the state court in the Circuit Court of the United States, and for docketing the cause therein. Before stating the proceedings which have been had under said section, and considering their effect upon the jurisdiction of said prosecution, it will be well to do two things. One is to realize the constitutionality of said section, and to come to an understanding as to the basis thereof. This understanding will aid in its construction when we come to take that matter up. Its constitutionality was directly upheld in the case of *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664, and assumed in the case of *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667, decided the same day, and in the cases of *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Bush v. Kentucky*, 107 U. S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354; *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075; *Smith v. Mississippi*, 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082; *Murray v. Louisiana*, 163 U. S. 101, 16 Sup. Ct. 990, 41 L. Ed. 87; *Williams v. Mississippi*, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012—decided subsequently. Its peculiarity, causing one to want to understand as to its constitutionality, if not to question it, consists in the fact that it provides for the removal of a state prosecution for a state offense pending in a state court to a federal court. Section 643, heretofore referred to, is like it in this particular. It, too, provides for the removal of a state prosecution for a state offense pending in a state court to the federal court, but in a different state of case from that provided in section 641. That state of case is when the prosecution is against "any officer appointed under or acting by authority of any revenue law of the United States * * * or against any person acting under or by the authority of any such officer on account of any act done under color of his office or of any such law or on account of any right, title or authority claimed by such officer or other person under any such law," etc. This statute originated, about the same time as that contained in section 641, in section 67 of the act of July 13, 1866 (14 Stat. 171, c. 184), and was carried from thence into the revision of 1873-74 as section 643. On the same day that section 641 was held to be constitutional, to wit, in the case of *Strauder v. West Virginia*, supra, section 643 was held to be constitutional, also, in the case of *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648. That day was March 1, 1880. It may be said to have been a great day in the history of federal jurisprudence. On the same day, section 4 of the act of March 1, 1875 (18 Stat. 336, c. 114 [U. S. Comp. St. 1901, p. 1261]), making it an offense against the United States, punishable in its courts, for a state officer or other person charged with any duty in the selection or summoning of jurors in state courts to exclude or fail to summon any citizen possessing all other qualifications prescribed by law on account of race, color, or previous condition of servitude, was held to be constitutional in the case of *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676. At the same time section 641 was construed not only in *Strauder v. West Virginia*, supra, but also in *Virginia v. Rives*, supra. A vigorous attack was made in

said four cases thus disposed of on the same day upon the constitutionality of said sections 641 and 643 and section 4 of the act of March 1, 1875, by Justices Field and Clifford, and they dissented from the conclusion of the majority of the court as to the constitutionality of each statute. Justice Clifford wrote the dissenting opinion in *Tennessee v. Davis*, and Justice Field that in *Ex parte Virginia*. Their views as to the constitutionality of section 641 were embodied in a separate opinion by Justice Field in *Virginia v. Rives*, in which concurrence was expressed with the opinion of the majority of the court in that case as to the construction of section 641, and its applicability to a case of that kind. The ground of their attack upon all three statutes was, in substance, that they were an invasion of the sphere of state action, there being nothing in the federal Constitution to warrant them. In the case of *Ex parte Virginia*, Justice Field, in referring to the criminal prosecution of a state officer in a federal court under section 4 of the act of March 1, 1875, said:

"The proceeding is a gross offense to the state. It is an attack upon her sovereignty in matters over which she has never surrendered her jurisdiction. The doctrine which sustains it, carried to its logical results, would degrade and sink her to the level of a local municipal corporation."

In the case of *Tennessee v. Davis*, Justice Clifford said:

"Viewed in any light, the proposition to remove a state indictment for felony from a state court having jurisdiction of the case into the Circuit Court, where it is substantially admitted that the prisoner cannot be tried until Congress shall enact some mode of procedure, approaches so near to what seems to me both absurd and ridiculous that I fear I shall never be able to comprehend the practical wisdom which it doubtless contains."

Both judges had much to say as to the mode of procedure in the federal courts after the removal thereto of a criminal prosecution pending in the state court under either section 641 or 643. Justice Field, in *Virginia v. Rives*, said:

"There are many other difficulties in maintaining the position of the Circuit Court, which the counsel of the accused and the Attorney General have earnestly defended. If a criminal prosecution of an offender against the laws of a state can be transferred to a federal court, what officer is to prosecute the case? Is the attorney of the commonwealth to follow the case from his county, or will the United States district attorney take charge of it? Who is to summon the witnesses and provide for their fees? In whose name is judgment to be pronounced? If the accused is convicted and ordered to be imprisoned, who is to enforce the sentence? If he is deemed worthy of executive clemency, who is to exercise it—the Governor of the state, or the President of the United States? Can the President pardon for an offense against the state? Can the Governor release from the judgment of a federal court? These and other questions which might be asked show, as justly observed by the counsel of Virginia, the incongruity and absurdity of the attempted proceeding."

The necessity of Congress having to enact some mode of procedure in such a case after its removal, before the prosecution could be tried, seems not to have been admitted, as Justice Clifford thought. Concerning this matter, Justice Strong, who delivered the opinion on behalf of the court in all four cases, in the case of *Tennessee v. Davis*, said:

"The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offense against the peace and dignity of a state, if they were real, would be for the consideration of Congress. But they are unreal. While it is true there is neither in section 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The Circuit Courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the state in civil cases, and there is no more difficulty in administering the state's criminal law. They are not foreign courts. The Constitution has made them courts within the states to administer the laws of the states in certain cases, and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a state in tribunals of the general government grows entirely out of the division of powers between that government and the government of a state; that is, divisions of sovereignty over certain matters. When this is understood—and it is time it should be—it will not appear strange that, even in cases of criminal prosecution for alleged offenses against a state, in which arises a defense under United States law, the general government should take cognizance of the case, and try it in its own courts according to its own forms of proceeding."

The warrant found by the majority of the court in the federal Constitution for section 643 was the second section of article 3 and the eighth section of article 1 thereof. By the former it is provided that the judicial power of the federal government shall extend to all cases in law and equity arising under the Constitution and laws of the United States, and treaties made under their authority. By the latter it is provided that Congress shall have power to make all laws necessary and proper for carrying into execution all the powers vested by the Constitution in the government of the United States, or in any department or officer thereof. It was held that a state prosecution for a state offense pending in a state court, in which the defendant claims that the act for which he is being prosecuted was done under the color of his office as a federal official, was a case arising under the Constitution and laws of the United States, to which the judicial power thereof extended, and that a law providing for the removal of such prosecution to the federal court was proper for carrying into execution such power. The warrant so found for sections 641 and 642 and section 4 of the act of March 1, 1875, was the fourteenth amendment to the federal Constitution, and particularly that part thereof contained in the last clause of the first section thereof, providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws," and in the fifth section thereof, providing that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Said last clause of the first section, though in form a prohibition simply against state action amounting to a denial to any person within its jurisdiction of the equal protection of its laws, conferred a right on such a person to the equal protection of the laws, which he was entitled to enforce. In the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, Justice Matthews said that it was "a pledge of the equal protection of the laws." In the case of *Strauder v. West Virginia*,

supra, Justice Strong said, "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right." And in the Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835, Justice Bradley said:

"Positive rights and privileges are undoubtedly secured by the fourteenth amendment, but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect."

As to the protection afforded by said clause of the amendment, Justice Field had this to say in the case of Santa Clara v. So. Pac. R. Co. (C. C.) 18 Fed. 398:

"This protection attends every one everywhere, whatever be his position in society or his association with others—either for profit, improvement, or pleasure. It does not leave him because of any social or official position which he may hold, or because he may belong to a political body or to a religious society, or be a member of a commercial, manufacturing, or transportation company. It is the shield which the arm of our blessed government holds at all times over every man, woman, and child in all the broad domain, wherever they may go, and in whatever relation they may be placed."

Said sections 641 and 642 enforce said last clause of the first section, in that they provide that if, in a civil or criminal prosecution pending in a state court, the defendant therein is denied or cannot enforce therein any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof—by which is meant said clause or any statute so providing passed pursuant thereto—he shall be entitled to have the suit or prosecution removed to the federal court. Said section 4 of the act of March 1, 1875, enforces said clause, in that it provides for the indictment and conviction in a federal court of any state official charged with the duty of selecting or summoning jurors who discriminates against him because of his color, and to this extent denies him the right to the equal protection of the laws pledged by said clause.

So much, then, as to the constitutionality of section 641, and as to the basis thereof.

The other thing which it will be well to do before stating the proceedings had under said section, and considering their effect upon the jurisdiction of the prosecution, is to give an outline of the proceedings had in the state courts before and up to the beginning of said removal proceedings, and thus fit the two together. March 9, 1900, said prosecution was begun by the issuance of a warrant for defendant's arrest by the county judge of Franklin county. March 11, 1900, defendant was arrested under said warrant. March 27, 1900, after an examining trial had before said county judge, he was held without bail to the grand jury of said county, at the then next April term of the circuit court thereof. April 17, 1900, an indictment found by said grand jury was returned into court. May 2, 1900, the prosecution was transferred to the circuit court of Scott county—an adjoining county to Franklin, and in the same judicial district, and within said Eastern District of Kentucky—on defendant's motion for a change of venue. Beginning July 9th, a spe-

cial term of the said Scott circuit court was held, at which defendant was tried, and found guilty by the jury, who fixed his punishment at imprisonment for life. The verdict was returned August 18, 1900, and judgment thereon was entered September 5, 1900. The jurors from whom said jury was impaneled came from Scott county, and said jury was composed entirely of Scott county jurors. March 28, 1901, the Court of Appeals of Kentucky reversed this judgment—the court standing four to three in favor of the reversal—and remanded the prosecution to the lower court for further proceedings consistent with the opinion then delivered. The grounds of reversal were errors of the lower court as to the admissibility of testimony and instructions to the jury. October 10, 1901, at the regular October term, 1901, of said court, a second trial of defendant was had, which terminated as the first trial. The verdict of the jury was returned October 26, 1901, and judgment thereon was entered the same day. The jurors from whom this jury was impaneled came partially from Scott county and partially from Bourbon county—an adjoining county to Scott, and in the same state judicial district—and said jury seems to have been composed of six jurors from Scott and six from Bourbon. December 3, 1902, the Court of Appeals reversed this judgment—the court standing four to three in favor of reversal—and remanded the prosecution to the lower court for proceedings consistent with the opinion then delivered. The grounds of reversal were the same as on the first appeal, and, in addition, the refusal of the judge of the lower court to vacate the bench at the second trial therein upon defendant's filing an affidavit, under section 968 of the Kentucky Statutes of 1903, to the effect that said judge would not give him a fair and impartial trial, and setting forth at large the facts upon which he based this claim. On the filing of the mandate of the Court of Appeals in the lower court, said judge refused to vacate the bench, and thereafter was required to do so by a writ of prohibition from the appellate court. Thereupon a special judge was appointed by the Governor to try the case at the next trial. Beginning August 3, 1903, a special term of the Scott circuit court was held, at which defendant was again tried and found guilty; but this time the jury fixed his punishment at death, instead of imprisonment for life, as had been done by the two former juries. The verdict was returned August 29, 1903, and judgment thereon was entered the same day. The jurors from whom this jury was impaneled came from Bourbon county, and said jury was composed entirely of Bourbon county jurors. December 6, 1904, the Court of Appeals reversed this judgment—the court standing four to three in favor of reversal—and remanded the prosecution to the lower court for proceedings consistent with the opinion then delivered. The grounds of reversal were the entering of the judgment upon the verdict of the jury the same day it was returned, in violation of a Code provision, when defendant was seeking more time for filing additional grounds for new trial, and improper conduct on the part of one of the employed counsel for the commonwealth in his argument to the jury. Theretofore a jury in the Frank-

lin circuit court had convicted James B. Howard, claimed to be the assassin of William Goebel, of his murder, and fixed his punishment at imprisonment for life. Said counsel, in his argument to the jury, made this statement in regard to that verdict, to wit, "Howard was not hung, but eleven of the twelve jurors who tried him were in favor of hanging him, and one was for life imprisonment, and the eleven had to come to the one," which the lower court permitted to be made against defendant's objection. The opinion delivered in the Court of Appeals on the three separate hearings therein may be found reported as follows, to wit: Powers v. Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245; Same v. Same, 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494; Same v. Same (Ky.) 83 S. W. 146.

The term of office of one of the judges of the Court of Appeals who concurred in the said judgments of reversal expired on the 1st day of January last, and he was succeeded by the judge of the Scott circuit court who presided at the first two trials; having been elected to said position at the regular November election in 1904. Upon his vacating the office of circuit judge, an appointment was made by the Governor to fill the vacancy until the November election in this year. May 3, 1905, the third day of the May term, 1905, of said Scott circuit court, the mandate of the Court of Appeals, issued upon its last judgment of reversal, was filed in the Scott circuit court, and the prosecution was set for a fourth trial at a special term to begin the 10th of this month—three days hence—when a trial will be had in said court before the judge appointed to fill said vacancy, if jurisdiction of the prosecution remains in the state court.

It is now in order to state the proceedings had under section 641, and, after doing so, to consider the question whether their effect has been to work a transfer of jurisdiction. Those proceedings were begun in the Scott circuit court May 3, 1905, immediately upon the filing of the mandate of the Court of Appeals, as hereinbefore stated. At that time defendant tendered to said court a petition for the removal of the prosecution from that court to this court, and moved that he be permitted to file the same. Upon the objection of the commonwealth, said court refused to permit said petition to be filed. The next Circuit Court of the United States in this district held thereafter was the London term, which began May 8, 1905—five days after the tendering of the petition for removal to the state court. On that day, upon defendant's motion, a partial transcript of the record in the state court—all that the clerk thereof was able to furnish in the meantime—was filed and the cause was docketed in said court. The commonwealth objected to this action of the court, and, upon its being had, moved to set it aside, which motion was overruled. Leave was then granted to the defendant until the 8th day of June thereafter to procure and file an additional transcript, which has been done within the time limited. The motion for the writ of habeas corpus was made at the time of filing the partial transcript and docketing the cause, and after the filing

thereof, to wit, on June 8th, said motion was taken up, argued, and submitted.

We are now in position to confront the question raised by said motion for a writ of habeas corpus, to wit, whether the effect of said removal proceedings has been to work a transfer of jurisdiction. Three things are essential in order that they should have had that effect. The first thing is that it must appear that the defendant has a right which he is entitled to enforce. The second is that it must appear that such right is a right secured to him by a law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States; i. e., a right secured to him by the equal protection of the laws clause of the fourteenth amendment, or a statute passed pursuant thereto and the fifth section thereof. It is not sufficient that it be a right which he is entitled to enforce. It must be a right so secured to him. The third and last thing is that it must appear that the defendant is denied such right, or cannot enforce it, in the state courts having jurisdiction of the prosecution against him, within the meaning of section 641.

The petition for removal contains two paragraphs, in each of which defendant states a separate right which he claims he is entitled to enforce, is secured to him by said clause of the fourteenth amendment, and is denied him and cannot be enforced by him in the state courts in the prosecution therein against him. That stated in the first paragraph is the right to be released from further custody under the charge against him, because of a pardon for said offense issued to him March 10, 1900, the day after his arrest, by William S. Taylor, then claiming to be Governor of Kentucky. That stated in the second paragraph is a right to have the jurors from which the jury that is to try him is to be impaneled selected from persons possessing the statutory qualifications, without discriminating against those of them who belong to the same political class to which he belongs, to wit, Republicans, because of their belonging to such class.

I prefer to take up the right stated in the second paragraph first, and consider and determine whether defendant has any such right; whether, if he has, it is secured to him by said clause of the fourteenth amendment; and whether, if it is, it is denied him or cannot be enforced by him in the state courts in the prosecution against him. The first two questions go together, for it is not claimed that he has any such right, other than by virtue of said clause of the fourteenth amendment. It is to be noted that, if he has any such right, it is only in relation to state action. It is not in relation to individual action apart from state connection. Of course, it could not well be otherwise, for no one has anything to do with the selection of jurors but some person acting for and on behalf of the state. If it exists, however, it is a right in relation to state action through any of its agencies. Justice Field, in *Ho Ah Kow v. Nunan*, Fed. Cas. No. 6,546, said:

"This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative, and judicial departments; and to the subordinate legislative bodies of counties and cities."

The right secured by said clause, when its language is departed from, is almost invariably, if not entirely, referred to as a right to have the state refrain from unjust or unreasonable discrimination. A state has a right to discriminate between persons within its jurisdiction, but such discrimination must be along just and reasonable lines. A discrimination that is without a just or reasonable basis is purely arbitrary. And as said by Justice Matthews in *Yick Wo v. Hopkins*, supra, the principles upon which the institutions of our government are supposed to rest "leave no room for the play and action of purely personal and arbitrary power." He said further therein as follows, to wit:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

As a rule, at least, discrimination by a state between classes of persons within its jurisdiction is unjust and unreasonable. Justice Matthews, in the case last mentioned, in referring to the ordinance involved therein, which left the question as to who might carry on the laundry business in San Francisco in wooden buildings to the arbitrary consent of a board of supervisors, who, in administering it, refused consent to Chinese, said:

"The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists, except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the Constitution."

In the case of *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, in referring to a discrimination by a state through legislative action, Justice Brown said:

"The question in each case is whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

In the case of *Ho Ah Kow v. Nunan*, supra, Justice Field, in referring to similar discrimination, said:

"But in our country hostile and discriminating legislation by a state against persons of any class, sect, creed, or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment."

And in the case of *Gibson v. Mississippi*, supra, Justice Harlan said:

"In the administration of criminal justice, no rule can be applied to one class which is not applicable to all other classes."

In the matter of selecting jurors, it is well settled that there may be a discrimination by the state between persons within its jurisdiction that is just and reasonable, and hence right, under the fourteenth amendment. Justice Strong alluded to such discrimination in *Strauder v. West Virginia*, supra, when he said:

"We do not say that, within the limits from which it is not excluded by the amendment, a state may not prescribe the qualifications of its jurors, and, in so doing, make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the fourteenth amendment was ever intended to prohibit this. Looking at its history, it had no such purpose."

Beyond such discrimination, a class discrimination in the selection of jurors is unjust and unreasonable. In the cases heretofore cited, beginning with *Strauder v. West Virginia*, in which the constitutionality of section 641 was held or assumed, it was held or assumed that a discrimination in the selection of jurors against negroes, because of their color, was unjust and unreasonable, and hence in violation of the fourteenth amendment. No occasion has arisen heretofore to decide whether any other class discrimination in the selection of jurors was likewise unjust and unreasonable, and such a violation. But in the case of *Strauder v. West Virginia*, supra, Justice Strong said:

"If, in those states where the colored people constitute a majority of the entire population, a law should be enacted excluding all white men from jury service, thus denying to them the privileges of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor, if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment?"

Judge Barker, in his separate opinion rendered on the last hearing of this prosecution in the Court of Appeals (*Powers v. Commonwealth* [Ky.] 83 S. W. 149), sums up the position of the Supreme Court of the United States in this particular in these words:

"The Supreme Court of the United States, the final arbiter in all matters involving the federal Constitution, has uniformly held that the exclusion from juries, grand or petit, of persons belonging to a class, for the sole reason that they belonged to such class, is, as to a member of the excluded class being tried under a charge of crime, a deprivation of the equal protection of the laws. This question has generally arisen in cases involving the exclusion and trial of negroes. This might well be expected, in the confusion of adjusting the rights of this race from their former condition of slavery to that of citizens, under the thirteenth, fourteenth, and fifteenth amendments. But the application of the principle under discussion is not confined to the rights of negroes. It extends to every person, whatever his race, color, or political affiliation, if his legal rights have been denied solely because thereof."

There would seem, therefore, to be no room to question that the defendant has the right which he asserts in the second paragraph of his petition, to wit, to have the jurors from which the jury is to be impaneled that is to try him selected from persons possessing the statutory qualifications, without discrimination against those of them who are members of the same political class as defendant be-

cause of their belonging to such class, and that it is a right secured to him by the equal protection of the laws clause of the fourteenth amendment. The right which he thus has is a right against discrimination on that account. It is not a right to a mixed jury; i. e., to have on the jury members of the political class to which he belongs. On this point Justice Strong had this to say in *Virginia v. Rives*, *supra*:

"Nor did the refusal of the court and the counsel for the prosecution to allow a modification of the venire, by which one-third of the jury, or a portion of it, should be composed of persons of the petitioner's own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them or to any person by the law of the state, or by any act of Congress, or by the fourteenth amendment of the Constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the state court, viz., a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia or by any federal statute. It is not, therefore, guaranteed by the fourteenth amendment, or within the purview of section 641."

The right against discrimination, therefore, is a constitutional right, and should be respected by every one who in an official way has to deal with it. It should not be disregarded for any reason—not even because of a sincere conviction of guilt on the part of the accused, and a fear that otherwise he will go unwhipped of justice. The conception of a jury selected without class discrimination is a narrower conception than that of a fair and impartial jury. It is, however, an essential element in the conception of a fair and impartial jury. There cannot be a fair and impartial jury where there has been class discrimination. Just how far the fairness and impartiality of the jury will be affected by such discrimination depends on circumstances. In some circumstances it will be affected more than in others. But it is hard to conceive of a case where it will be more affected than in a case where there has been discrimination against the political class to which the defendant belongs, and the case has a political bearing, and has awakened great political feeling. Judge Barker, in the dissenting opinion heretofore referred to, truly said:

"I do not insist that in ordinary criminal trials there is any necessity for watchfulness to keep politics out of the jury box. When, ordinarily, one is arraigned for crime, it is immaterial whether the jurors are of the same or an opposing political party. Usually this is a question which excites neither the interest of the accused, nor that of his counsel. But when the offense springs from an intense political contest, all becomes different. Then the political complexion of the jury is all-important. The administration of even-handed justice has no more insidious enemy than political prejudice. It enters unseen and unsuspected into the human mind, corrodes the reason, and undermines the judgment. Neither purity of heart nor exaltation of character affords an antidote for this deadly poison. Indeed, these virtues may well magnify the evil, for the mind thus possessed is all the more ready to enforce the oblique judgment when it has no cause to suspect its own integrity."

And again: "Nothing so surely tends to enhance the respect men owe to the law than a fairly rooted conviction that its judgments are the offspring of evenhanded justice, and of its temple an impartial jury is the chief corner stone. On the other hand, nothing is so certainly productive of distrust and fear out of which springs anarchy, as a well-grounded suspicion that judicial procedure is tainted with partiality and indirection. That conviction forms the basis for the love of the citizen of his state in return for 'the equal protection of the laws,' and this suspicion engenders the scorn and hatred which all good men entertain for that oriental system of judicature with whose decrees the chance of the dice box is honest by comparison, and of this suspicion a partisan jury is the most effective promoter."

The federal thought on the subject is expressed in Act June 30, 1879, c. 52, § 2 [1 U. S. Comp. St. p. 624], which provides that jurors in the federal courts shall be selected by the "clerk of the court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliation, until the whole number required shall be placed therein."

It remains, so far as this branch of the case is concerned, to consider and determine whether, within the meaning of section 641, it appears that the defendant is denied or cannot enforce in the state courts this constitutional right thus determined to be his. It will be noted that he is entitled to a removal if either he is denied or cannot enforce such right therein. Justice Bradley, in the case of *Texas v. Gaines*, Fed. Cas. No. 13,847, in referring to the third section of the original civil rights act of April 9, 1866 (14 Stat. 27, c. 31)—substantially the same as section 641 in wording—said:

"What says the third section? How does it describe and define those who are within the meaning of the act? It defines them as 'persons who are denied or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any of the rights secured to them by the first section of this act.' Here are two classes: (1) Persons who are denied any of the rights secured to them by the first section of the act; (2) persons who cannot enforce in the courts any of said rights."

And first, does it appear that the defendant is so denied the rights in question? Here, again, the question breaks in two. What facts appear in relation to a denial thereof? And what is the proper legal construction to be placed upon such facts?

It will aid in presenting them to make a preliminary statement in regard to two matters. One relates to the method of selecting jurors prescribed by the statutes of Kentucky. A certain number of jurors are selected annually by three jury commissioners appointed annually for each county by the judge of the circuit court. In Scott county the jury commissioners seem to be appointed each year, at the regular October term of the circuit court thereof. The names of the jurors thus selected are placed by the commissioners in a wheel, and the regular panels of grand and petit jurors for each term thereafter during the year are drawn from the wheel. The commissioners draw the panels for the first term thereafter, and the circuit judge draws them for the subsequent terms. The statute prescribes that the commissioners shall be intelligent and discreet housekeepers of the county, over 21 years of age, resident in

different portions of the county, and having no action in court requiring the intervention of a jury. They are required to select the jurors from the intelligent, sober, discreet, and impartial citizens, resident housekeepers in different portions of the county, over 21 years of age. It is provided that the judge of the circuit court may at any time during the term when it is necessary, after the regular panel is for any reason exhausted, draw and select from the wheel other persons to act as grand and petit jurors, or he may, in his discretion, direct that such jurors be supplied from bystanders. The other matter referred to is the number of peremptory challenges allowed in the state courts in a felony prosecution. They are five to the commonwealth, and fifteen to the defendant.

Now as to the facts that appear in relation to a denial of defendant's said constitutional right. And first, what facts are alleged in the second paragraph of the petition? Four circumstances are alleged that have a tendency to induce a suspicion, if not an actual belief, that, in the selection of the jurors from which the jury that tried defendant on each occasion came, those persons qualified for jury service who belonged to the same political class as defendant, to wit, Republicans, were purposely excluded therefrom, and thus discriminated against. The first is the existence of a state of feeling against the defendant on the part of those of opposite politics because of his alleged offense. It is alleged that at the regular election for Governor and other state officials in November, 1899, said William Goebel was the Democratic candidate for Governor, said William S. Taylor was the Republican candidate therefor, and defendant was the Republican candidate for the office of Secretary of State; that said Taylor, defendant, and the other Republican candidates were declared elected and inducted into their respective offices; that thereafter Goebel contested Taylor's right to the office of Governor, defendant's opponent contested his right to the office of Secretary of State, and like contests were had as to the other offices; that it was pending said contest that Goebel was assassinated; that the public mind was greatly inflamed, and bitter and intense political animosities were excited and fostered by reason of said election, contest, and assassination, and that such feelings existed at each of said three trials, and still existed against him, on the part of Goebel Democrats throughout the state, and particularly in Scott and Bourbon counties. At the election in 1899 there was a split amongst the Democrats; John Young Brown ran as an Independent; and by "Goebel Democrats" is meant those that supported Goebel. The second is that those who had to do with selecting the jurors from whom the three juries came were all Goebel Democrats. The third is that at the time of each of the trials there were in Scott and Bourbon counties such a number of Republicans qualified for jury service that it is not likely that a jury would have been obtained having no Republicans upon it. It is alleged that at the presidential election in November, 1900, 2,500 Democratic and 2,100 Republican votes were cast in Scott county; that in the presidential election in 1896 2,600 McKinley and 2,200 Bryan votes were cast in Bourbon county; and that at the state election in 1899 Taylor received 27 more votes than Goebel in Bourbon county. It appears from

the returns that at the last three presidential elections in said two counties the vote was as follows:

Scott County.			
	Dem. Votes.	Rep. Votes.	
1896.....	2,374	1,713	
1900.....	2,539	2,107	
1904.....	2,237	2,111	

The average Democratic vote for the three elections was 2,378, and the average Republican vote for same was 1,977. For the last two years the former average was 2,388, and the latter 2,109.

Bourbon County.			
	Dem. Votes.	Rep. Votes.	
1896.....	2,210	2,578	
1900.....	2,411	2,217	
1904.....	2,586	2,147	

The average Democratic vote for the three elections was 2,402, and the average Republican vote for same was 2,314. For the last two years the former average was 2,498, and the latter 2,183. It is further alleged that the number of white Republican voters in Scott county is about 1,300, and that in Bourbon county three-fifths of the Republican voters are negroes, which would make the white Republican voters in Bourbon county about 900. The proportion of Democratic voters to Republican white voters in Scott county is not as great as two to one. In Bourbon county it is somewhat less than two to one, and not as great as three to one. If, then, no more Democratic voters in proportion were disqualified or excusable from jury service than Republican white voters, which it is reasonable to conclude was the case, it follows that the proportion of Democratic qualified and nonexcusable jurors to Republican white qualified and nonexcusable jurors in Scott county was not as great as two to one, and in Bourbon county it was between three to one and two to one. The fourth and last circumstance referred to is that upon neither one of the three juries that tried defendant was there a single Republican. As to the composition of the first jury, it is alleged that it was composed "almost, if not entirely, of Goebel Democrats, and no Republicans"; as to the second jury, that it was composed "entirely of Goebel Democrats"; and, as to the third, that it was composed "entirely of Goebel Democrats—one juror, a Goebel supporter, but of doubtful politics, excepted." Then certain acts are alleged in relation to the selection of the jurors from which said juries were impaneled, and to the impaneling of the juries therefrom, which, taken in connection with said circumstances, establish, if true, that in such selection Republicans were discriminated against and purposely excluded therefrom, in order that there might not be any of them on the jury to try defendant, and that the Scott circuit court held that such discrimination was not illegal, and the defendant had no right to have it refrained from. It is alleged, as to the first trial at the July-August, 1900, special term, that there were in the wheel the names of 100 undrawn jurors, placed there, prior to the election of 1899 and the assassination of

Goebel, by impartial and unbiased jury commissioners appointed by the circuit judge in October, 1899; that, upon the regular panel being exhausted, defendant moved said judge to select additional jurors required from the wheel, and that he refused to do so, and directed the sheriff of Scott county to summon first 100 men, and then 40 men, for jury service from said county, and to summon no man from Georgetown, the county seat of said county, but to go out in the county for that purpose; that the men so summoned were, with the exception of three or four Republicans and Independent Democrats, known to be partisan Goebel Democrats, and were, with said exception, purposely summoned because of their known party affiliation; that when the men so summoned appeared in court they were seated on the side of the courtroom separate and apart from the spectators and other persons, and said judge, without notice to defendant or his counsel, or making any request of either to accompany him, left the bench, went to the place where said veniremen were seated, called them up to him one at a time, not in defendant's or in his counsel's hearing, and, without swearing them, excused such of them as he saw fit from jury service; and that from the jurors so summoned the first jury was obtained. As to the second trial, at the regular October term, 1900, it is alleged that at the October term, 1900, when an appeal was pending from the judgment entered upon the verdict of the first jury, and there was a possibility of its being reversed and another trial had, said judge appointed as jury commissioners John Bradford, Ben Mallory, and H. H. Haggard, all Goebel Democrats; that said jury commissioners placed in the wheel the names of 200 citizens of Scott county, 195 of whom were Goebel Democrats, and 5 of whom were Republicans; that, of the names so placed in the wheel, 75 were drawn at the regular February and May, 1900, terms of said court, and 125 were drawn at the regular October, 1901, term, upon defendant's second trial; that, of the 5 Republicans so placed in the wheel at the beginning, 1 was drawn at the February term, 1 at the May term, and the other 3 at the October term; that, of the 3 drawn at the October term, two were disqualified by previously formed opinions, and the other was peremptorily challenged by the commonwealth; that a jury was not obtained from said Scott county jurors, probably as much as 6 jurors being obtained therefrom, and the sheriff was directed to summon veniremen from Bourbon county; that he summoned 168 veniremen from said county, all of whom were Goebel Democrats, except 3 who were Republicans; and that from the jurors so summoned the remaining jurors of the second jury were obtained. As to the third jury at the last trial at the special term in August, 1903, it is alleged that 176 jurors were summoned from Bourbon county, and, of them, 3 or possibly 4 were Republicans, and the remaining 172 or 173 were Goebel Democrats, and were summoned because they differed politically from defendant. It is further alleged that on each of said trials Republicans and Independent Democrats qualified for jury service were intentionally passed by in selecting and summoning veniremen, in order that de-

fendant might not have a fair trial by a jury of his peers, impartially selected, but to the end that a jury might be selected to convict him; that in the second trial he objected to the formation of a jury from the veniremen summoned, and moved the court to discharge the entire venire, on the ground that he could not obtain a fair trial before a jury selected therefrom, and filed an affidavit in support thereof, but, although the statements in said affidavit were true, and known to be true by the court, he was forced to submit to trial before a jury composed as heretofore stated; that on the third and last trial he asked the court to admonish the sheriff to summon an equal number of men of each political party, which request was refused; that he then asked the court to instruct him to summon the talesmen as he came to them, regardless of political affiliation, which request was also refused; and that at each of said trials the facts in relation to the jurors as heretofore stated were embraced in affidavits filed in support of challenges to the panel and the venire, and objections to the formation of the jury from the men so summoned, and also in the motions and grounds for new trial prepared and filed on behalf of defendant at each of the trials, but they were disregarded by the court, and defendant's challenges to the panels and to the venire, and his motion for new trial, in each instance were overruled.

The commonwealth of Kentucky has not filed a reply to said petition for removal, or in any way taken issue with the defendant as to any of the allegations thereof. Said allegations must therefore be accepted as true, save in so far as they may be contradicted by the transcript on file herein. In the case of *Dishon v. C., N. O. & T. P. Ry. Co.*, 133 Fed. 471, 66 C. C. A. 345, Judge Richards, in discussing the affirmative allegations of a petition for removal in a civil suit under the jurisdictional acts of 1887-88, said:

"If these averments were not true, the plaintiff should have denied them, and an issue would then have been made for the court below to try and determine. No answer was filed; no issue in any other way was taken. The plaintiff contented himself with making a motion to remand, and which only raised a legal question, namely, whether, upon the facts stated in the petition for removal, taken in connection with the record, a case for removal was made out."

In the case of *Whitten v. Tomlinson*, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406, Justice Gray, in referring to a petition for a writ of habeas corpus under sections 751-755, Rev. St. U. S. [U. S. Comp. St. 1901, pp. 592, 593], said:

"In a petition for a writ of habeas corpus, verified by oath of the petitioner, as required by Rev. St. U. S. § 754, facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous."

The allegations of the petition for removal are not borne out by the transcript in all their detail. They are, however, borne out to a substantial degree, and are not contradicted in any substantial particular. It establishes the discrimination complained of in the selection of the jurors by the subordinate officers having to do

therewith on the second and third trials, and that on both trials the Scott circuit court held that such discrimination was not illegal, and the defendant had no right to complain thereof, it not being claimed that the jurors selected did not possess the statutory qualifications. As to the first trial, all that the transcript shows is that it was one of the grounds of defendant's motion for new trial that the circuit judge, after the regular panel was exhausted, had refused to draw from the wheel the names of jurors placed there in the fall of 1899, before any motive for discrimination had arisen, concerning which Judge Du Relle had this to say in the opinion delivered by him on behalf of the majority of the Court of Appeals on the first appeal:

"In the grounds relied on in the motion for new trial it is stated that the court overruled the motion of appellant, after the regular panel was exhausted, to draw the remaining names necessary to complete the jury from the jury wheel. It is to be regretted that, in a case concerning which so much feeling existed, the simple and easy mode was not adopted, which would have put beyond cavil the question of the accused having a trial by jury impartially selected. This will doubtless be done upon the succeeding trial."

There seems to have been no challenge to the venires or the panel on this trial on account of any discrimination. As to the second trial, the transcript shows that the defendant challenged the Scott county jurors drawn from the wheel and each of two Bourbon county venires before the panel was completed, and the panel after it was completed, because of the discrimination complained of, and that the challenges were overruled. It further shows that defendant filed in support of said challenges the affidavits of himself and three citizens of Scott county, and one citizen of Bourbon county, and that the commonwealth filed the affidavits of one citizen of Scott county, one of its employed counsel, of the deputy sheriffs of Scott and Bourbon counties who summoned and assisted in summoning the Bourbon county jurors, and of two citizens of Bourbon county, against the challenges. The state of political feeling and the political complexion of the voters of Scott and Bourbon counties, of the qualified jurors therein, of the three jury commissioners appointed in October, 1900, pending the first appeal, when there was the possibility of another trial, of the Scott county jurors placed in the wheel by said commissioners, and those remaining therein at the second trial, and of the Bourbon county jurors summoned at said trial, were made out by said affidavits, the same as stated in the second paragraph of the petition, as heretofore cited. Said affidavits specified the names of the five out of two hundred Scott county jurors placed in the wheel by the jury commissioners appointed in October, 1900, pending the first appeal, and when another trial was possible, and the three out of 168 Bourbon county jurors summoned by the deputy sheriffs, who were Republicans. The facts thus stated, as shown by said affidavits, were not contradicted by any statement in any counter affidavit, save as to the political complexion of the jurors summoned from Bourbon county. The sole fact stated in any of the affidavits as to the Scott county jury commissioners and as to the Scott county jurors was that they

possessed the statutory qualifications. As to the political complexion of the Bourbon county jurors, one of the Bourbon deputy sheriffs stated that the claim that only two of the first venire were Republicans was untrue, and that many more of them voted for McKinley in 1896, and against Goebel in 1899; another of said sheriffs stated, as to the claim that only one of the second venire was a Republican, that many more of them had voted as aforesaid; and the two citizens of Bourbon stated that not less than eight of the first venire voted against Goebel, and that not less than five of the second venire were Republicans. Neither of these affiants specified the name of any person upon either venire who was a Republican, other than the three specified in the defendant's affidavits. The showing made by these affidavits amounted, at the most, to this: That, out of one hundred and sixty-eight jurors summoned from Bourbon county, as many as eight voted against Goebel, and as many as five were Republicans. In each of the affidavits of the Bourbon county sheriffs and citizens it was stated that the Bourbon county jurors were sober, discreet, intelligent, good citizens of Bourbon county, thus coming up to the statutory requirement; and in the affidavits of the Scott county deputy sheriffs, who did the actual summoning of the Bourbon county jurors, they state that they told the deputy sheriffs of Bourbon county that they desired men who had the qualifications of jurors. In view of the precedent action of the judge of Scott circuit court in refusing at the first trial to draw from the wheel the names of jurors placed there in the fall of 1899, when no motive for making the discrimination complained of existed, and in appointing three Goebel Democrats as jury commissioners in October, 1900, pending the first appeal, when there was the possibility of another trial, and of the showing made in the affidavit filed before him on said challenges, the reasonable inference is that the challenges were overruled, not because it was held that there had not been the discrimination complained of, but because it was held that such a discrimination was not illegal, and the defendant had no right to complain of it, inasmuch as it was not questioned that the jurors selected possessed the statutory qualifications.

As to the third trial, the transcript shows that the defendant challenged each venire summoned from Bourbon, and the panel after it was completed, because of the discrimination complained of, and that said challenges were overruled. It further shows that the defendant filed in support of said challenges the affidavit of himself and of two citizens of Bourbon county, and that the commonwealth filed the affidavits of the officers who summoned and assisted in summoning the two venires, against the challenges. The political complexion of the two venires was shown by defendant's affidavits to be as alleged in the second paragraph of the petition. In addition, it was specifically shown how the discrimination complained of was actually practiced as to the first venire, as follows, to wit: That in Paris and on the Millersburg pike the officers summoned six Goebel Democrats, and passed by four Republicans and one In-

dependent Democrat; that on the Maysville, Lexington, and Clintonville pikes they summoned eleven Goebel Democrats, and passed by seven Republicans and one Independent Democrat; that on the Jackstown pike they summoned five Goebel Democrats, and passed by three Republicans; that on the North Middletown and Flat Rock pikes they summoned four Goebel Democrats, and passed by three Republicans; that in the town of Ruddles Mills and on the Millersburg and Ruddles Mill pike they summoned eight Goebel Democrats, and passed by two Republicans and one Independent Democrat; and in the vicinity of Clay's Crossroads, and the territory included by the Clay and Kiser pikes and the Georgetown and Cynthiana pikes, they summoned three Goebel Democrats, and passed by four Republicans and eleven Independent Democrats. The affidavits specified the name of each Goebel Democrat so taken, and each Republican and Independent Democrat so left, in these various portions of Bourbon county, and that each Republican and Independent Democrat so left was a qualified juror. The affidavits of the officers filed by the commonwealth denied that they had been guilty of the discrimination charged, and stated that the persons summoned were sober, discreet, and intelligent housekeepers of Bourbon county, qualified for jury service; that many of the persons passed by were not qualified for jury service, some of them being United States revenue officials, others old and infirm, and others practicing physicians; that, of the 95 constituting the first venire, more than two were Republicans, and a number were Prohibitionists, Republicans, and Independent Democrats; that at least 90 per cent. of the persons qualified for jury service were Democrats, and many of the Republicans who would otherwise be competent as jurors were in the service of the United States government as storekeepers, gaugers, rural carriers, post office, and other employments; and that a number of the persons named as Republicans and Independent Democrats were lifelong Democrats. No specification was made, however, as to who of the persons so named as Republicans were such Democrats. On overruling the challenge to the first venire, the court gave its reason for so doing, and entered it of record. On overruling the challenge to the second venire and the panel, no reason was given, so far as the record shows. The reasonable presumption is that it was for the same reason that the first challenge was overruled. That reason was that it was not claimed in the grounds of the challenge that the jurors were not sensible, discreet, and sober men, and housekeepers of Bourbon county, over 21 years of age, and it was expressly stated and entered of record that the challenges was overruled without any reference to the affidavits. The transcript further shows that before the venires were summoned the defendant moved the court to instruct the sheriff to summon persons without regard to political affiliation, which motion was overruled. There can be no question, then, but that the Scott circuit court held on this third and last trial that defendant had no right to have jurors summoned without discrimination against the political class to which he belonged. As said by Judge Barker in the dissenting opinion heretofore referred to:

"It is clear that the trial judge was of opinion that it was not an offense against the fourteenth amendment, or a denial of the equal protection of the laws to the defendant, to exclude Republicans from the jury solely because they were Republicans, provided the selected Democrats were possessed of the statutory qualifications required for jury service. There was no decision upon the evidence offered as to whether in fact there had been the discrimination complained of; it being necessarily assumed that this was, if true, an immaterial circumstance."

That a refusal to hear evidence offered by the defendant in a criminal prosecution that he has been illegally discriminated against in the selection of jurors is a violation of the fourteenth amendment, and a denial of the equal protection of the laws guaranteed by it, has been settled by the Supreme Court of the United States in the recent cases of *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839; *Rogers v. Alabama*, 192 U. S. 226, 24 Sup. St. 257, 48 L. Ed. 417. The *Carter Case* was an indictment against a negro found in the state court. The defendant moved to quash the indictment because of discrimination against his racial class in the selection of the grand jury. After reading his motion, he asked leave of the court to introduce witnesses, and offered them, to prove and sustain the allegations therein made. The court refused to hear any evidence in support of said motion, and overruled it, without investigating into the truth or falsity of the allegations of said motion. The Supreme Court reversed the judgment against him on this ground. Mr. Justice Gray said:

"Whenever by any action of a state, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in a criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the fourteenth amendment of the Constitution of the United States." And again: "The necessary implication is that the defendant has been denied a right duly set up and claimed by him under the Constitution and laws of the United States."

The *Rogers Case* was also an indictment against a negro, found in the state court. The defendant moved to quash the indictment because of discrimination against his racial class in the selection of the grand jury. The state court struck the motion from the files because of its prolixity. The Supreme Court held the action of the state court in this particular was a denial to defendant of the equal protection of the laws, and reversed the judgment against him.

It therefore appears from the second paragraph of the petition for removal, in connection with the transcript, that in the selection of the jurors on the second and third trials the defendant has been discriminated against by those who have had to do therewith, and that on each trial it was held by the Scott circuit court that the defendant had no right to complain thereof, inasmuch as the jurors selected possessed the statutory qualifications. He has therefore been denied the equal protection of the laws guaranteed him by the fourteenth amendment both by said subordinate officers and said court. There is no claim put forward in the petition that the Court

of Appeals decided against defendant's said constitutional right on either appeal, or that he has been denied the equal protection of the laws by said court. By section 281 of the Criminal Code of Practice of Kentucky it is provided as follows:

"The decisions of the court [trial court] upon challenges to the panel and for cause, upon motions to set aside an indictment and upon motions for a new trial shall not be subject to exception."

Because of this Code provision the Court of Appeals refused on the second and third hearings therein to pass upon the action of the Scott circuit court on the second and third trials therein in relation to the defendant's challenges to the venires and panels. It held that jurisdiction had not been conferred upon it to hear and pass upon such questions, and hence declined to express any opinion in regard thereto. On the second hearing in the Court of Appeals, Judge O'Rear, who delivered the opinion on behalf of the majority, said:

"Objections were made by affidavit and motion to the manner of selecting the jury in this case, and to the venire because of its bias. The charges made are of a more serious import, if true. But it is proper to state that they are controverted, except as to the fact of the political affiliation of the panel summoned in the case. It should not be said, and it cannot be true, that per se a Democrat is disqualified from fairly trying a Republican charged with crime, or vice versa. If men should be selected as jurymen whose prejudices would be relied on to procure a conviction or acquittal of one whom they are trying, charged with crime, we are fully persuaded that the fact of the politics of such jurymen would not be the cause of such selection. It would be the character of those so selected. But it has been held (*Terrell v. Com.*, 13 Bush, 246; *Kennedy v. Com.*, 14 Bush, 342; *Forman v. Com.*, 86 Ky. 606, 6 S. W. 579) that objection to the panel of the jury shall not be subject to review by this court. It is the opinion of the court (a point upon which, however, we have not been in entire accord) that under paragraph 281, Cr. Code Prac., this court has no jurisdiction to pass upon these questions. In the opinion of some of the members, when jurisdiction is conferred upon this court of this class of cases it is not competent for the Legislature to limit the court as to what errors it may reverse for, or as to what shall not be the subject of reversal; that to so allow is to leave the propriety and legality of the proceedings in the court to legislative, and not judicial, control. The majority of the court adheres to the former rulings on this subject. The manner of selecting the jury, except as regulated by statute, is within the control of the trial court. To its sense of fairness and desire to dispense that justice in trials whose essence is impartiality, this question must be left."

On the third hearing, though the Court of Appeals reversed the judgment of the lower court, it refused to do so on the ground that it had erred in its action as to the challenges. Judge Barker delivered the opinion of the majority of the court, setting forth the grounds upon which the reversal was had, as heretofore set forth. He also filed a separate opinion, from which I have quoted quite liberally, in which two other of the judges concurred, and in which he took the ground that the judgment should be reversed upon the error of the lower court as to the challenges. He said:

"Having written the opinion of the court in this case on the only theory upon which a majority of the members could agree, the deep conviction I have on the federal question contained in the record constrains me to express in a separate opinion my personal views on that subject."

And after doing this he said:

"In conclusion, I am of the opinion that the trial judge should have passed upon the question of fact presented by the appellant as to the summoning of the jurors, and, if there was even a well-grounded suspicion that unfairness had prevailed, the jury should have been discharged, and others summoned under such safeguards as would preclude indulgence in partisan methods."

He took the position that the Court of Appeals had jurisdiction to pass on said question by virtue of article 6 of the federal Constitution, which provides that:

"This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

It is not expressly stated in the opinion delivered on the last hearing that the court refused to pass on this federal question because of said section 281, but there can be no doubt that such was its reason in not doing so. So far as the action of said subordinate officers and the Scott circuit court in denying defendant the equal protection of the laws is concerned, it has not been contended otherwise on behalf of the commonwealth on the hearing of the motion; nor has one serious word been said to the effect that the claim of defendant in this particular is not entirely correct. The sole position taken on the part of the commonwealth has been that such action by said subordinate officers and by said court is not a denial in the judicial tribunals of the state of the equal protection of the laws, within the meaning of section 641. It is contended that defendant's sole remedy is, in case such action is repeated on another trial, to take the case to the Supreme Court of the United States by writ of error, and get it to correct the wrong done him. Are this position and contention correct? What is the proper legal construction to be placed upon such action of said subordinate officers and said court? Because of it, can it be said that the defendant is denied the equal protection of the laws in the judicial tribunals of the state where the prosecution against him is pending, within the meaning of section 641? The determination of this question demands ascertainment by us of the true intent and meaning of said section in this particular. But before entering upon its construction, a word or two as to whether the section should be liberally or strictly construed. It is well settled that the fourteenth amendment should be liberally construed. In the case of *Strauder v. West Virginia*, supra, Mr. Justice Strong said, "If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally to carry out the purposes of its framers." As section 641 was enacted to enforce said amendment, there would seem to be some ground for holding that it, too, should be construed liberally. Another consideration that may be thought to lead in the same direction is this: The object of the jurisdictional acts of 1887-88, as is well known, was to restrict federal jurisdiction in civil suits. This it did by enlarging the amount in

controversy essential to jurisdiction, and cutting down the time within which a petition for removal might be filed, and perhaps in other ways. But by section 5 thereof sections 641, 642, and 643 were continued in force, without a change in any of their provisions. On the other hand, attention may be directed to the fact that the jurisdiction conferred by section 641 is a delicate one, and, in its exercise, calculated to disturb the harmony that should exist between the federal and state jurisdictions. This thing of taking a state prosecution for a state offense pending in a state court out of said court bodily, and transferring it to a federal court, under circumstances that cannot help but be construed as a reflection upon the state court and the state itself, is a very serious matter; and, in view of it, it may be thought that the section should be strictly construed. Judge Rives characterized the federal jurisdiction thus acquired as "an anomalous jurisdiction," and in the case of *Fowlkes v. Fowlkes*, Fed. Cas. No. 5,005, he thus expressed himself as to how section 641 should be construed:

"It is observable that the late comprehensive act of March 3, 1875, embraces cases only originally cognizable by the federal courts. The same is the case of removal on the ground of prejudice or local influence. The exception to this applies to cases of public officers, and to persons denied or prevented from enforcing in the courts of the state their equal civil rights. This departure from the fundamental principle of limiting removals to cases cognizable in the federal courts results from the duty of the government to its officers, and the obligations of Congress to enforce by appropriate legislation the provisions of the fourteenth amendment. These exceptional statutes, therefore, are to be strictly construed—interpreted, if practicable, in subordination to and conformity with the theory of our judicial system, state and federal, and the provisions of the Constitution."

But, however this may be, the statute is not to be limited by construction because of the delicacy of the jurisdiction it confers. In referring to section 643 in *Tennessee v. Davis*, supra, Mr. Justice Strong said:

"That the act of Congress does provide for the removal of criminal prosecutions for offenses against the state laws, where there arises in them the claim of the federal right or authority, is too plain to admit of denial. Such is its positive language, and it is not to be argued away by presenting the supposed incongruity of administering state criminal laws by other courts than those established by the state."

All certainly that can be required is that it should be made clear and reasonably certain that the case in question comes within the meaning of the statute.

What, then, does the statute mean by a denial in the judicial tribunals of a state of the equal protection of the laws, and do said acts of said subordinate officers and of said Scott circuit court come within that meaning? Before attempting a construction of this provision of section 641 on our own account, it should be ascertained first what, if anything, has been held in regard thereto by the courts in which question as to its meaning has arisen, for, if it has been held by courts whose decisions are binding on me that said acts do or do not come within such provision, I have nothing

more to do than to follow them. All the cases that have arisen under the statute have been in relation to alleged discriminations against negroes because of their race and color, but the principles laid down with reference to such discriminations apply equally well to the case in hand. The first cases that arose under the statute presented the question as to whether strong prejudice in the community where the prosecution was pending against the defendant on account of his race, color, and politics was sufficient to make out a case under the statute, and the question was acted upon by the state courts in determining the effect of the removal proceedings on their jurisdictions. It was held by the Supreme Courts of North Carolina and Texas that such prejudice was sufficient to justify a removal. *North Carolina v. Dunlop*, 65 N. C. 288; *Gaines v. State*, 39 Tex. 606. In the North Carolina Case the ground of removal alleged in the petition was that there was prejudice against the defendant on account of his color and politics; that he was an active member of the Republican party, and deceased of the Democratic party; that there was a systematic effort by Democrats to produce the impression that he killed deceased from political motives; that county commissioners and sheriff and deputies were all Democrats, and colored men were seldom summoned, and juries were almost entirely Democrats; that there was less chance of enforcing his rights than those of a white man, and probabilities of denial of them much more enhanced; that these feelings were intensified by successful attempts made to give political color to the homicide, and feeling against him was so bitter he could not obtain justice; and that as full and equal benefit of laws of the state and proceedings for the security of person and property as were enjoyed by the citizens thereof was denied to him, and could not be enforced on his behalf. The case alleged in the petition for removal in the Texas case was substantially the same as that in the North Carolina case. But the federal courts at once took a narrower view of the statute. Justice Bradley remanded the Texas case to the state court when it came before him. *Texas v. Gaines*, Fed. Cas. No. 13,847. And he took a like position in *Ex parte Wells*, Fed. Cas. No. 17,386. So did Judge Rives, in Virginia, in the case of *Fowlkes v. Fowlkes*, supra. It is evident that a case of local prejudice could not be within the statute. Its constitutionality depended upon said clause of the fourteenth amendment. That clause prohibited state action. It had nothing to do with individual action—much less, with an individual or community state of mind. The statute probably could not have made such state of mind a ground of removal. It certainly did not intend to make it so. The question was then considered and discussed, whether action by a state through any of its agencies—legislative, executive, or judicial—within the prohibition of said clause of the fourteenth amendment, could amount to such a denial, and therefore justify a removal. It prohibited state action through either agency. Could a removal be had for state action within the prohibition by either agency? Judge Rives of Virginia stated in the cases of *Fowlkes v. Fowlkes*, supra, and *Ex*

parte Reynolds, Fed. Cas. No. 11,720, that it could, or, in other words, that section 641 was as broad as said clause of the fourteenth amendment. In the Fowlkes Case he said:

"When we construe this language in subordination to the constitutional amendment, it seems to me it clearly points to the action of the state in one of its three capacities—legislative, executive, or judicial. Ought not the petition in such a case to designate some law, some judicial ruling, some executive act, as the denial of his equal and civil rights, or as constituting the obstacle to his obtaining them?" And again: "This enactment of Congress was designed to secure him the equal protection of the laws, and his equal civil rights, when invaded by the state in any part of its administration—legislative, executive, or judicial."

In the Reynolds Case he said:

"A state is a sort of trinity. It exists, acts, and speaks in three capacities—legislative, executive, and judicial. What is forbidden to it in one capacity is forbidden to it in each and all. It may not infringe this article by legislation, but it may equally do so by its courts or its executive authorities. Hence it seems to me it is in strict pursuance of this article to base the intervention of the federal courts on the inability to enforce in the judicial tribunals of the state, or in some part thereof, the equal civil rights secured by this article. The mischief is the same whether the deprivation proceeds from the law, the courts, or the executive. It is equally attributable to the state. The laws of the state may be all conformable to the requirements of the article, but its infraction may rest with the courts or executive authorities of the counties. The amendment, to be potential and attain its end, should be enforced, as these enactments purport, by providing a remedy for the dereliction, in whatever quarter it may appear. Hence, to find a casus for the application of this law of federal intervention under the theory of this article, we are not restricted to the action of the Legislature alone. It clearly contemplates the failure of executive or judicial remedies for the enforcement of these equal civil rights."

Judge Rives, however, seems to have overlooked the words of the statute, and not to have observed that the denial which it provided should be a cause for removal was a denial "in the judicial tribunals of the state." When the Reynolds Case came before the Supreme Court, as it did under the style of *Virginia v. Rives*, it was laid down that by reason of this limitation the statute was not as broad as the Constitution. Justice Strong said, "The constitutional amendment is broader than the provisions of that section;" and he pointed out in his opinion an instance in which it was broader. The grounds for removal stated in the petition in the case were three. One was that a strong prejudice existed in the community against the defendants, independent of the merits of the case, and based solely upon the fact that they were negroes, and the man they were accused of having murdered was a white man. Another one was that negroes had never been allowed to serve as jurors either in civil or criminal cases in the county in any case, civil or criminal, in which negroes were interested. The third one was that the court before the trial had overruled defendants' motion that a portion of the jury by which they were to be tried should be composed in part of competent negroes. Judge Rives held that the petition stated a case within section 641, and, under a writ of habeas corpus, took custody of the negroes. Of course, no case was stated in the

allegations as to the prejudice, as Judge Rives had held in the Fowlkes Case. Nor was any case stated in the allegation that negroes had not been allowed to serve as jurors, for that may have been true, and yet the exclusion may not have been the result of discrimination on account of race. He therefore based his action on neither one of these grounds, but solely upon the refusal of the state court to provide a mixed jury. Thereupon the state of Virginia applied to the Supreme Court of the United States for a mandamus to compel restoration of the persons to state custody, which made the case of *Virginia v. Rives*. The court granted the writ, holding that the defendants were not entitled to a removal on either ground stated in the petition. I have heretofore quoted what Justice Strong had to say on the ground as to the mixed jury. This was really all that was up for decision in that case. But the fact that this was the first time that section 641 was before the Supreme Court, and the broad position taken by Judge Rives, led to a consideration of the statute somewhat at large. In the course of the argument it was stated that the officer having to do with selecting the jurors from which were drawn the juries that indicted and tried defendants had illegally discriminated against them because of their race and color. This statement led the court to consider and determine whether such discrimination by such an officer was within the statute, and it was held that it was not. Justice Strong said:

"If, as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the statute of the state, confined his selection to white persons, and refused to select any persons of the colored race solely because of their color, his action was a gross violation of the spirit of the state's laws, as well as of the act of Congress of March 1, 1875, c. 114, 18 Stat. 335 [U. S. Comp. St. 1901, p. 1259], which prohibits and punishes such discrimination. He made himself liable to punishment at the instance of the state, and under the laws of the United States. In one sense, indeed, his act was the act of the state, and was prohibited by the constitutional amendment. But inasmuch as it was a criminal misuse of the state law, it cannot be said to have been such a denial or disability to enforce in the judicial tribunals of the state the rights of the colored men as is contemplated by the removal act (section 641). It is to be observed that act gives the right of removal only to a person who is denied or cannot enforce in the judicial tribunals of the state his equal civil rights, and this is to appear before trial."

And again he said:

"But when a subordinate officer of the state, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied or cannot enforce in the judicial tribunals of the state the right which belongs to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge this duty in the true spirit of the law—if he excludes all colored men solely because they are colored—or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored, or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason, it can with no propriety be said the defendants' right is de-

nied by the state, and cannot be enforced in the judicial tribunals. The court will correct the wrong—will quash the indictment or the panel—or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of section 641.”

Such denial was not, therefore, a denial in the judicial tribunals of the state. It was simply an occasion for such tribunal to correct the wrong done.

What was thus said in *Virginia v. Rives* was subsequently decided by the Supreme Court in the cases of *Neal v. Delaware*, *supra*; *Gibson v. Mississippi*, *supra*; *Smith v. Mississippi*, *supra*; *Murray v. Louisiana*, *supra*.

In the petition in the *Neal Case* the ground for removal stated was that, by virtue of the Constitution and laws of the state of Delaware, negroes were excluded from jury service, and that negroes otherwise qualified had always been excluded from jury service, and had been excluded from the grand jurors who returned the indictment against defendant, and from the petit jurors summoned to try the case. The state court denied the removal, and thereafter defendant moved to quash the indictment and the panels of the grand and petit juries on the same ground that removal was sought, which motion was overruled. Upon conviction had, the case went to the Supreme Court on error. It was held that the petition did not state good cause for removal, because the Constitution and laws of Delaware did not exclude negroes from jury service, and their actual exclusion by subordinate officers was not a denial, within section 641. Mr. Justice Harlan said “that Congress had not authorized a removal where jury commissioners or other subordinate officers had, without authority, deviated from the Constitution and laws of the state, and excluded colored citizens from juries because of their race.” It was held that the motion to quash the indictment and panels should have been sustained because the affidavit of the petitioner, in connection with the fact that no negro had ever been selected as a juror, grand or petit, and that the negro population exceeded 26,000 in a total population of 150,000, made out a *prima facie* case of exclusion because of race, and there were no counter affidavits. It is to be noted that, so far as the action of the state court in overruling the motion to quash was concerned, it was not alleged as a ground for removal. It was made after the petition was denied, and was overruled, not because it was held that a discrimination on account of race was not illegal, but because there was no evidence of such discrimination. Chief Justice Waite, who had concurred with the majority in the decision of March 1, 1880, dissented from the holding that the judgment of the state court should be reversed because of its action on the motion to quash, on the ground that sufficient proof of the fact of discrimination because of color had not been introduced.

In the *Gibson Case* one of the grounds upon which removal was sought was that the officers who had to do with selecting the grand jurors who returned the indictment against the defendant had great prejudice against him because of his race, and had illegally dis-

criminated against his race in selecting said grand jurors. It was held that defendant was not entitled to a removal on said ground. The Smith and Murray Cases were like the Gibson Case. In the Smith Case, however, a motion to quash the indictment on the ground of illegal discrimination had been made and overruled prior to the filing of the petition for removal, but no evidence was introduced in support of this motion. In the Murray Case, which was like the Smith Case in the fact of prior challenge of the grand jury, the evidence showed that there had been no illegal discrimination. In neither case was the action of the court in overruling the motions to quash or challenge to the jury made a ground for removal.

It is therefore well settled that a class discrimination in the selection of jurors, grand or petit, by subordinate officers charged with their selection, nothing else appearing, is not a denial in the judicial tribunals of the state of the equal protection of the laws, within the meaning of section 641. On the other hand, it is equally well settled that where there is a statute providing for such discrimination, though unconstitutional and null and void, there is such a denial. This was held in the case of *Strauder v. West Virginia*, supra. That was a prosecution against a negro in the state courts of West Virginia, whose statute provided that jurors should consist of white male persons who were 21 years of age, and who were citizens of the state. The ground upon which it was so held is stated by Justice Strong in *Virginia v. Rives* in these words:

"When a statute of a state denies his right, or interposes a bar to his enforcing it in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions, and in such a case a defendant may affirm on oath what is necessary for removal. Such a case is clearly within the provisions of section 641."

A contrary presumption is indulged in in a proceeding under sections 751-755 to obtain release from state custody on the ground that detention is had in violation of the Constitution or a law of the United States. Justice Harlan, in *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, said:

"The Circuit Court was not at liberty, under the circumstances disclosed, to presume that the decision of the state court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States."

In *Neal v. Delaware*, supra, it was held that, though the statutes of Delaware passed prior to the fifteenth amendment prescribed the same qualifications for jurors as for suffrage, and for suffrage that the person should be white, yet if since the adoption of said amendment the state had treated the statute as to suffrage repealed by the fifteenth amendment, and the jury statute affected to like extent thereby, the statute did not amount to a denial, within section 641. And in *Bush v. Kentucky* it was held that inasmuch as the Court of Appeals had held that a statute passed after the fourteenth amendment, making an illegal discrimination as to jurors, was unconsti-

tutional, because in violation of the fourteenth amendment, it no longer amounted to a denial, within such meaning. And in the Gibson, Smith, Murray, and Williams Cases, it held certain statutes and laws not to amount to such denial.

Such, then, is the full extent to which the applicability of section 641 has been determined by the courts. It is held that an illegal discrimination by subordinate officers is not within the statute, and that such a discrimination by the Legislature is. It follows, therefore, that, in so far as the illegal discrimination complained of by defendant was on the part of the subordinate officers who had to do with selecting the jurors from whom came the juries that tried him, the second paragraph of the petition does not state a case for removal. It follows further that, in so far as said discrimination was on the part of the Scott circuit court, said paragraph states a case that is beyond any case that has yet arisen under section 641, and hence a case that is as yet undetermined by the courts. The only case in which judicial action prior to the filing of the petition for removal was made a ground of the right to removal was in the case of *Virginia v. Rives*, and it was held therein that said judicial action so relied on was not a good ground for removal, not because it was judicial action and not legislative action, but because the judicial action complained of was not a denial of the equal protection of the laws. It was simply a refusal to provide a mixed jury, to which defendants were not entitled under the fourteenth amendment.

It is claimed, however, on behalf of the commonwealth, that it has been laid down by the Supreme Court in the various cases coming before it involving the application of section 641, in certain general remarks on that section, that judicial action can never make a case under it, and that the only thing that can do so is legislative action. As, for instance, in *Virginia v. Rives*, *supra*, Justice Strong said:

"The statute authorizes removal of the case only before trial, not after trial has commenced. It does not, therefore, embrace many cases in which a colored man's rights may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial, or by discrimination against him in the sentence, or the mode of executing the sentence. But the violation of the constitutional provisions, when made by the judicial tribunals of the state, may be, and generally will be, after the trial has commenced. It is, then, during or after the trial that denial of a defendant's right by judicial tribunals occurs. Not often until then. Nor can the defendant know until then that the equal protection of the law will not be extended to him. Certainly, until then, he cannot affirm that it is denied, or that he cannot enforce it in the judicial tribunals. It is obvious, therefore, that to such a case—that is, a judicial infraction of the constitutional inhibitions after trial or final hearing has commenced—section 641 has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the state, and ultimately to the review of this court. We do not say that Congress could not have authorized the removal of such a case into the federal courts at any stage of its proceeding, whenever a ruling should be made in it denying the equal protection of the laws to the defendant. Upon that subject it is unnecessary to affirm anything. It is sufficient to say now that section 641 does not. It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a state rights secured to a

defendant by any law providing for equal civil rights of all persons of the United States, of which section 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the state, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial, or an inability resulting from it."

Again, in the case of *Neal v. Delaware*, *supra*, Justice Harlan, in summing up the result of the opinions in 100 United States cases, said:

"But it was also ruled in the cases cited that the constitutional amendment was broader than the provisions of section 641 of the Revised Statutes; that, since that section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence; that, for denials arising from judicial action after the trial commenced, the remedy lay in the revisory power of the higher courts of the state, and ultimately in the power of review which this court may exercise over their judgments whenever rights, privileges, or immunities secured by the Constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the state rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the state, rather than a denial first made manifest at the trial of the case."

This language of Justice Harlan is repeated substantially in most, if not all, of the subsequent cases. Does it have the value which counsel for the commonwealth attach to it? In considering the value of such general remarks, the rule laid down by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 399, 5 L. Ed. 257, should be borne in mind. It is as follows:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Take up, then, the first part of this statement of Justice Harlan—the negative branch of it; that which undertakes to point out what sort of a case section 641 does not embrace—what does it amount to? Does it go to the extent of saying that under no circumstances can judicial action make a case within section 641? I submit that it does not. The only judicial action to which reference is had is judicial action that comes after the filing of the petition for removal. It is "judicial action during the trial, or in the sentence, or in the mode of exercising the sentence," or judicial action after the trial has commenced. The judicial action had in view here is the final judicial action in the prosecution and in the trial court. No other judicial action is thought of. This is settled by the reason given why it cannot make a case within section 641, and what is said as to how it can be taken advantage of. The reason so given is that it comes after the petition for removal is filed. Of course, the petition

for removal cannot be based upon that which has no existence when it is filed. The way pointed out for taking advantage of it is by carrying the case up to the higher courts, and, if necessary, on error to the Supreme Court of the United States. Of course, the only judicial action that can be so taken advantage of is judicial action in the prosecution, and judicial action that is final. It follows that judicial action outside of the prosecution or judicial action in the prosecution prior to the filing of the petition for removal is not within the negative part of Justice Harlan's statement. Then take the latter part thereof—the affirmative part—in which he undertakes to state what section 641 refers to. He says that it refers to a denial resulting from the Constitution or laws of the state, rather than judicial action at the final hearing. He, however, does not say that it refers exclusively to such a denial. He is more cautious than that. He says that it refers to such a denial "primarily, if not exclusively." Again, what are the laws of a state, within the meaning of those words as used by Justice Harlan in this connection? Did he have in mind solely the statutes of a state, or did he include rules of action laid down by the judiciary? Then as to the statement by Justice Strong at the close of the last quotation made from the opinion in *Virginia v. Rives*, in these words: "In other words, the statute has reference to a legislative denial, or an inability resulting from it." Bearing in mind the rule of Chief Justice Marshall quoted above, should not that be confined to a case where there has been a denial by subordinate officers, and the meaning held to be that in such a case legislative denial is essential in order to bring it within section 641? There is no escape, therefore, from the conclusion that we have here a brand-new case—a case beyond any that has been heretofore decided, or that has been had in contemplation. Does it, then, come within the true intent and meaning of section 641? Though it is beyond the cases heretofore decided, we can obtain help from them in answering this question. The result of those cases we have found to be is that an illegal discrimination of the kind complained of by the subordinate officers who select the jurors, when there is nothing in the statute requiring it, is not within section 641. On the other hand, such an illegal discrimination made by statute is within said section. Now, it would seem that if we can get a firm grasp of the idea why the one discrimination is held not to be a denial in the judicial tribunals of the state, and the other discrimination is so held to be such a denial, we will have obtained some help to the solution of said question. The reason why a discrimination by subordinate officers is held not to be a denial is, as stated by Justice Strong in a quotation already made from his opinion in *Virginia v. Rives*, this:

"It ought to be presumed the court will redress the wrong." Or again: "The court will correct the wrong—will quash the indictment or the panel—or, if not, the error will be corrected in a superior court."

The reason why a discrimination by legislative action is held to be a denial is, as likewise stated, this:

"When a statute of the state denies his right, or interposes a bar to his enforcing it in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions."

The one discrimination is not a denial, therefore, because it will not affect the judicial tribunals of the state prejudicially to the defendant. The other discrimination is a denial, because it will so affect said tribunals. It will not affect them absolutely or certainly. It may not affect them at all. Indeed, it is their duty not to be affected by it. Article 6 of the federal Constitution requires that they should not be affected by it. But they may be, and the presumption is to be indulged that they will be, notwithstanding that in a habeas corpus case, under sections 751-755, as to one claiming to be in custody in violation of the Constitution, the contrary presumption is indulged in. Does it not follow from this that any other state action involving an illegal discrimination which will in a real sense affect the judicial tribunals of the state—in as real a sense as legislative action will—is within the meaning of section 641? I think it is. We reach the same conclusion if we consider the purpose of the section, the end it was intended to accomplish, its spirit which has been congealed in the words of the statute, and from that lofty height view and construe the language. What was that purpose or end? Was it not to secure in the state judicial tribunals a free and full exercise and enjoyment of the equal protection of the laws, as full and free as ought to be obtained or can be obtained in the federal tribunals, and was it not intended to provide that, if a defendant in a prosecution pending there could not obtain such exercise and enjoyment of such protection in those tribunals—if there was any real hindrance or obstacle to obtaining them there—then he should have the right to have the prosecution removed to the federal court? It seems to me that it was. These two considerations lead to the conclusion that the denial referred to, and within the meaning of the statute, was not primarily a denial that had its place in the judicial tribunals of the state, but a denial that in a real sense would have an effect there, without any limit as to where it took place, provided it would have an effect there. If so, then prior judicial action either outside of or within the particular prosecution which would affect the state court having to do with said prosecution, in affording this defendant therein the equal protection of the laws in its further handling of the prosecution, was within the meaning of the statute. As, for instance, suppose the Court of Appeals, though reversing the judgments against him on the various grounds stated, had held that it had jurisdiction to consider the question as to the illegal discrimination complained of, and that the defendant had no right to be free from such discrimination, would that not have made a clear case of a denial to the defendant of the equal protection of the laws, and authorized a removal under section 641? Such judicial action would have affected the lower court in its further handling of the case in just as real a sense as an unconstitutional statute providing for the discrimination. There

would seem to be no question as to this, and that such a case would be clearly within section 641.

The position that what amounts to a denial of the equal protection of the laws by judicial action prior to the filing of the petition for removal may be within section 641 is strengthened by two considerations. One is that the denial called for by said section is not limited in its words to a denial by legislative action. There is not a word said about legislative action in the section. The other is that the section authorizes a petition for removal to be filed after judicial action has been had not only outside of the prosecution, but within it. The time fixed for filing it is "at any time before the trial or final hearing of the cause." In the case of *Ayers v. Watson*, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1093, Justice Bradley said, "This language has been held to apply to the last and final hearing." To the same effect, see *Home Life Ins. Co. v. Dunn*, 86 U. S. 214, 24 L. Ed. 68; *Vannever v. Bryant*, 88 U. S. 41, 22 L. Ed. 476; *Jifkins v. Sweetser*, 102 U. S. 177, 26 L. Ed. 129; *B. & O. R. Co. v. Bates*, 119 U. S. 464, 7 Sup. Ct. 285, 30 L. Ed. 436; *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080; *City of Detroit v. Detroit City Ry. Co. (C. C.)* 54 Fed. 10.

In *Bush v. Kentucky*, *supra*, the case was removed from the state court on the first application after a reversal by the Court of Appeals of a judgment in the trial court; and in *Davis v. So. Carolina*, 107 U. S. 597, 2 Sup. Ct. 636, 27 L. Ed. 574, a removal was had under section 643, which has the same language as 641 as to time after a trial and verdict and a new trial granted. The statute therefore contemplated a removal after several trials, and the case had gone to the Court of Appeals several times, as here, and therefore after judicial action had in the prosecution that might affect the last and final trial.

Besides all this, the cases in which the Supreme Court has had to do with the construction of section 641 are not without intimation that judicial action prior to the filing of the petition for removal might make a case for removal. In the case of *Virginia v. Rives*, in holding that a case for removal had not been made on the ground that before the filing of the petition the state court had refused to provide the defendant with a mixed jury—the only case that has arisen in which judicial action prior to the filing of the petition has been made a ground of removal—the Supreme Court did not base its ruling upon the ground that prior judicial action could not be made a cause for removal, but on the ground that the prior judicial action complained of therein was not a denial of the equal protection of the laws, inasmuch as a mixed jury was not an element of such protection; and it seems to be implied that prior judicial action that was a denial thereof might be made a cause for removal. And in the case of *Neal v. Delaware*, Justice Harlan expressly said as follows:

"Had the state, since the adoption of the fourteenth amendment, passed any statute in conflict with its provisions, or with the laws enacted for their enforcement, or had its judicial tribunals, by their decisions, repudiated that

amendment as a part of the supreme law of the land, or declared the acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that there was such a denial upon its part of equal civil rights, or such an inability to enforce them in the judicial tribunals of the state, as, under the Constitution, and within the meaning of section 641, would authorize a removal of the suit or prosecution to the Circuit Court of the United States."

This language is repeated in one of the subsequent cases.

Again, in *Bush v. Kentucky* it was held that a statute illegally discriminating against negroes, passed after the fourteenth amendment, which, nothing else appearing, would have amounted to a denial in the judicial tribunals of the state, under *Strauder v. West Virginia*, did not amount thereto in that case, because prior to the filing of the petition for removal the Court of Appeals had held the statute unconstitutional. If, then, a denial could be removed by judicial action, could it not as well be created thereby?

The commonwealth's contention really comes down to a question of tenses. Its position amounts to this: A defendant in a prosecution in a state court, who has been denied therein the equal protection of the laws prior to the filing of a petition for removal, is not entitled to a removal, because the denial is a past denial, and not a present one. The position is fallacious, in that it assumes that such a past denial may not be a present one. Though past in being made, if never set aside it is present in force and effect.

Conceding, then, that it is possible for judicial action in a prosecution in a state court prior to the filing of the petition for removal to make a case for removal, is the prior action of the Scott circuit court at the second and third trials of defendant, in holding that he had no right to be exempt from the discrimination complained of, and in thus denying him the equal protection of the laws, sufficient to entitle defendant to a removal? It all depends upon whether such action is a hindrance or obstacle, in a real sense, to a free and full exercise and enjoyment of such right at another trial in said court—just as much so as an unconstitutional statute which said court should disregard and refuse to follow would be. Though the judgments of conviction in said court have been reversed, they have not been reversed on the ground of such action, but on other grounds. The Court of Appeals has held that it had no jurisdiction to consider or question said action, and has declined to do so. The Scott circuit court is the highest court in the state that had or has a right to deal with that question. It has on two occasions held that the defendant had not the right which he claims, and has entered upon its records that the defendant is not entitled thereto, and that entry has never been expunged or set aside. It remains there to-day. It must be conceded that this action and this entry will have an influence upon the future action of the court in this particular. The granting to defendant of the right asserted by him at another trial will be a change of front on the part of the court. To grant it, it will have to reverse its former action.

It cannot be urged that said prior action of the Scott circuit

court, denying the defendant the right he claims, is not a real hindrance and obstacle in the way of the future assertion of that right in said court, because there is now a new judge on the bench. A change of judges in the past has not effected a change in action with reference to defendant's right. Indeed, such a change, instead of being a reason for expecting a change in such action, may be regarded as a reason for not expecting it, on the ground of comity. In courts of original jurisdiction, comity, as a rule, at least, requires that the successor of another judge in a case shall adhere to the latter's former rulings therein.

It is to be noted, though it is probably without legal significance, that it is reasonable to conclude that the Court of Appeals, as constituted at the time the petition for removal was filed, was adverse to defendant's said right. The majority thereof consisted of the former judge of the Scott circuit court, who presided at the first two trials, and the minority, who dissented from the judgment of reversal at the last hearing in the appellate court. The basis of the inference as to the said minority consists in the expression of regret in the opinion delivered on its behalf that the case was to be reversed. It is hard to conceive how such a feeling could exist if it was really believed that the defendant had the right in question, the record showing clearly that it had been denied him. This inference is enforced by the further fact that in the opinion delivered on behalf of the minority on the second hearing, when amongst the errors complained of was the denial of said right, it was stated that "outside of the refusal of the circuit judge to vacate the bench all the errors complained of may justly be compared to fly-specks on the surface of the shell of a hen's egg," and, further, that "the circuit judge presided at the trial with rare ability and entire impartiality."

I, therefore, conclude that the prior action of the Scott circuit court denying the defendant the equal protection of the laws is a real hindrance and obstacle to his asserting his right thereto in a future trial therein—just as real as an unconstitutional statute would be—and that the defendant is denied the equal protection of the laws in said court, within the meaning of said section, and entitled to a removal on account thereof. He is denied in said court the equal protection of the laws because he has been denied, and such denial has never been set aside, but remains in full force and effect.

But thus far we have only dealt with one half of the statute. It remains to consider briefly the other half thereof. It is claimed in the petition for removal that defendant cannot enforce his right to the equal protection of the laws in the judicial tribunals of the state, and because of this he is entitled to a removal. By an "inability to enforce in the judicial tribunals of the state" is meant, as I construe the statute, any judicial tribunal of the state that may have jurisdiction of the prosecution. It was intended thereby to provide that, if a defendant in a criminal prosecution pending in a state tribunal cannot enforce his right to the equal protection of the laws in such court, or in any court to which it may be carried, then he is entitled to a removal. In this case the Court of Appeals of

Kentucky has jurisdiction of the prosecution against defendant. It can be carried there on appeal from the circuit court, but defendant cannot enforce therein his right to the equal protection of the laws, if denied in the circuit court, at a future trial; and this is, by virtue of legislative action, embodied in section 281 of the Kentucky Criminal Code of Practice, heretofore quoted, as construed by the Court of Appeals. The only answer that is made to this is that, if defendant is entitled to a removal because of this inability to enforce said right, every defendant in a criminal prosecution instituted in a circuit court in this state will be entitled to a removal. This, however, does not follow. It only follows that every defendant who has been prejudiced by the inability to enforce, as defendant has been, is entitled to a removal. In the case of *Com. v. Wright*, 79 Ky. 22, 42 Am. Rep. 203, the question was up whether a white person indicted by a grand jury composed wholly of persons of the white race could complain because negroes were excluded from the jury by which he was indicted, under the statute of Kentucky excluding them therefrom. It was held that he could not. Chief Justice Cofer said, "Only those who are prejudiced by an unconstitutional law can complain of it." Likewise I would hold that only persons who may be prejudiced by the statute making it so that a defendant in a criminal prosecution cannot enforce his right to the equal protection of the laws in the Court of Appeals of this state can have a removal to the federal court because of such inability.

The conclusion I have reached, therefore, is that this case comes within both halves of the statute. It is no answer to defendant's right to the removal sought that he could have had the denial of his right to the equal protection of the laws corrected by the Supreme Court of the United States on error thereto, had either of the last two judgments against him been affirmed by the Court of Appeals, or that he can obtain such correction if there is a similar denial in the future, and a judgment of conviction against him is allowed to stand. Notwithstanding this remedy, he is entitled to the remedy of removal, if the case comes within the statute. Congress has seen fit to provide him with this remedy, and all that is essential to entitle him to it is that his case shall come within the terms of the statute, and that I have found to be the case.

But to say the very least, it is not certain that defendant can correct the denial complained of, if repeated at another trial; and, so far as my research has gone, I have been unable to find a decision of the Supreme Court of the United States which would authorize a writ of error in this sort of a case. If entitled to such writ, it must be to re-examine either the judgment of the Scott circuit court, or the judgment of the Court of Appeals affirming that judgment. It is difficult to see how it could, in any state of the case, be to re-examine the judgment of the Scott circuit court, either before or after a judgment of affirmance by the Court of Appeals. Section 709, Rev. St. U. S. [U. S. Comp. St. 1901, p. 575], relating to writs of error as to judgments and decrees of state courts, expressly provides that

the judgment or decree of a state court, which the Supreme Court may re-examine and reverse or affirm upon writ of error, is the "final judgment or decree in the highest court of a state in which a decision in the suit could be had." The Scott circuit court is not the highest court of the state in which a decision in the prosecution against the defendant can be had. The Court of Appeals is that court. An extreme application of this requirement is the case of *Great Western Tel. Co. v. Burnham*, 162 U. S. 342, 16 Sup. Ct. 850, 40 L. Ed. 991. There a circuit court of Wisconsin had overruled a demurrer to the petition. The appellate practice of that state authorized an appeal to the Supreme Court from such an order, and an appeal was taken therefrom. It was held that the demurrer should have been sustained, the order was reversed, and the cause was remanded to the circuit court for further proceedings according to law. The lower court thereupon sustained the demurrer and dismissed the petition. It was held that the judgment of the circuit court was not subject to a writ of error; that an appeal should have been taken to the Supreme Court of the state, notwithstanding it was bound by its former ruling, and would affirm the case as a matter of course, and upon its doing so the judgment of affirmance should have been made the subject of the writ. The following cases on error from Massachusetts, to wit: *McGuire v. Com.*, 3 Wall. 382, 18 L. Ed. 164; *McDonald v. Massachusetts*, 180 U. S. 311, 21 Sup. Ct. 389, 45 L. Ed. 542; *Rothschild v. Knight*, 184 U. S. 334, 22 Sup. Ct. 391, 46 L. Ed. 573—in which it is held that the judgment of the superior court of Massachusetts, and not that of the Supreme Court, is the subject of the writ of error—should be distinguished. This was because the superior court of that state is the highest court in which a final judgment or decree in such a suit can be had; the Supreme Court simply passing on exceptions, and certifying its ruling to the superior court. Likewise this case on error from New York, to wit, *Green v. Van Buskirk*, 3 Wall. 448, 18 L. Ed. 245, in which it was held that on affirmance by the Court of Appeals of that state of a judgment of the Supreme Court thereof, and sending the record to the Supreme Court with directions to enter judgment, which was accordingly done, a writ of error might be taken to the latter court, should be distinguished. This was because a writ of error may be taken to either court where the judgment of the highest court may be found. On such writ of error, however, it is the judgment of the highest court of the state, and not that of the lower court, which is re-examined. Justice Story, in *Gelston v. Hoyt*, 3 Wheat. 304, 4 L. Ed. 381, said as follows:

"It must be directed either to that tribunal which can execute it, to that in which the record and judgment to be examined are deposited, or to that whose judgment is to be examined, although, from its structure, it may have been rendered incapable of performing the act required by the writ. Since the law requires a thing to be done, and gives the writ of error as the means by which it is to be done, without prescribing in this particular the manner in which the writ is to be used, it appears to the court to be perfectly clear that the writ must be so used as to effect the object. It may then be directed

to either court in which the record and judgment on which it is to act may be found. The judgment to be examined must be that of the highest court of the state having cognizance of the case, but the record of that judgment may be brought from any court in which it may be legally deposited, and in which it may be found by the writ."

As distinguishing the Massachusetts and New York cases, see *Atherton v. Fowler*, 91 U. S. 143, 23 L. Ed. 265; *Crane Iron Co. v. Hoagland*, 105 U. S. 701, 26 L. Ed. 1109.

So it is that it has always been the practice in taking cases to the Supreme Court of the United States from Kentucky, after the affirmance of a judgment of the circuit court by the Court of Appeals, to take the writ of error from the Court of Appeals. The following cases were so taken, to wit: *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; *Cov. & Cin. E. R. & T. B. Co. v. Kentucky*, 154 U. S. 224, 14 Sup. Ct. 1094, 38 L. Ed. 970; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. Ed. 953; *Chesapeake & Ohio R. Co. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. Ed. 244. If, then, defendant would be entitled to a writ of error at all in case of a future denial, it could only be taken from the judgment of the Court of Appeals affirming the judgment of the Scott circuit court, to re-examine said judgment of affirmance. It is difficult to see how it could lie to said judgment, because it would not be against any federal right of the defendant. The Legislature has provided that the Court of Appeals of Kentucky shall not have jurisdiction to review challenges to the juries in criminal prosecutions for any cause whatsoever, and that the action of the circuit court is final in regard thereto. At least, the Court of Appeals has so construed section 281, and that construction is binding on this court. It was not bound to provide that any appeal might be taken from a judgment of the circuit court in a criminal case. It might have made the judgment of the circuit court final. An appeal, therefore, being a matter of grace, and not of right, it could be granted on such terms as the Legislature saw fit. *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Andrews v. Swartz*, 156 U. S. 272, 15 Sup. Ct. 389, 39 L. Ed. 422; *Kohl v. Lehlback*, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. Ed. 432; *Mallett v. North Carolina*, 181 U. S. 589, 21 Sup. Ct. 730, 45 L. Ed. 1015. In this state the Legislature has seen fit to grant an appeal, but has provided that, on an appeal, rulings of the lower court as to challenges to the jury, as to motions to set aside the indictment, and as to motions for new trial cannot be considered by the Court of Appeals. This it had a right to do. It seems to me, therefore, that the Court of Appeals was correct in its ruling heretofore declining to pass on the federal question raised by defendant in regard to the selection of the jurors from which came the juries that tried him. It has not denied him the equal protection of the laws, because it had no jurisdiction to pass on the question. And here I feel constrained to differ from Judge Barker's position in his separate opinion the last hearing. He based his opinion that the Court of Appeals had jurisdiction of the federal question

on article 6 of the federal Constitution, which provides that the Constitution and laws of the United States shall be the supreme law of the land, and that the judges in every state shall be bound thereby. But this article of the federal Constitution does not undertake to confer jurisdiction on state judges or courts. It simply provides that state judges and courts, in disposing of matters of which they have jurisdiction, shall be bound by the federal Constitution and laws, and nothing more. If, then, the Court of Appeals has no jurisdiction of the federal question involved here, and it declines to pass upon it, how can a writ of error be taken to its judgment? It has passed on no federal question adversely to defendant. In the case of *Great Western Tel. Co. v. Burnham*, supra, Justice Gray said:

"This court has no jurisdiction upon writ of error to review a judgment of a state court, unless it was a final judgment by the highest court of the state in which a decision in the suit could be had, and against a right set up under the Constitution and laws of the United States."

In *Gelston v. Hoyt*, supra, Justice Story said:

"The judgment to be examined must be that of the highest court of the state having cognizance of the case."

And in *Fashnacht v. Frank*, 23 Wall. 416, 23 L. Ed. 81, Chief Justice Waite said:

"We act only upon the judgment of the Supreme Court. Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings can be considered by us upon error."

In the cases cited above which went to the Supreme Court of the United States on error from Kentucky, in which a reversal was had, to wit, the *Crutcher and Cov. & Cin. E. R. & T. B. Co. Cases*, the judgments of the Supreme Court were that the judgments of the Court of Appeals of Kentucky be reversed; not a word being said about the judgments of the circuit court which had thereby been affirmed.

What makes me hesitate to take the position that no writ of error would lie to the Supreme Court in the case under consideration is that it is hard to conceive of its being possible that there should be a case where a denial by a state court of a federal right could not be carried on error to the Supreme Court. To prevent such a *casus omissus*, one would be justified in straining the language of section 709 to the utmost limit, and it is evident that it would not be favored by the Supreme Court. In the case of *Luxton v. North River Bridge Co.*, 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194, it was held that a writ of error would not lie to the Circuit Court of the United States for the District of New Jersey to reverse an order appointing commissioners to assess damages in a condemnation proceeding, because such an order was not final. In the prior case of *Wheeling & B. Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 11 Sup. Ct. 301, 34 L. Ed. 967, it was held that a writ of error would lie to the Supreme Court of West Virginia, affirming the order of a

lower court appointing commissioners for such purpose in such a proceeding. In distinguishing this case from the later case, Justice Gray said that the former was accounted for by the fact that the Supreme Court of West Virginia had held that the order of the lower court was a final order, from which error lay to it, and said:

"To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the Constitution and laws of the United States, for, if the highest court of the state held the order appointing commissioners to be final and conclusive unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of validity of the condemnation, except by writ of error to the order appointing commissioners."

And in the case of *Great Western Tel. Co. v. Burnham*, supra, in response to the position of plaintiff in error that a writ of error to the circuit court was the only way in which the federal question involved in the case could be reviewed, Justice Gray said, "If all this were so, there would be strong ground for sustaining the present writ of error."

I am not unmindful of the fact that in *Bush v. Kentucky*, supra, the Supreme Court of the United States reversed the judgment of the Court of Appeals because it affirmed a judgment of the circuit court, which had overruled a motion to set aside an indictment found when the discriminatory statute of Kentucky had not been declared unconstitutional, when it should have sustained the motion, and that a Code provision similar to section 281 was then in force. But no attention seems to have been called to the existence of this Code provision, or as to its having any bearing upon the question. So far as the opinion of that case shows, the Court of Appeals considered and passed on the question. At least, there is nothing showing that it did not.

If, then, no writ of error would lie to the Supreme Court in case defendant should hereafter be denied the equal protection of the laws, all the more reason for holding that this case comes within section 641. In that event the alternative remedies would be either a removal under section 641, or, if convicted, a release from said state custody, and from further prosecution for the offense in any court, upon writ of habeas corpus, under sections 751-755. The latter is the more delicate remedy of the two, and of the two the former is to be preferred. If, however, it cannot be said certainly that a writ of error will not lie, only that it is uncertain whether it will lie, and that it will take the Supreme Court to determine the question, then it will hardly be right to let go a remedy for a wrong that is practically conceded, on the idea that another remedy exists therefor, until it has been settled beyond question that the other remedy exists. For if I shall decide that the remedy of removal under section 641 does not exist, and hence overrule the motion, it would be a letting go of that remedy. This action would have to be followed by an order remanding the cause to the state court, and no appeal or writ of error could be taken therefrom, nor could I be

compelled to take jurisdiction by mandamus. It was so decided by the Seventh Circuit Court of Appeals in *Cole v. Garland*, 107 Fed. 759, 46 C. C. A. 626. On the other hand, if I decide to take jurisdiction, my action is not final. Application can be made to the Supreme Court for a mandamus commanding me to restore defendant to state custody, as was done in *Virginia v. Rives*, and the whole question as to defendant's remedies can be settled for all time to come. That the fact that the grave questions which I have considered herein cannot be carried further if I decide against defendant, and that they can be carried further if I decide in his favor, should have something to do with controlling my action, and just what it should have to do therewith, is well stated by Judge Sanborn in the recent case of *Boatmen's Bank v. Fritzlen* (C. C. A.) 135 Fed. 655. He there said:

"Every conscientious judge, every thoughtful man, upon whom is laid the grave responsibility and the heavy burden of determining the rights of his fellows, rejoices in the thought, wherever such is the case, that his decision may be reviewed, and that, if erroneous, it will not work irreparable injustice to him whom he deems it his duty to defeat. When a case has been removed from a state to a federal court, and a motion to remand is made, or when a motion to remove is presented in the first instance to the federal court, the petitioner either has or he has not the right to the trial and decision of his controversy in that court. That right is of sufficient value and gravity to be guaranteed by the Constitution and acts of Congress. If it exists, and the circuit court denies its existence, and remands or refuses to remove the suit, the error is remediless, and it deprives the petitioner of his constitutional right. If the right does not exist, and the court affirms its existence and retains the suit, any error may be corrected by the Supreme Court. An error that the aggrieved party may correct is less grievous than one that is without remedy. And the true rule is that motions to remand and for removal should be decided, not by existence of doubts, but by the preponderance of the facts, the law, and the reasons which condition them, in view of the fact that the right to invoke the jurisdiction of the federal court is a valuable constitutional right, and an erroneous affirmation of the claim of that right may be corrected by the Supreme Court upon a certificate of the question of jurisdiction, while an erroneous denial of the claim is remediless."

It remains to say a word or two in conclusion in regard to the first paragraph of the petition, in which it is claimed that defendant is entitled to a removal because the state courts have denied the validity of the pardon issued by Taylor. In order for that to be a good ground for removal, it is necessary, in addition to such denial, that defendant had a right to be released from custody because of such pardon, and, further, that the right to such release was secured to him by the fourteenth amendment. As to the right to be released from custody because of said pardon, I do not think that I have the right to pass upon the question on its merits. The question as to who was Governor of Kentucky *de jure* and *de facto* on the 10th of March, 1900, and as to the validity of said pardon, is a local one, and it has been determined by the Court of Appeals that J. W. C. Beckham was Governor of Kentucky, both *de jure* and *de facto*, on said date, and that said pardon is invalid, and I think I am concluded by that determination. Furthermore, even if said right existed, I do not think that it is one secured to the defendant by the

equal protection of the laws clause of the fourteenth amendment. If it is, then every right one has is so secured, and every decision by the state courts against such a right would present a federal question and a ground for removal. This certainly cannot be the case.

My conclusion, therefore, is that, by virtue of the second paragraph of the petition, the removal proceedings have worked a transfer of jurisdiction. It seems to me that it would be hard to get a case that more certainly comes within section 641. The defendant has been and is denied the equal protection of the laws in the Scott circuit court, and he cannot enforce his right thereto in the Court of Appeals.

Since writing the foregoing I have stationed myself away from it, and looked at it to see what possible flaw I could detect in its reasoning. So far as my mental vision goes, I am unable to detect any; but another position than those urged by counsel for the commonwealth occurs to me for claiming that this case does not come within section 641, and I think I ought to refer to it. The positions which said counsel have urged are two, one relating to each half of the statute. That relating to the first half is that a judicial denial is not, and only a legislative denial is, within said section; and that relating to the second half is that, if defendant can claim a removal because of section 281 of the Kentucky Criminal Code of Practice, then every person against whom a criminal prosecution is instituted in this state can likewise claim a removal. These are the only positions which they have put forward or relied on. The additional position that has so occurred to me is that I am wrong in assuming that the equal protection of the laws clause of the fourteenth amendment is a law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, in the meaning of section 641; that the law had in view thereby is a statute so providing; that the only statute which it could have had in view is section 1977, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1259], which provides that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other," and that this section is limited in the benefits which it confers to negroes and other colored persons, and that white persons have acquired no rights thereunder. The effect of this position is to limit the right of removal provided by section 641 to negroes and other colored persons, and exclude white persons therefrom. In support of the proposition that said section had in view a statute only, and that statute section 1977, reference may be made to Justice Strong's statement in *Strauder v. West Virginia*, that section 641 "plainly has reference" to said section 1977.

But to say that it has reference thereto is not the same as to say that it is limited thereto. And the equal protection of the laws clause is a law providing for the equal civil rights of all persons within the jurisdiction of the United States, in that by reason of it all such persons have such rights. It is a part of the organic law of the federal government to that effect. The position, if not vulnerable here, is so at another point. Section 1977, so far as it confers rights, is not limited to negroes and colored persons. It confers rights on white persons. The persons on whom it confers rights are "all persons within the jurisdiction of the United States." It is only when it comes to define the rights which the section confers that they are referred to as such "as is enjoyed by white citizens." Concerning this section, Justice Strong said: "This act puts in the form of a statute what has been substantially ordained by the constitutional amendment. It was a step towards enforcing the constitutional provision." And he refers to section 641, in relation to said section, as "an advance step." According to this, section 1977 is as broad as the fourteenth amendment as to the persons affected by it; and it is well settled now, however it may have been earlier, that said amendment relates to all persons, without reference to color. If, indeed, section 641 was intended to be limited to negroes or other persons of color, it is difficult to understand why it did not so provide, instead of conferring the right of removal upon "any person who is denied or cannot enforce," etc.

The motion for the writ is sustained.

In re HALE.

(Circuit Court, S. D. New York. June 8, 1905.)

1. GRAND JURY—POWERS—WITNESSES—REFUSAL TO TESTIFY.

Where, after a witness had refused to testify before a grand jury considering supposed infractions of the anti-trust law, the grand jury made a presentment to the court charging the witness with contempt, and the court, after hearing, ordered the witness to answer the questions, and to forthwith produce the papers required, the court's action was equivalent to an express instruction to the grand jury to investigate the matter referred to in the presentment, and hence the fact that the grand jury had been previously acting beyond its power was harmless.

2. WITNESSES—PRIVILEGE—ANTI-TRUST ACT—INQUISITIONS.

An inquisition before a grand jury to determine the existence of supposed violations of the anti-trust act was a "proceeding" within Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 848 [U. S. Comp. St. Supp. 1903, p. 365], providing that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any "proceeding" under several statutes mentioned, including such anti-trust act.

3. UNREASONABLE SEARCHES—RIGHTS OF AGENT—SUBPŒNA DUCES TECUM.

A subpoena duces tecum commanding the secretary and treasurer of a corporation supposed to have violated the anti-trust act to testify and give evidence before the grand jury, and to bring with him and produce numerous agreements, letters, telegrams, reports, and other writings, described generically, in effect including all the correspondence and documents of his corporation originating since the date of its organization, to which 19 other named corporations or persons were parties, for the purpose of enabling the district attorney to establish a violation of such act on the part of the witness' principal, constituted an unreasonable search and seizure of papers, prohibited by Const. U. S. Amend. 4.

4. HABEAS CORPUS—CIRCUIT COURTS—JUDGES—CO-ORDINATE JURISDICTION.

Where a subpoena duces tecum was directed to be issued by a circuit judge, and the witness was committed for contempt for failure to obey the same, he would not be discharged on habeas corpus by another judge of the same court, though the latter was of the opinion that the subpoena authorized an unconstitutional search and seizure of private papers.

Henry W. Taft, for complainant.

Elihu Root and De Lancey Nicoll, for defendant.

WALLACE, Circuit Judge. This is a proceeding in habeas corpus to test the legality of the imprisonment of the petitioner, pursuant to an order of the Circuit Court, adjudging him guilty of contempt in refusing to produce certain documents and writings and answer certain questions as a witness before the grand jury impaneled in that court. The petitioner was the secretary and treasurer, and also a director, of McAndrews & Forbes Company, a New Jersey corporation, and had been served with a subpoena duces tecum issued out of that court commanding him to testify and give evidence before the grand jury upon the part of the United States of America "in a certain action now pending and undetermined" in that court between the United States of America and the American Tobacco Company and the McAndrews & Forbes.

Company, and to bring with him and produce numerous agreements, letters, telegrams, reports, and other writings, all of which were described generically, and may for the present purposes be described as including all the correspondence and documents of his corporation originating since the date of its organization, to which 19 other named corporations or persons were parties. He appeared before the grand jury pursuant to the subpoena, and was then asked several questions bearing upon the general inquiry whether there was any agreement, arrangement, or understanding between his corporation and the American Tobacco Company in relation to the trade in licorice affecting the business between several states of the United States. He declined to produce the papers or to answer the questions, stating to the grand jury as a reason for so doing that he had been advised by counsel that he was under no legal obligation to produce the writings, and that the production of the papers or the answers to the questions would tend to criminate him. Thereupon he was informed by the United States attorney that the proceeding was one under the act of Congress to protect trade and commerce against unlawful restraints and monopolies, and it was not proposed to prosecute him or subject him to any penalty or forfeiture on account of anything to which he should testify, or as to which he should produce documentary or other evidence, and that he (the district attorney) offered and assured to him immunity and exemption from any such testimony. The petitioner again declined to answer, for the reasons previously stated. Subsequently the grand jury made a presentment to the court charging the petitioner with contempt because of his refusal to produce the writings and give the testimony required, and setting forth fully the facts relating thereto. When this presentment was submitted to the court, the petitioner being present, the court made an order directing him to answer the questions as propounded by the grand jury, and to forthwith produce the papers. Upon his refusal to comply, further proceedings were taken, which resulted in an order by the court adjudging him in contempt, and committing him to the custody of the marshal until he should comply with its previous order.

It is insisted by the petitioner that his imprisonment and restraint are without lawful authority for reasons which may be summarized as follows: (1) That the grand jury could only investigate specific charges against particular persons, and, as there was not any proceeding of that nature before them, and no cause or action of any kind whatever pending in the court, they were not in the exercise of proper authority in prosecuting the investigation when petitioner was before them, and consequently he could not be lawfully required to testify or give evidence; (2) that petitioner was within the protection of the fifth amendment of the Constitution in refusing to testify or produce incriminating evidence against himself; and (3) that the order of the court directing him to produce the papers contravened the fourth amendment of the Constitution, and in fact deprived him of his right to be secure against unreasonable search and seizure of his papers, and was equivalent to a

warrant not issued upon probable cause or particularly describing the things to be seized.

It is manifest from the facts recited in the presentment made by the grand jury that the investigation which they were pursuing was not based upon any specific charge which had been formulated and laid before them by the United States attorney, and that it was not founded upon their own knowledge, or upon information derived from any source that a specific offense had been committed by either of the two corporations named in the subpoena. It appears to have been one which they were pursuing, with the assistance of the United States attorney, directed to the discovery of some infraction by one or both of these corporations of the law of Congress of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," known as the "Anti-Trust Law" (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Consequently the first contention for the petitioner presents the question whether it is within the competency of the grand jury to institute and pursue such an investigation in the exercise of its inquisitorial power.

The authority and functions of a grand jury in the courts of the United States in investigating criminal offenses are not prescribed by statute, but are such as inhere in that body by the general sanction of the common-law courts. That a grand jury is not confined to the investigation of an alleged offense to which their attention has been called by the court, or which has been laid before them in an indictment, or an information by the prosecuting attorney of the court, or which is within the personal knowledge of some of the members, is the generally accepted opinion of the courts of this country, unless in some of the states where there may be statutory restrictions to the contrary. As said by Mr. Justice Brewer in *Frisbie v. The United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657:

"In this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and, after determining that the evidence is sufficient to justify putting the party suspected to trial, to direct the preparation of the formal charge or indictment."

That they may investigate into offenses which may come to their knowledge, other than those to which their attention has been called by the court, or which have been submitted to their consideration by the district attorney, is shown by the observations of Mr. Justice Field in a carefully considered charge to the grand jury in the United States Circuit Court for the District of California. 2 Sawy. 667, Fed. Cas. No. 18,255. That a grand jury has certain inquisitorial powers—and by this is meant the power of instituting an investigation to discover whether a particular crime has been committed—is also a proposition which has been frequently affirmed by the courts of this country; but as to the extent and limitation of this power there is pronounced divergence of opinion. It will suffice to refer to a few of the many citations which counsel have with great industry collated.

In *Blaney v. The State of Maryland*, 74 Md. 153, 21 Atl. 547, the court said:

"However restricted the functions of grand juries may be elsewhere, we hold that in this state they have plenary inquisitorial powers, and may lawfully press, and upon their own motion originate, charges against offenders, though no preliminary proceeding has been had before a magistrate, and though neither the court nor the state's attorney has laid the matter before them. * * * Though far-reaching and seemingly arbitrary, this power is at all times subordinate to the law, and experience has taught that it is one of the best means to preserve the good order of the commonwealth and to bring the guilty to punishment."

In *Re Lester*, 77 Ga. 143, the Supreme Court, after stating in its opinion that it was undeniable that the powers of the grand jury are to a certain extent inquisitorial, but are to be exercised within well-defined limits, said:

"Anything they can find out upon inquiry and observation is legitimate and praiseworthy, but they have no authority to force private persons or the officers of other courts to disclose to them who have violated the public laws, and the names of persons by whom such infractions can be established; in short, to make any man the spy upon the conduct of his neighbors and associates, and compel him to violate the confidence implied in holding social intercourse with his fellows by forcing him to become a public informer."

Such an exercise of power, the court said, would be in derogation of "rights regarded as sacred and paramount in the intercourse between man and man; and these rights have been carefully guarded, not only by the spirit of our law, but by its express enactment."

In the United States Circuit Court for the District of Tennessee (reported in *Wharton on Criminal Pleading*, p. 224) Mr. Justice Catron compelled witnesses to answer who had been summoned by the grand jury, when it did not appear that there was any specific charge made against any particular person, and when the questions were whether the witnesses knew of any person or persons in the city of Nashville who had begun, or set on foot, or provided means for a military expedition to the Island of Cuba. He said:

"As all these questions tend fairly and directly to establish some of the offenses made indictable by the act of 1818, and are pertinent to the charge delivered to the grand jury, they may be properly propounded, unless the answers would tend to establish that the witness was himself guilty."

In *United States v. Kilpatrick* (D. C.) 16 Fed. 765, the court, after proving the practice of the state courts in North Carolina, said:

"Grand juries cannot make inquisitions into the general conduct or private business of their fellow citizens, and hunt up offenses by sending for witnesses to investigate vague accusations founded upon suspicions and indefinite rumors."

He adds:

"The rights of society, as well as the nature of our free institutions, forbids such a dangerous mode of inquisition."

In *Thompson & Merriam on Juries*, § 615, it is said, referring to authorities cited:

"These expressions of opinion bristle with evidence of the inquisitorial power of the grand jury to inquire of their own motion into offenses of every character punishable by the court, of which it is a component part."

The subject is summed up in volume 17, Am. & Eng. Enc. of Law (2d Ed.) p. 1279, as follows:

"Although it has been sometimes asserted that at common law the grand jury was charged with inquisitorial duties, and was empowered to institute inquiries and investigations into criminal offenses, according to the weight of authority the power of the grand jury to originate criminal prosecutions otherwise than by a presentment based upon the personal knowledge or observation of the members of that body is ordinarily limited to cases in which individuals have been charged with specific crimes before a magistrate, in which cases the accused has a responsible prosecutor upon the record, who may, if he swear falsely, be indicted for perjury, or to cases which are called to its attention by the court or the prosecuting attorney; and it has no power of its own motion to institute a prosecution by summoning and examining witnesses for the purpose of obtaining information upon which to base a presentment of a supposed offender."

The result of the authorities seems to be fairly summarized in the last citation.

The question whether an improper exercise of the inquisitorial power subverts the jurisdiction of the court, or is simply such an irregularity as to enable the accused or a witness to invoke the intervention of the court, or as may vitiate an indictment, has never been decided. Were it not for the implication arising from the treatment of the subject in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, it would seem quite clear that it could not affect the jurisdiction of the court. The grand jury is a part of the court in the exercise of criminal jurisdiction, and their proceedings are always subject to the control of the court. The court can at any time direct the grand jury to consider a particular accusation, or to investigate a supposed violation of the criminal law; and whether it does this by direct instructions or by directing the prosecuting officer to present the matter for the consideration of the grand jury is of no consequence. If, in the absence of such instructions, the grand jury proceeds of its own motion, and is guilty of any abuse of its powers, the court can at any time intervene, and correct or suppress the proceedings. If the conduct of the grand jury is called to its attention, and the court approves or disapproves, whether its judgment may be correct or wrong, it is in the exercise of its undoubted jurisdiction; and, though it is erroneous, it is not void or illegal, and cannot be reviewed by habeas corpus. Of course, this is not true in cases where the court transcends its authority. In the *Counselman* Case, which was a habeas corpus case, the court adverted to the contention that the jury in the particular case had not been "investigating specific charges against particular persons," but said that it was not necessary to intimate any opinion as to the validity of the contention, and placed its decision upon another ground. The circumstance that the point was adverted to is hardly enough to suggest that the court considered it to be a valid one.

In the present case it does not appear that the investigation was initiated *sua sponte* by the grand jury, and it may be inferred from the participation of the United States attorney in the proceeding that it originated in his formal presentation of the charge to them. The subpoena duces tecum was the process of the court. As it commanded the witnesses to appear before the grand jury, it is manifest that the recital about the pending "action" could only have referred to a proceeding between the United States and the two corporations of the only kind which a grand jury can entertain, viz., a preliminary investigation to ascertain whether there was sufficient cause for an indictment. When, after the presentment of the alleged contumacy of the witness by the grand jury to the court, he was ordered by the court to answer questions and produce the documents, the action of the court was equivalent to an express instruction to the grand jury to investigate the proceedings mentioned in the presentment. While the investigation was not directed to a specific offense, it was directed to the inquiry whether one of the laws of the United States—the so-called Anti-Trust Law—had been violated by either or both of the two corporations mentioned. Without this intervention by the court the investigation would have been one upon the border line between the legitimate exercise and the abuse of the inquisitorial power of the grand jury, but not one which can be safely held to have been an ultra judicial proceeding. After the intervention of the court the original abuse of power, if there was any, became innocuous.

The contention for the petitioner that the order of the court violates the constitutional prohibition against compelling a person to give evidence against himself in a criminal case would be clearly sound were it not for the effect of the immunity act of Congress of February 19, 1903, c. 708, 32 Stat. 848 [U. S. Comp. St. Supp. 1903, p. 365]. In view of his official relations with the corporation, it fairly may be assumed that the petitioner had participated personally in some of the acts or transactions which were the alleged offenses of the corporation, and was therefore originally responsible himself. It is not for this court to question the soundness of the judgment in *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, or to weigh the value of the dissenting opinions. That judgment is authoritative that such an exemption from liability to prosecution or penalty as was secured to the witness by the immunity act of February 19, 1903, if it extends to testimony given or compelled before a grand jury, deflects the application of the fifth amendment to the Constitution so that the prohibition against compelling a person to be a witness against himself in a criminal case does not protect him. The petitioner's counsel do not argue otherwise, and their argument is that the immunity given by this act does not extend to testimony given by a witness before a grand jury. The provision is that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, "in any proceeding, suit, or prosecution"

under the several statutes mentioned, including the anti-trust act. The argument that a proceeding before a grand jury is not such a proceeding as is meant by the provision has been ingeniously presented, and is not without plausibility. But the word "proceeding" is a broad term, and was apparently intended to include some form of judicial inquiry other than a "suit or prosecution." In one sense it is true a criminal proceeding is not instituted against an accused person until a formal charge is made against him by indictment or information, or a complaint before a magistrate; and proceedings before a grand jury are not, in that sense, a criminal proceeding against an accused. *Post v. United States*, 161 U. S. 583, 16 Sup. Ct. 611, 40 L. Ed. 816. But in another sense any initial step before a judicial tribunal preliminary to the commencement of a civil suit or a criminal prosecution is a proceeding. As used in this statute, inasmuch as testimony given in a suit or prosecution embraces that given not only at the trial, but upon all occasions incident to the controversy, the term "proceeding," if limited to some step in the progress of a civil suit or a criminal prosecution which has been previously instituted, is mere tautology. A rational construction seems to require it to include any preliminary step which is incident to the institution of a civil suit or a criminal prosecution.

The contention that the order requiring the petitioner to produce papers called for by the subpoena duces tecum was made in violation of the petitioner's rights under the fifth amendment to the Constitution, raises the question whether such a general inquisition into his private papers as is permitted by the terms of the subpoena was not such an abuse of judicial process as to amount to an unreasonable search and seizure. As Judge Cooley says in his work on Constitutional Limitations:

"Near in importance to exemptions from an arbitrary control of the person is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers against even the process of the law, except in a few specified cases."

In *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, it was decided that the law of Congress which authorized a court of the United States in revenue cases on motion of the government attorney to require a defendant to produce in court his private books, invoices, and papers, and permit the attorney, under the direction of the court, to make examination of the same, and which provided that, if the defendant refused to produce the same, the allegations of the attorney as to their contents specified in his written motion should be taken as confessed, was unconstitutional and void, as being repugnant to the fourth and fifth amendments to the Constitution. The court said:

"It is our opinion, therefore, that a compulsory production of a man's private papers, to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the Constitution, in all cases in which a search or seizure would be, because it is a material ingredient and affects the sole object and purpose of search and seizure."

And the court concluded:

"We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection of the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings."

It will be observed that the statute in that case did not deprive the party of the custody of the books and papers which he was required to produce, and authorized only such an inspection of them as the court might direct. This judgment concludes an inquiry by this court as to the validity of two propositions, and it settles, first, that a subpoena or an order of the court may be the equivalent of a search and seizure within the constitutional provision; and, second, that any search or seizure for the purpose of obtaining incriminating evidence against the party, is an unreasonable one within the meaning of the provision. The judgment would have controlled this case, and would have entitled the petitioner to be discharged, if the evidence sought to be procured could have been used to incriminate the petitioner. Is a search and seizure any the less unreasonable when it compels the official custodian of all the papers of his principal, whose duty it is to keep their privacy inviolable, to produce them in order to incriminate his principal? It may be conceded that his duty to the state and courts is paramount; but is this true when the evidence is not to be used against a principal who is under any criminal accusation, or against whom any civil suit is pending, and is only to be used to discover if possibly any ground of accusation can be found against him?

If the petitioner had been ordered to produce a single document or numerous documents in his possession, which were adequately described to enable him to find them, for use as evidence in a pending action, civil or criminal, it seems plain that the order would have been unobjectionable, and such as the courts are daily making. Such was the case of *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860, where the observation was made by the court upon which the government relies.

The petitioner was required to produce a numerous array of documents and papers for the purpose of ascertaining whether they contained anything which would tend to establish the commission of an offense by either of the two corporations; and it is apparent that the object was to enable the government, by inspecting this mass of the private papers and documents of the petitioner's corporation, to find something which might induce the grand jury to find an indictment against his corporation. It is this which gives to the proceeding its color of oppression and the attributes of an unreasonable search and seizure.

The legality of search warrants has been sanctioned on the ground of public necessity, because without them felons and other malefactors would escape detection. But a search warrant for the papers of a suspected party, to be used as evidence against him, was illegal at common law. Archbold, Criminal Law (7th Ed.) 141.

Because of the obnoxious character of the process, very great particularity is required in designating the articles to be searched for before the officers of the law are permitted to invade the premises where the articles sought are supposed to be. A designation of goods to be searched for as "goods, wares, and merchandise," without more particular description, has been regarded as insufficient, even in the case of goods supposed to be smuggled, where there is usually greater difficulty in giving description, and consequently more latitude should be permitted, than in the case of property stolen. *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151. Lord Camden, speaking of a warrant not specifying the particular papers, but authorizing the seizure of all the papers of the person named in it, described it as "an execution upon all the party's papers," and said:

"To enter a man's house by virtue of a nameless warrant, in order to produce evidence, is worse than the Spanish inquisition—a law under which no Englishman would care to live an hour." *Entinck v. Carrington*, 19 State Trials, 1029.

Any process which is issued to perform the office of a search warrant should conform in some remote degree, at least, in certainty and specific description, to the requirements of a valid search warrant. The subpoena issued in this case may possibly meet these requirements, but it is not too much to say that it resembles more nearly a general warrant to search all the private papers of a witness. It falls but little short of being in substance and effect a roving commission, devised by the government to compel a witness to bring before the grand jury a general mass of the private papers of his principal, in order that the prosecuting officer might discover whether at any time during its corporate life the principal had been a party to any act which could afford the basis of a criminal accusation. This was a wanton assault upon the right of privacy, and in my judgment the process, in view of the circumstances under which and the purposes for which it was issued, authorized an unreasonable search and seizure of papers within the spirit and meaning of the fourth amendment.

The conclusions thus indicated would ordinarily lead to an order for the petitioner's discharge, but the order compelling him to produce the papers alluded to in the subpoena was made by one of the judges of this court, and although it was not made under circumstances which afforded an opportunity for deliberate consideration, the manifest impropriety of reversing it indirectly in the same court, held by a different judge, is so great that it ought not to be done if the only result will be to shift the burden of preparing a record for a review by a higher tribunal from the one party to the other. Whether the present decision is in favor of the petitioner or against him, it is understood that it will be taken for review to the Supreme Court, and pending that review the petitioner will not be confined.

Under these circumstances an order will be entered refusing the discharge of the petitioner.

STERNFELS et al. v. WATSON et al.

(Circuit Court, D. Oregon. July 19, 1903.)

No. 2,782.

1. TRUSTS—NOTICE—CONVEYANCE TO PERSON AS TRUSTEE.

The word "trustee" following the name of the grantee in a deed is notice that he is not the owner of the property, and is sufficient to put all subsequent purchasers from him on inquiry as to the existence and nature of the trust.

2. SAME—PURCHASER FROM TRUSTEE—RIGHTS OF EQUITABLE OWNERS.

The legal presumption is that a trustee has no power of sale, and a mortgagee of property which was conveyed to the mortgagor as trustee and all subsequent purchasers through him are bound to exercise reasonable diligence to ascertain whether or not the equitable owners of the property had authorized the execution of the mortgage. Such diligence is not exercised where there is nothing of record, and they fail to make inquiry of the trustee himself, and make no effort to do so; and the contingency that he might have denied the trust is no excuse for such failure.

3. SAME.

Where a conveyance of property is taken to one as trustee, the trust being in fact in favor of others, who paid the consideration therefor, the rights of the equitable owners are not affected by the fact that the declaration of trust was not executed until afterward.

4. SAME—MORTGAGE BY TRUSTEE—VALIDITY.

A mortgage given by a trustee on property the title to which he holds in trust for himself and others, although unauthorized and invalid as against his co-owners, is valid as to his individual interest in the property as against a subsequent purchaser.

5. SAME—UNAUTHORIZED CONVEYANCE BY TRUSTEE.

Three persons purchased a tract of land, each paying a portion of the consideration, and a conveyance of the same was taken to one as trustee. A declaration of trust was subsequently executed, showing that he held the title in trust for himself and the other part owners, which instrument was not recorded. The trustee subsequently executed a mortgage on the land, which was foreclosed, and the title acquired by the purchaser at the sale passed, through mesne conveyances, to defendants. The co-owners of the trustee had no knowledge of the mortgage, which was not authorized by the declaration of trust, nor of the foreclosure proceedings. Only one of the subsequent purchasers made any inquiry as to the nature of the trust disclosed by the first deed, and he made none of the trustee himself, and no effort to do so. *Held*, that the mortgage and subsequent conveyances passed title only to the trustee's individual interest, and that defendants held the remaining interests subject to the original trust.

6. SAME—SUIT TO ENFORCE—LACHES.

Where the holder of the title to land on an express trust for himself and others has never denied the trust to his co-owners, they are not chargeable with laches in failing to institute proceedings to recover their interests from adverse claimants through unauthorized conveyances by the trustee, of which adverse claims they had no notice.

In Equity. Suit to enforce trust.

The complainants, who are the widow and heirs at law of Morris Sternfels, deceased, presented their bill alleging that Morris Sternfels died intestate September 24, 1900; that prior to March 28, 1891, said Morris Sternfels, George B. Rate, and T. J. Watson made an agreement to purchase a tract of land, which is described in the bill, for the sum of \$7,500, the said Sternfels was to contribute four-fifteenths thereof, Rate was to contribute two-fifteenths, and

T. J. Watson was to contribute the remaining nine-fifteenths, all of said parties to own and hold said land jointly in proportion to the money paid by each, and to take a deed therefor in the name of T. J. Watson, trustee, for said purchasers; that pursuant to said agreement said parties did, on March 28, 1891, purchase said land for said sum of \$7,500, and a conveyance was taken in the name of "T. J. Watson, trustee"; that the deed was duly recorded on May 8, 1891; that said land was so taken in the name of T. J. Watson, trustee, for the purpose of enabling him to sell the same in small parcels at a profit to the owners, and for no other purpose; that pursuant to said agreement and conveyance the said Sternfels, Rate, and Watson, on March 31, 1891, made and entered into a declaration of trust in which said Watson covenanted to and with the other owners of said property that he held the same in trust for the purchasers in the proportions above set forth, and that upon the sale of the same he would account to them in said proportions, after deducting necessary expenses; that pursuant to said agreement said land was surveyed and laid out in a town or addition to Hood River, Or., and platted in lots and blocks under the name of "Idlewilde Annex"; that on December 11, 1894, said Watson, in consideration of \$1,739, to him paid by said Morris Sternfels, sold and conveyed unto him all his right, title, and interest in and to said tract; that thereupon said Sternfels became the owner of a thirteen-fifteenths interest in said land; that prior thereto, and on January 16, 1893, said Watson executed and delivered to Fred Darvill a mortgage on said land to secure payment of \$1,000 and interest; that said mortgage was made, delivered, and received in bad faith, and without the knowledge of said Sternfels, and without authority, and in breach of said trust, and the sum so borrowed was not needed to carry on said trust or to protect said tract of land, and that none of the same was used in carrying out said trust, but was used by said Watson for his sole and exclusive use and benefit; that thereafter said Darvill assigned his mortgage to Charles E. Gill; that on December 10, 1894, said Watson, trustee, filed in the county clerk's office of Wasco county a petition asking that the plat of Idlewilde Annex be vacated, and in said petition he recited that he was the trustee of the owners of said Idlewilde Annex; that on December 21, 1894, a complaint was filed to foreclose said mortgage, in which complaint T. J. Watson, trustee, T. J. Watson and M. G. Watson, his wife, were named as defendants; that on said proceedings a decree of foreclosure was had, and said land was sold to Gill on May 1, 1895, for \$1,261.85; that said land so purchased by Gill was impressed with said trust; that on July 3, 1902, said Gill conveyed said land to Robert R. Erwin, a son-in-law of said T. J. Watson, and on July 29th of said year said Erwin and wife conveyed the same to the defendant Joseph F. Batchelder; that on November 4, 1902, said Batchelder and his wife conveyed said land to George T. Prather and Lucretia H. Prather, his wife, and on November 24, 1902, said Prather and wife executed and delivered to Joseph F. Batchelder and Robert R. Erwin, trustees, a conveyance of the said land; that said original mortgagee and all his grantees had notice and knowledge of said trust; that the complainants had no knowledge or notice of any of the facts above alleged, except the deed of trust and the declaration of trust, until December, 1902. And complainants prayed that they be decreed to be the owners of thirteen-fifteenths of said land, and that the defendant George B. Rate have such relief as he may be shown to be entitled to, etc.

The answer of the defendants other than Rate denies that Sternfels owned any interest in said land at the time of his death, or that George B. Rate ever had any interest therein, and alleged that Joseph F. Batchelder is the trustee, and holds said property in trust for himself, C. Lombardi, George E. Prather, C. E. Heman, and R. R. Erwin. The defendants deny the agreement to purchase, or the contribution of money therefor by Sternfels or Rate, and the execution of the declaration of trust, and deny that the legal title to said land was taken for said purchasers in the name of T. J. Watson as trustee. They deny that said mortgage was made in bad faith, or without the knowledge of Sternfels, or without his authority, or in breach of said alleged trust. They deny that the title which passed to said Gill on foreclosure was impressed with the trust, or that any subsequent purchasers had notice of the trust. The defendant George B. Rate filed an answer both to the bill of complaint and to the

answer of the other defendants, in which he denied the material allegations of said answer, and admitted, affirmed, and confirmed all the allegations of the bill, and prayed for the relief prayed for by the complainants in proportion to his interest in the property. No exception was taken to the form of his pleading, and, as the parties went to trial upon the issues so formed without objection, the affirmative matter of the answer may, upon the final hearing, be deemed to be substantially a cross-bill.

Upon the issues so made testimony was taken, and it was shown that on March 28, 1891, W. P. Watson and wife executed to "T. J. Watson, trustee," for a recited consideration of \$7,500, paid to them by said trustee, a deed to the land in controversy, conveying the same to "T. J. Watson, his successors and assigns, forever," and that said deed contained general covenants of warranty to and with "T. J. Watson, trustee, his successors, heirs, and assigns"; that on March 31st, T. J. Watson duly signed, sealed, and acknowledged a declaration of trust, in which it was declared that the property had been conveyed to said T. J. Watson as trustee, and that he held the same as trustee for Morris Sternfels, who owned four-fifteenths, George B. Rate, who owned two-fifteenths, and T. J. Watson, who owned nine-fifteenths, and that he covenanted upon the sale of the property to account to said parties in the proportions so stated, after deducting all necessary expenses; that said declaration was executed in triplicate, one whereof was given to Morris Sternfels and one to George B. Rate, and that on the copy which was given to Sternfels T. J. Watson subsequently, on December 11, 1894, for a stated consideration of \$1,739, assigned and transferred unto the said Sternfels all his right, title, and interest in and to the property described therein. The defendant Batchelder testified that before purchasing the property his attention was called to the word "trustee" in the conveyance to T. J. Watson, trustee, as it appears in the abstract of title; that he saw W. P. Watson, the grantor of said conveyance, who informed him that he didn't know that the word "trustee" was in the deed, and had no knowledge of any trusteeship; and that he made inquiry of Milton W. Smith, who was the attorney for the then owner of the property, who informed him that he had no knowledge of any one having any claim on the property. He testified further that he placed the abstract in the hands of an examiner of titles, and directed him to make thorough inquiry. The examiner of titles so employed testified that he ascertained from the records of Wasco county that there was no declaration of trust on record, and that he made inquiry of Milton W. Smith, who informed him that there was "nothing within his recollection that brought in any one else," but that he made no inquiry of any other person; that he advised Batchelder that, if T. J. Watson could be found, it would be the proper thing to ask him. He gave no testimony as to any effort made to find T. J. Watson. He admitted that he knew that T. J. Watson had been engaged in the real estate business in Portland with his brother, but he stated that it did not occur to him to make inquiry of the brother. There was no other testimony of efforts made to ascertain the existence or the nature of the trust. On the hearing of the case the deposition of T. J. Watson was taken, from which it appeared that he left Portland in the fall of 1897, or early spring of 1898, for Dawson, Yukon Territory.

J. R. Stoddard, for complainants and defendant Rate.
Pipes & Tift, for other defendants.

GILBERT, Circuit Judge (after stating the case as above). There can be no doubt that the use of the word "trustee" in the conveyance to T. J. Watson was sufficient to put all subsequent purchasers from him upon inquiry as to the existence and nature of the trust. *Railroad Co. v. Durant*, 95 U. S. 576, 24 L. Ed. 391; *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Covington v. Anderson*, 16 Lea (Tenn.) 310. The rule applicable to such a case is well expressed by the Circuit Court of Appeals for the Eighth Circuit in *Geyser Marion Gold Min. Co. v. Stark*,

106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684, in which it was said of the use of the word "trustee":

"It is a warning and declaration to every one who reads it (1) that the person so named is not the owner of the property to which it relates; (2) that he holds it for the use and benefit of another; and (3) that he has no right or power to sell or dispose of it without the assent of his cestui que trust. It denies the equitable ownership and beneficial interest of the party to whom it is applied, and asserts that he holds it in a representative capacity. It signifies the opposite of the word 'owner,' and means that, while the party called 'trustee' has the naked legal title, he has no beneficial right, title, or interest in the property. * * * Hence the legal presumption is that a trustee has no power to sell or convey the property which he holds in his fiduciary capacity, and the fact that he holds it as trustee is a warning and a declaration to all the world that he is without the power of disposition, unless that power is specifically given by the instrument creating the trust, or by the assent of those whom he represents. The legal presumption is that a trustee has no power of sale. *Jaudon v. Bank*, Fed. Cas. No. 7,230; *Gaston v. Bank*, 29 N. J. Eq. 98, 103; *Duncan v. Jaudon*, 15 Wall. 165, 175, 21 L. Ed. 142."

The mortgagee of the mortgage made by Watson and all subsequent purchasers were bound to exercise reasonable diligence to ascertain whether or not the equitable owners of this real estate had authorized the execution of a mortgage. The investigation and inquiry that were made fall far short of what the law requires. No inquiry whatever appears to have been made by the original mortgagee or by his assignee, nor by any of the purchasers, until the purchase which was made by the defendant Batchelder. The extent of his investigation was to ascertain that no declaration of trust was of record, and to inquire of the grantor of Watson, who informed him that he did not know that the word "trustee" was in the deed, and of Milton W. Smith, the attorney for the person from whom he purchased, who informed him that he knew of no one having any claim on the property. No inquiry was made of T. J. Watson, and no effort, so far as the testimony shows, was made to communicate with him. He, of all persons whose names appeared on the records, best knew the facts, and the contingency that he might have denied the trust was no excuse for failure to make inquiry of him. *Jones v. Williams*, 24 Beav. 62; *Jones v. Smith*, 1 Hare, 55; *Geyser Marion Gold Min. Co. v. Stark*, 106 Fed. 562, 45 C. C. A. 467, 53 L. R. A. 684; *Shaw v. Spencer and Others*, 100 Mass. 390, 97 Am. Dec. 107, 1 Am. Rep. 115; *Mercantile Bank v. Parsons*, 54 Minn. 64, 55 N. W. 825, 40 Am. St. Rep. 299.

It is earnestly contended by the defendants that no trust was imposed upon the title received by T. J. Watson, for the reason that the declaration of trust was not executed until three days after the execution of the deed. It is unimportant at what date the trust deed was executed. It is not disputed that the trust relation existed at and before the purchase of the property, and it is immaterial, so far as the rights of the complainants are concerned, whether the purchase price was \$7,500, or \$1,300, as contended for by the defendants. If it was \$1,300, additional proof was thereby afforded of the mala fides of T. J. Watson, trustee. Whatever may

have been the consideration actually paid for the land, the facts remain that Sternfels and Rate paid their proportion as declared in the declaration of trust, the deed was taken in trust for them, and the trustee so acknowledged by the declaration. It is true that T. J. Watson in his deposition testified that the mortgage was made with the knowledge and consent of his co-owners of the property, but George B. Rate expressly denied that he ever was informed of or knew of the mortgage until after the commencement of the present suit. What Sternfels would have testified to had he lived cannot be known, but this much is shown: that on December 11, 1894—10 days after the complaint in the foreclosure suit was filed—he bought and paid for Watson's nine-fifteenths interest in the property the sum of \$1,739, and thereafter paid no attention to the mortgage or to the foreclosure suit, and never redeemed the property from foreclosure sale. It is not conceivable that he would thus have ignored the mortgage and the foreclosure thereof if he had had knowledge of either. In addition to this, T. J. Watson is effectually impeached by the testimony of witnesses as to his reputation in this community for truth and veracity.

There is no proof that any part of the money raised upon the mortgage was expended upon the trust property, or that the other owners received the benefit thereof, although there is testimony tending to show that at some point of time not remote from the time when the mortgage was made a portion of the land was cleared. That fact alone, even if fully sustained by the evidence, would be no defense to the equitable relief which is sought by the complainants and the defendant Rate. The contention is made that, inasmuch as considerable sums were expended by Batchelder and his associates in improvements upon the property, those expenditures should, in equity, be a charge upon the other interests. But that fact presents no obstacle to the relief which is sought in the present suit. This is not to say that money so expended, if expended in good faith, may not hereafter be the basis of relief in a partition suit between the owners.

There can be no question that the interest of T. J. Watson in the premises passed by the mortgage and foreclosure thereof notwithstanding his subsequent conveyance to Sternfels. Watson owned nine-fifteenths, and could lawfully mortgage his interest.

As to the defense of laches, it is sufficient to say that the trust was an express one, and was never repudiated or denied by T. J. Watson otherwise than constructively by his act of mortgaging the property, and nothing came to the notice of Sternfels or Rate to show that the trust was denied, or that others claimed to hold the property adversely. The law applicable to such a state of facts is expressed in *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718.

The decree of the court will be that the complainants are the owners of four-fifteenths and that the defendant Rate is the owner of two-fifteenths of the property described in the complaint; that the defendants who hold the title to the interest of T. J. Watson

convey such interests to the complainants and the defendant Rate, respectively, within a time to be named in the decree; and that the complainants and defendant Rate recover their costs and disbursements in this suit.

UNITED STATES v. ONE PEARL CHAIN.

(District Court, S. D. New York. June 2, 1904.)

1. CUSTOMS DUTIES—PASSENGERS' BAGGAGE—FORFEITURE—BURDEN OF PROOF—PROBABLE CAUSE.

On a suit by the United States, under section 3082, Rev. St. [U. S. Comp. St. 1901, p. 2014], to forfeit articles found in the baggage of a person arriving in the United States, and seized as fraudulently imported, the burden of proof is not upon the claimant of the articles, unless the court finds that there is probable cause for seizing them. If at the close of the government's case there is not enough evidence to go to the jury, there is not such probable cause as to put the burden of proof upon the claimant.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 324.]

2. SAME—ARTICLES OF GREAT VALUE.

The rules and regulations relating to the importation of baggage, or articles upon the person, of people arriving in the United States, though applying usually to articles of no great value, apply as well where the articles so imported are of very great value.

3. SAME—FORFEITURE—INTENT TO SMUGGLE.

It is immaterial that a person bringing goods to the United States intends to smuggle them. If the time has not passed when it is his duty to make the necessary declaration, and there remains an opportunity for him to change his mind, the goods are not subject to forfeiture under section 3082, Rev. St. [U. S. Comp. St. 1901, p. 2014].

Action of Forfeiture for Illegal Importation.

This was an action brought by the United States for the forfeiture of a pearl chain of a value of about \$26,000, which was found in the possession of the claimant in this proceeding, Ida Josephine Dulles, on her arrival in this country as a passenger on a vessel, and was seized by a special employé of the Treasury Department as imported in violation of sections 2799-2802, 3082, Rev. St. [U. S. Comp. St. 1901, pp. 1872, 1873, 2014], and therefore subject to forfeiture. At the close of the government's case, counsel for the claimant rested, and made a motion to direct a verdict in favor of the claimant. Affirmed, 139 Fed. 513.

Arthur M. King and Ernest E. Baldwin, Asst. U. S. Attys.

De Lancey Nicoll, John D. Lindsay, and Archibald R. Watson, for claimant.

HOLT, District Judge (orally). The consideration that has been suggested by Mr. Baldwin that the burden of proof is upon the claimant in this case is subject to the condition that the court finds that there is probable cause for the seizure. I think the question

whether there is such probable cause as to make the collector absolutely responsible in some way would be rather a different question from the question of whether there is probable cause here on the question of the burden of proof; and in my opinion, in any case, whatever the circumstances are, if at the close of the government's case there is not, in the opinion of the court, evidence enough to go to the jury, then there was not such probable cause as to put the burden of proof upon the claimant in the suit.

Now, as I read the decision of the Circuit Court of Appeals in this case (123 Fed. 371, 59 C. C. A. 499), it establishes the general proposition, in the first place, that there is a very great difference between the importation of ordinary merchandise and the importation of baggage, or personal articles brought upon the person. It recognizes that the law has provided a simple method of declaring in these cases, which certainly, it seems to me, ought to be provided. Passengers coming in usually bring articles of no very great value. The article in this case is one of great value, but, of course, it is governed by the rules and regulations applicable to the importation of baggage, or articles upon the person. The case holds that under these rules and regulations there must be a declaration, made by the passenger, of articles which are being brought in, and, as I understand, it must be made at the time the officer takes the statement on the ship, although, as I understand it, if there was some error in writing it down, that would not necessarily affect it. But there must be a declaration, though it may be of a very general character and not descending into particulars; yet, if it fairly covers the property being brought in, the particulars are to be ascertained by the customs officials there at the dock for the purpose of assessing the duty. Now, the court in this case held that Mrs. Dulles, having stated that she had wearing apparel the value of which was not known, had made a sufficient declaration of the fact that she was bringing in jewelry. She appears to have brought in other property, the value of which she computed under this declaration after they arrived at the dock. It is not claimed that that property was forfeited because she had only described it as "wearing apparel." It is claimed that this is forfeited, but it is covered by the same general description. Counsel criticises the term "wearing apparel," and the court says, in this opinion that it is not an expression which would be usually used to designate jewelry; but at the same time the court says that jewelry is included in the list, because described as wearing apparel; and it seems to me, when you consider it, it is nothing but wearing apparel. It is apparel, and it is worn, and the real function of it is to be worn as apparel. It seems to me that a necklace of this kind is wearing apparel, and nothing else. The Court of Appeals says she made the declaration, and therefore it certainly cannot be held, and the Court of Appeals said it could not be held, at any time before she left the ship, that this property could be seized as having violated the revenue laws.

This is a suit to forfeit property. This is not a suit to collect duty. The question is whether the title passed by reason of a

violation of the revenue laws. Now, what is the proof that there was any violation of the revenue laws? If the declaration she made was sufficient to enable this lady on the dock to have described it with particularity and paid the duty, then the government must show that the time for her to do so passed without her doing so. In my opinion, there is no evidence to that effect. She had the same opportunity to make the declaration in regard to the necklace that she had with regard to the other articles with regard to which the declaration was made. As I understand the evidence, Mr. Theobald assumed, because she did not describe the necklace with particularity on the declaration, that an offense had been committed, and that the goods were subject to seizure, and went ahead and seized them, and that took place before the time passed during which she had an opportunity to declare them to the inspector.

As I look at the law in this case, the question of intent is immaterial. The court held in *U. S. v. One Pearl Necklace*, 111 Fed. 165, 49 C. C. A. 287, 56 L. R. A. 130, and the *Dodge Case*, 131 Fed. 849, 65 C. C. A. 603, that, if a person in entire good faith did not make the declaration, the goods might be forfeited. On the other hand, if the persons who brought the goods here intended to smuggle them, they had an opportunity to change their minds down to the time when it was their duty to make the necessary declaration; and, in my opinion (and I think that is the true construction of the opinion of the Circuit Court of Appeals in this case), the government cannot seize these goods as forfeited until the time has come when the person importing them has had an opportunity to declare them and has not done so. In my opinion, there is no evidence in this case that that time had come, and therefore I think there should be a verdict directed in this case for the claimant, and I will so direct.

UNITED STATES v. ONE PEARL CHAIN et al.

(Circuit Court of Appeals, Second Circuit. April 6, 1905.)

No. 194.

1. CUSTOMS DUTIES—FORFEITURE—SMUGGLING—INTENT.

Mere intent to smuggle goods will not work a forfeiture under the laws of the United States. Though goods are brought in with intent to smuggle them, they may not be seized while the persons importing them may yet change their minds and observe the necessary formalities in due season.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 297.]

2. SAME—PASSENGERS' BAGGAGE—DECLARATION.

A person coming into the United States, and having in possession a valuable pearl chain, silk wearing apparel, and other articles, had made a declaration on board the vessel as to certain "wearing apparel, value not known," had proceeded to the portion of the dock adjacent to the vessel that had been roped off for convenient examination of passengers' effects, and was there awaiting opportunity to give the information necessary for completing the entry; but before this opportunity had been given, the pearl chain was seized as illegally imported. *Held*, that the phrase "wearing apparel," as used in the declaration, was a sufficient mention of the chain, within the meaning of section 2802, Rev. St. [U. S. Comp. St. 1901, p. 1873], and that the seizure was illegal.

3. SAME—PASSENGERS' EFFECTS—ILLEGAL SEIZURE.

If, instead of requiring a passenger to make due entry of dutiable articles which such passenger imports, government officers elect to seize them before the passenger is called upon to complete his entry, he is not to be held responsible for failure to complete the entry, if he mentions the articles as required by law, when he first made his entry.

4. SAME—PERSONAL EFFECTS—CONCEALED ARTICLES.

Personal effects of a person arriving in the United States do not cease to be baggage by being so disposed on the person as to be covered from view by the passenger's dress.

In Error to the District Court of the United States for the Southern District of New York.

The court annulled the seizure by a special employé of the Treasury Department of a pearl chain found in the possession of Ida Josephine Dulles, the claimant and defendant in error in this proceeding, on her arrival in this country from abroad. 139 Fed. 510.

Sections 2799, 2801, 2802, and 3082, Rev. St. [U. S. Comp. St. 1901, pp. 1872, 1873, 2014], read as follows:

"Sec. 2799. In order to ascertain what articles ought to be exempted as the wearing apparel and other personal baggage, and the tools or implements of a mechanical trade only, of persons who arrive in the United States, due entry thereof, as of other merchandise, but separate and distinct from that of any other merchandise, imported from a foreign port, shall be made with the collector of the district in which the articles are intended to be landed by the owner thereof, or his agent, expressing the persons by whom or for whom such entry is made, and particularizing the several packages, and their contents, with their marks and numbers; and the person who shall make the entry shall take and subscribe an oath before the collector, declaring that the entry subscribed by him and to which the oath is annexed contains, to the best of his knowledge and belief, a just and true account of the contents of the several packages mentioned in the entry, specifying the name of the vessel, of her master, and of the port from which she has arrived; and that

such packages contain no merchandise whatever other than wearing apparel, personal baggage, or, as the case may be, tools of trade, specifying it; that they are all the property of a person named who has arrived, or is shortly expected to arrive in the United States, and are not directly or indirectly imported for any other, or intended for sale."

"Sec. 2801. On compliance with the two preceding sections, and not otherwise, a permit shall be granted for landing such articles. But whenever the collector and the naval officer, if any, think proper, they may direct the baggage of any person arriving within the United States to be examined by the surveyor of the port, or by an inspector of the customs, who shall make a return of the same; and if any articles are contained therein which in their opinion ought not to be exempted from duty, due entry of them shall be made and the duties thereon paid.

"Sec. 2802. Whenever any article subject to duty is found in the baggage of any person arriving within the United States, which was not, at the time of making entry for such baggage, mentioned to the collector before whom such entry was made, by the person making entry, such article shall be forfeited, and the person in whose baggage it is found shall be liable to a penalty of treble the value of such article."

"Sec. 3082. If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

Arthur M. King, Asst. U. S. Atty.
De Lancey Nicoll, for the claimant.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. This cause was most elaborately discussed upon the former appeal (123 Fed. 371, 59 C. C. A. 499), and it seems unnecessary to repeat anything which can be found in our former opinion, or in the two opinions in the Dodge Case (111 Fed. 165, 49 C. C. A. 287, 56 L. R. A. 130; 131 Fed. 849, 65 C. C. A. 603), where the whole subject of declaration and entry of articles brought by passengers arriving by vessels from foreign countries was carefully considered. The case was practically disposed of when, upon the first appeal, we held that the words "wearing apparel, value not known," were, upon the government's own construction of them, broad enough to cover "jewelry." On the first trial, verdict was directed against the claimant. Referring to that circumstance, we said that, in considering the case on appeal, "every conflict of evidence must be resolved in her favor, and every inference from the facts be drawn in her favor, because, if upon her own statement of what took place she did not violate the law, she was entitled to have the jury pass upon the question whether her own narrative was or was not to be accepted as the true one." This statement certainly did not imply that upon a retrial the case must be sent to the jury, even though the proofs adduced by the government might substantially agree with the claimant's story as to the

controlling facts. And that is just what has happened. Leahy, the official who took her declaration, testified that after he had asked her in a general way as to what she had to declare, following this by a specific inquiry as to her expenditures in the line of wearing apparel while abroad (he does not claim to have asked her particularly as to jewelry), she said "that she had naturally purchased some things abroad," and thereupon he inserted in the declaration, with her consent, the term "Wearing apparel, value not known," which she then signed and swore to. This accords with the claimant's narrative of the interview given on the first trial, and, after an exhaustive analysis of the "declaration," we held that it was a sufficient disclosure, and all that the law required from her at that time. The trial judge correctly held that, even if persons have brought goods here "intending to smuggle them, they had an opportunity to change their minds down to the time when it was their duty to make the necessary declaration." * * * * The government cannot seize the goods as forfeited until the time has come when the person importing them had an opportunity to declare them and has not done so." In other words, mere intent without act will not work a forfeiture.

The declaration, however, although sufficient as a disclosure, was defective or incomplete as an entry, and it was claimant's duty thereafter, and at such time as might suit the convenience of the customs officers, to complete the entry by enumerating the items of "wearing apparel," and giving such information as to their purchase as would be helpful towards appraisement; and, of course, she was bound to pay whatever duties might be imposed. She did this as to the "embroidered linen" and the "silk wearing apparel," but the entry was not completed as to the pearl chain.

The next step taken by the customs officers after obtaining the declarations from the passengers is to inspect the baggage. That might, of course, be done on the ship, the different pieces being grouped on different parts of the deck and in the larger rooms; but, for the convenience of the examiners and to avoid delays, the baggage is brought down on a part of the dock, adjacent to the vessel, which is roped in, and remains till the work is completed within the jurisdiction of the customs officers. Until a piece of baggage is removed beyond the customs lines thus established, it is as much under the control of the officers as if it were still in the passenger's stateroom. The claimant having made her declaration, and the ship having made fast to the pier, she passed down the gang plank to the dock, and placed herself near the pile of baggage to which her own trunks were to be brought. Subsequently, when the trunks came, she disclosed the two items above referred to, and completed her entry by inserting them. Before she was called upon by the inspector to open her trunks and give him the information which her imperfect prior declaration made it her duty to give, Theobald, the special treasury agent, approached her, told her that he knew she had purchased a pearl necklace in Paris, which she had omitted to declare, and asked her to produce it. He testified, "She at first said that she had had one of her necklaces mended at Tiff-

any & Co.'s, and that she had not purchased any necklace, but, being further pressed, said she had purchased a necklace." In response to his suggestion that she produce it, she returned on board with witness and her husband and complied with his request. Thereupon he put it in his pocket and walked away with it. The fact that her jewelry had been thus seized and removed by officers of the government was presumably the reason why she did not complete the entry by having the pearl chain added to the embroidered linen and the wearing apparel, and, in our opinion, she could not under such circumstances be held for failure to make declaration of entry. As was said on the Dodge Case, 111 Fed. 165, 49 C. C. A. 287, 56 L. R. A. 130, "If they make such an examination and find in the baggage any articles which they deem dutiable, they are to require due entry of them to be made, together with payment of the duties." If, instead of requiring the passenger to make due entry of dutiable articles which such passenger produces, they elect to seize and remove them before the passenger is called upon to complete his entry, he is not to be held responsible for failure to include them in the itemized entry, provided he has mentioned them to the customs officer when he first made his entry. Under our former opinion, there can be no doubt that Mrs. Dulles did so mention all her dutiable purchases which were classifiable as "wearing apparel," within the broad meaning which the government gave to that term in the document which they gave to her for that purpose.

The plaintiff in error relies upon the circumstance that the pearl chain was on claimant's person, covered from view by parts of her dress; but on the former appeal we held that a passenger's wearing apparel, articles of adornment, and personal effects did not cease to be baggage the moment they were taken out of a trunk and placed on the person. Whether they are hid from view by being stowed in the middle of a trunk, or by being placed under some part of the passenger's clothing, is immaterial; the crucial questions are, has such a declaration been made as would be "a disclosure by the passenger sufficient to put the customs officers upon inquiry as to the dutiable character" of the articles purchased abroad? and has the passenger followed that disclosure by the production for their inspection of all such articles? It is to be observed, as was pointed out on the former appeal, that the form of declaration prepared by the government covers not only articles in the baggage, but also on the person. This effectually disposes of the contention that plaintiff was entitled to go to the jury under section 3082, Rev. St. [U. S. Comp. St. 1901, p. 2014], on the question whether claimant did not, with intent to defraud, "smuggle and clandestinely introduce into the United States the said pearl chain." She brought it on her person under cover, as it would have been brought in a trunk under cover, from the ship to the customs territory on the pier, making no effort, so far as the proof shows, to remove it beyond the customs lines. This, under *Keck v. U. S.*, 172 U. S. 459, 19 Sup. Ct. 254, 43 L. Ed. 505, could not be held to be "smuggling," even if it were done clandestinely; but how can

she be said to have "clandestinely" introduced it, when, before bringing it ashore, she gave to the customs officers a written declaration which in effect said to them, "I have in my baggage and on my person wearing apparel (including jewelry) which I have purchased abroad"? *Dodge v. U. S.*, 131 Fed. 849, 65 C. C. A. 603.

The judgment is affirmed.

WALLACE, Circuit Judge. I concur in the result of the opinion of the court, but not altogether in its reasoning.

If the jury believed the witnesses for the government, they would have been justified in finding that the claimant, when the vessel on which she was a passenger arrived in port and landed at the dock, was carrying concealed in one of her stockings a necklace worth \$16,000, which she had recently bought in Paris; and they were at liberty to find that she had concealed her necklace in her stocking for the purpose of smuggling or clandestinely introducing it into the United States without paying duty thereon. It was seized upon her person, however, before any obligation on her part had arisen to pay or account for the duties. I agree, as the Supreme Court has so decided in the *Keck Case*, that, until the obligation to pay or account for the duties arises, the offense of smuggling is not complete, and no cause of forfeiture accrues. Consequently, the case made by the government did not authorize a judgment of condemnation based upon the counts of the information alleging an offense under section 3082 of the Revised Statutes of the United States. I think, also, that the case made by the government did not authorize a judgment of condemnation upon the counts alleging an offense by reason of the failure of the claimant to make entry of or "mention" the article as a part of her baggage. An article which the passenger carries concealed on his person for the purpose of smuggling it, and which, perhaps, he has separated from his baggage expressly for that purpose, is not, in the ordinary meaning of language, baggage, or a part of his baggage, though it may well be held that an article should be regarded as baggage which he has temporarily removed from some of his packages, and declared or mentioned as a part of his baggage, and which has thus been treated as such by him. The counsel for the government concedes that, under such circumstances as are disclosed here, the article concealed is not a part of the baggage of the passenger, a conclusion which, it seems to me, is plainly constrained by the language of sections 2799, 2801, and 2802 of the Revised Statutes [U. S. Comp. St. 1901, pp. 1872, 1873]. For this reason, I think the discussion in the opinion of the court of the question whether the claimant made a sufficient declaration of the necklace as a part of her baggage is unnecessary.

The case presented by the record, assuming that the testimony of the special agent, Theobald, was true, discloses a serious defect in the customs laws, and this was adverted to in the *Keck Case*; but, as the court said in that case, it is for Congress, and not for the courts, to remedy the defect.

In re BRADFORD'S PETITION.

(Circuit Court of Appeals, Sixth Circuit. May 11, 1905.)

CIRCUIT COURT OF APPEALS—COSTS—PRINTING OF TRANSCRIPTS.

In view of the fact that the right to sue in forma pauperis, given by Act July 20, 1892, c. 209, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706], is limited to courts of original jurisdiction, the rule of the Circuit Court of Appeals, requiring the printing of transcripts, will be enforced in all cases.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 512.]

J. Gallagher, for plaintiff in error.

F. P. Poston, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The clerk of this court declined to allow the plaintiff in error to docket a transcript of the record from the court below until she should comply with rule 16 of this court requiring a deposit of \$35 as security for taxable costs. Thereupon plaintiff in error filed a verified petition praying to be allowed to prosecute her writ of error in forma pauperis, and that the clerk be required to docket her transcript, and that the rule requiring a deposit be dispensed with. This petition exhibited a state of facts entitling her to prosecute her suit as a poor person if the act of July 20, 1892, c. 209, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706], applies. Entertaining doubt as to whether the act of Congress mentioned applied to this court or to appellate proceedings at all, and also entertaining doubt as to the power of this court, independently of a statute, to permit the prosecution of a writ of error or appeal in forma pauperis, we certified both questions to the Supreme Court. That court has answered, saying that the act of July 20, 1892, does not apply to appellate proceedings, and that independently of statute it has no power to permit the prosecution of appellate proceedings in forma pauperis. *Bradford v. Southern Ry. Co.*, 195 U. S. 243, 25 Sup. Ct. 55, 49 L. Ed. 178. This interpretation of the scope of the act of Congress is in conflict with the view expressed heretofore by this court in *Reed v. Pennsylvania Co.*, 111 Fed. 714, 49 C. C. A. 572, and that opinion is upon that point overruled.

It also follows that so much of rule 16 of this court as refers to any dispensation of the rule requiring a deposit on account of poverty should be stricken from the rule, and it is ordered that hereafter the rule be printed and promulgated without the exception there mentioned. The application to be allowed to prosecute her writ of error in forma pauperis is therefore denied.

Mrs. Bradford's petition also asks that rule 23 of this court, which requires the printing of all transcripts from the court below, be dispensed with, and her case heard upon the transcript as sent from the court below. Rule 23 is substantially identical with the tenth rule of the Supreme Court. The cost of printing is under the rule a part of the taxable costs of the cause, including the supervis-

ing fee to the clerk, all of which costs and fees are required to be accounted for and paid over to the treasury department in the same manner as is provided in respect to other costs by the second section of the act of March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], establishing Circuit Courts of Appeal and regulating the appellate jurisdiction of the courts of the United States. The rule itself is made by virtue of the authority conferred by that act to establish all rules and regulations for the conduct of the business of the court. It is a rule intended to advance the administration of justice and to facilitate the business of the court.

We have in a few instances been induced to dispense with the rule, but in view of the limitations which Congress has thrown around the privilege of suing *in forma pauperis* by confining the right to so sue to courts of original jurisdiction, and also in view of the fact that applications for the supervision of the printing rule are so rapidly increasing as to amount to an abuse of an indulgence of doubtful propriety, we have come to the conclusion to enforce the rule hereafter without discrimination, against all alike.

The application to dispense with the printing rule is therefore denied.

CINCINNATI, N. O. & T. P. RY. CO. v. ROBERTSON.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1905.)

No. 1,401.

1. MASTER AND SERVANT—INJURIES TO SERVANTS—RAILROADS—APPLIANCES—CARE REQUIRED—ASSUMED RISKS.

While a railway company is bound to use reasonable care to provide reasonably safe appliances for their servants to work with and keep the same free from defects, an employé accepting employment about appliances which he knows are not safe, or which are so defective that he must be taken as a matter of law to know its unsafe condition, assumes the risk of injury therefrom.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 583-590.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2. SAME—PROMISE TO REPAIR—QUESTION FOR JURY.

Plaintiff, an engineer in defendant's employ, used an engine with lubricator tubes unprotected by shields for several months, until one of the tubes broke and injured his hand, when he notified defendant's foreman, and asked him to furnish shields. Plaintiff testified that when he asked for shields, and told the foreman there was none on the engine, he replied, "Well, they must be fixed;" and that he believed the foreman meant that he would supply shields as soon as he reasonably could, and that, acting on such belief, he remained in the service and used the engine without shields for eight days thereafter, when he was injured by the explosion of another tube. *Held*, that whether the statement of the foreman constituted a promise to furnish shields, and whether plaintiff was induced to remain in the defendant's employ and use the engine without shields, was for the jury.

3. SAME—TIME TO REPAIR.

Where plaintiff, a railroad engineer, complained to his foreman of the absence of shields about an oil tube on his engine, and the foreman

promised to furnish shields, without specifying any time, plaintiff was entitled to use the engine without shields without assuming the risk of injury from their absence for a reasonable time to enable defendant to procure and fit them.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 637-644.]

4. SAME—REASONABLE TIME—QUESTION FOR JURY.

Where plaintiff, a railroad engineer, complained to his foreman of the absence of oil tube shields on his engine, and the foreman promised to supply shields, without specifying any time, and it appeared that defendant did not make its own engines, but that shields were fitted as a part of the appliances of a complete engine by the makers, and that there was a custom to make repairs on engines in the order of emergency therefor, whether the lapse of 8 or 9 days after shields were promised without supplying them before plaintiff was injured by the explosion of a tube was an unreasonable time, so that plaintiff again assumed the risk of using the engine without shields, was for the jury.

In Error to the Circuit Court of the United States for the Eastern District of Kentucky.

The defendant in error, a locomotive engineer in the service of the railway company, lost an eye through the explosion of one of the glass tubes in the lubricator located in the cab of his engine. There was evidence tending to show that lubricator tubes were liable to explode, and that to prevent injury to the men in the cab it was usual to protect them with metal shields so constructed as to prevent injury from flying fragments of glass, without seriously obstructing the view of the tubes by the engineer. There was also evidence that many engineers, to escape the difficulty of keeping the tubes clean and clear with the shields in use, took them off and cast them aside. When the defendant in error took his engine he found that his lubricator was without any such shields. He took it in that condition, and ran the engine without protest until December 23, 1900, when one of the register glasses burst and slightly injured his hand.

Touching an alleged promise to supply him with shields, made on December 24th, the plaintiff testified as follows: "Q. After that breaking, tell what conversation took place between you and the foreman of engines, Mr. Brown? A. When it broke and cut my hand I put in another one in the engine. I think I met Mr. Brown, as well as I remember, between the storeroom and the roundhouse, and I asked him to put shields on this lubricator. He asked me where were the shields that come in the engine, and I told him I didn't know; that there were none on it when I was assigned to the engine. He says, 'Have you looked in the box for them?' and I told him I had, and that there wasn't any in there, and hadn't been any since I had been on the engine. I told him I wanted shields on the engine, and he said, 'Well, they must be fixed.' That was about the sum of the conversation between us. Q. Under the rules and regulations of the company and their method of doing business and making repairs at Somerset, how long did it take to do this work? (Objected to. Objections sustained, to which plaintiff excepts.) Q. When a matter of that kind is brought to the attention of the roundhouse foreman and the engineer foreman up there, what is the method and manner of looking after these matters? (Objected to. Objection sustained, to which plaintiff excepts.) Q. What are the rules and regulations in that respect? A. The foreman must see that this repairing is done, and if he can't do it right away he must as soon as he can get to it. Q. What is the rule as to the custom and method of doing this work, and how long does it take usually, in the management of the company's business? A. The custom is— There are several methods; there are 35 to 40 engines a day coming in there, and if one is so disabled that it can't go out again it must be fixed at once, and as soon as they can get this work off their hands they go and do this other repairing. Q. Did you rely on what the engine foreman said to you up there in regard to these shields? A. Yes, sir. Q. Did you believe he would do what he said he would? A. Yes, I did. Q. Had you before that

time made such reports to him and did he comply with them according to the custom and management of the business up there? A. Yes, sir."

The plaintiff admitted that on December 26th, 28th, and 29th he took out his engine knowing the shields had not been replaced as promised. On the morning of January 2d, while preparing his engine to go out again, one of his lubricator tubes burst, destroying an eye. There was evidence contradicting the testimony of the plaintiff in all material matters bearing upon the alleged promise to put on shields. At the close of all of the evidence the railway company asked to have the jury instructed to find a verdict for the defendant. This was overruled. The plaintiff counted upon negligence in the matter of supplying a defective lubricator glass, and also upon negligence in supplying a lubricator defective in the matter of shields.

The jury were instructed to find for the defendant upon the count upon a defective glass tube. Upon the other questions the trial judge instructed as follows:

"In order that you may find for the plaintiff in this case on that ground it is necessary that you believe from this evidence four things.

"One is that the lubricator was not reasonably safe without the shield around the glass; in other words, that it was a defective lubricator without the shields around the glass.

"Second, you must believe from the evidence that the defendant, the railway company, had failed to exercise reasonable care in providing shields.

"Third, you must believe from the evidence that the defendant's master foreman, Brown, upon complaint being made to him by the plaintiff in regard to the absence of shields, promised and assured him that the shields would be provided.

"Fourth, you must believe from the evidence that at the time of the injury a reasonable time had not elapsed in which the shields could have been provided.

"The reason why it is essential that there should have been a promise or assurance on the part of Brown that this alleged defect would be remedied is that if there had been no such promise the plaintiff would have assumed the risk of the alleged defect because it was obvious the shields were not there and the risk was obvious.

"And the reason why it was essential that a reasonable time had not elapsed for the defendant to comply with the assurance, if it was made, is that after the expiration of such a reasonable time the plaintiff had no longer any right to rely on the promise and must be considered as having assumed the risk.

"These are the facts and the things you must find to exist from the evidence before you can find for the plaintiff; but if you do find them to exist, it will then be your duty to find for the plaintiff, unless you further believe from the evidence that the plaintiff himself failed to exercise reasonable and ordinary care, and that such failure on his part contributed to his injury, so that the injury would not have been sustained had he not been guilty of such failure of care.

"There are three particulars in which under the evidence it is possible that the plaintiff himself was guilty of failure to exercise ordinary care on his part. Of course, it is for you to determine that.

"One particular is in not examining the glass that was put on the lubricator and afterwards exploded before he placed it.

"You will determine from the evidence whether he did examine it before placing it. My recollection is that he did not, but you will determine that question, and if by an examination he could have ascertained the defect in it his failure to examine it was want of due care on his part, such as to defeat his right of recovery in this case.

"Another particular in which it is possible for you to find—of course, you are the judges of that—that there was negligence on the part of the plaintiff. According to this evidence the explosion took place just after the plaintiff had placed the tube in the lubricator, and the defendant claims that it was caused by bad packing and method of turning on the steam. If you believe from the evidence that that was what caused the explosion, and the plaintiff

in so packing and turning on the water and steam failed to exercise care, it will be your duty to find for the defendant.

"Then, lastly, if you believe from the evidence that notwithstanding the promise and assurance (if you believe there was a promise and assurance), that a person of ordinary intelligence, with the plaintiff's experience—that a person of ordinary prudence, with plaintiff's experience with this lubricator—would not have continued to incur any risk that there was without shields, then he was guilty of such contributory negligence as to defeat his right to recover."

There was a verdict and judgment for the plaintiff.

John Galvin, for plaintiff in error.

Robert Harding, for defendant in error.

Before LURTON, Circuit Judge, and THOMPSON and WANTY, District Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The law is that a railway company owes to its employes the duty of using reasonable care to provide them with reasonably safe appliances to do their work, and the same degree of care to keep such appliances in repair and free from defects. There is, however, no duty to provide the latest, safest, or best appliances, but only such as are reasonably safe. Nevertheless, if one accept employment upon, about, or with machinery or appliances which he knows are not safe by reason of defects, or such defect is so obvious as that he must be taken as matter of law to know its unsafe condition, he will be taken to accept the hazards due to such defective appliance as one of the risks of the service, and the employer will not be liable for any injury he may suffer from the danger which thus becomes incidental to the employment.

The plaintiff in the case in hand was an experienced locomotive engineer. He had worked upon engines with and without lubricator shields. When he took the engine assigned him by the defendant company, he knew the lubricator was not protected by shields.

By implication of law he agreed to run an engine which he knew to be defective in the matter of protection against the possible explosion of the lubricator tubes. It was as if he had said: "I will use the lubricator in the condition I find it, and will accept as one of the risks incident to my contract the danger of injury from flying fragments of glass in case the lubricator tubes shall burst, you using due care in their selection." This continued to be the contract of service for eight or nine months. But there came a time when the plaintiff says there was a change of the terms of the contract of service—a time when the risk of danger from unprotected lubricator tubes was no longer a danger incidental to service. On December 23d one of his lubricator tubes burst and injured his hand. This accident seems to have aroused the instinct of self-preservation, for on the day following, when he had taken his engine into the roundhouse, he says that he notified the master foreman of the roundhouse, and asked him to put shields on his lubricator. This foreman might very well have said no. In this event,

if plaintiff had remained in charge of this engine there would have been no change in the terms of his contract of service.

The notice to the company of the defect and the request to remedy it would not have imposed upon the company any liability from a defect which was known to the employé and which the company refused to remedy. The plaintiff's continuance in service would have been under an implied assumption of the risk; for if a master chooses he may use an unsafe or defective appliance, and employés who take or continue service, with such knowledge, engage to work with unsafe and defective tools or appliances, assuming the risk as incident to the contract. *Tuttle v. Ry. Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; *Sweeney v. Berlin Envelope Co.*, 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; *Hough v. Ry. Co.*, 100 U. S. 214, 224, 25 L. Ed. 612; *Mining Co. v. Davis*, 90 Tenn. 711, 18 S. W. 387; *Railroad v. Duffield*, 12 Lea (Tenn.) 63, 68, 47 Am. Rep. 319; *Detroit Crude Oil Co. v. Grable*, 94 Fed. 73, 36 C. C. A. 94; 20 Am. & Eng. Ency. Law, 116, and cases cited.

But the plaintiff's contention was that the defendant's foreman did not refuse to put on shields as requested, but that he agreed to do so, and that in the belief that he would do so he was induced to remain in the service and operate the engine.

The question of whether a promise was made was one of the issues of fact in the case. Plaintiff testified that when he asked for shields, and told Brown, the foreman, that there was none in his box and had been none since he had had the engine, that Brown replied, "Well, they must be fixed." Now, this was not an explicit promise, but plaintiff says he believed Brown meant him to understand that he would, as soon as he reasonably could, supply shields, and that he acted upon this belief, and remained in the service until January 2d, when another tube exploded, with very lamentable results.

Did the plaintiff have the right to regard this as a promise made to induce him to remain in the service? The learned trial judge thought the meaning and intent of the language employed by Brown, when shields were asked for, was a question for the jury, under all the circumstances. In addition to what we have already set out upon this matter in the statement of the case, he, at the conclusion, gave the following:

"I wish to make an addition to my instructions, and that is in regard to the claimed assurance and promise to remedy the defect. The sole evidence on that line is the statement of Robertson that Brown said it must be fixed. In order that you may treat that as a promise, if you believe it was said, you must believe it was a reasonable inference on the part of Robertson that that was a promise to remedy the defect, and that it was made in order to induce him to remain in the employ of the company, and that he relied on it as such, and continued in the employment because of it. If, however, it was a mere expression of opinion that the shields ought to be there, and not a promise and assurance of the character I have referred to, plaintiff cannot recover in the case."

There was, we think, no error in the instruction given, and none in submitting the question to the jury.

The question of whether there was a promise to furnish his

lubricator with shields, and whether plaintiff was induced to remain in the management of an engine defective in this respect, having been submitted to the jury, we must, in view of the verdict, assume that both of these questions were found for him.

But the right to rely upon the promise to remedy the matter and to continue in the use of the defective appliance without assuming the risk as incident to the contract of service cannot continue beyond such time as, under all the circumstances, he might expect the promise to be redeemed. If there be undue delay, such as to indicate no purpose to supply the shields needed, it could not be said that after the time had passed within which he could reasonably expect the repair to be made that he was continuing to use the dangerous appliance in reliance upon a promise which had not been kept. On the other hand, it could not be reasonably contended that one who is induced to remain in the use of a defective tool by a promise that it should be speedily remedied accepts the danger incident to its use while waiting repair. Hence the rule is that, when there has been such a definite promise to repair a defect complained of as to reasonably induce the servant to remain in the service, he may recover for any injury caused by such unsafe defective tool or appliance which may be sustained within such a time after the promise as, under the circumstances, performance might be reasonably anticipated, unless it should appear that the danger from a continued use pending removal or repair would be so great as to be a reckless exposure to danger and constitute contributory negligence. *Hough v. Railway Co.*, 100 U. S. 214, 225, 25 L. Ed. 612; *Dist. of Columbia v. McElligott*, 117 U. S. 622, 631, 6 Sup. Ct. 884, 29 L. Ed. 946; *Northern P. Rd. Co. v. Babcock*, 154 U. S. 190, 200, 14 Sup. Ct. 978, 38 L. Ed. 958; *Detroit Oil Co. v. Grable*, 94 Fed. 73, 78, 36 C. C. A. 94; *Railroad v. Kenley*, 92 Tenn. 207, 21 S. W. 326; *Trotter v. Furniture Co.*, 101 Tenn. 257, 47 S. W. 425; *McPeck v. Cent. Vt. R. Co.*, 79 Fed. 591, 25 C. C. A. 110; *Stephenson v. Duncan*, 73 Wis. 407, 41 N. W. 337, 9 Am. St. Rep. 806; *Holmes v. Clark*, 7 H. & N. 937.

Thus, if the promise is that the repair shall be made by a definite time, and the time passes without its being made, the employe cannot ordinarily be regarded as remaining in service because of reliance upon a broken promise. *Trotter v. Furniture Co.*, cited above. But when the promise is not to repair within a definite time the question as to the time a servant may reasonably continue in service relying upon an assurance of repair must depend upon the circumstances of each case, and most generally the question is one for the jury. But when there is no conflict as to the facts, and only one inference could reasonably be drawn, the question of what would be a reasonable time during which one might rely upon an assurance of repair may become a question of law for the court. Thus, in *McPeck v. Cent. Vt. R. Co.*, cited above, the promise was that the practice of not giving signals to warn sectionmen at work on the track of the approach of trains should be corrected. It was held that, 20 days having elapsed between the complaint and the injury without any change in the management of its trains, the

plaintiff could not, as matter of law, rely upon the assurance of a change and had reassumed the risk. In the case before us the promise to supply shields was made on December 27th. The injury occurred on January 2d. Thus there had been eight or nine days within which to remedy the defect.

It has been pressed upon us very urgently that at the time of his injury the plaintiff could not reasonably be in the service in reliance upon the assurance of repair made eight days before, and must be regarded as having again assumed any risk incident to unguarded lubricator tubes. This question as to whether the unreasonableness of plaintiff's continued reliance upon the promise of repair after such a lapse of time is one for the jury or the court is not, on the facts of this case, one of easy solution.

The trial judge saw and heard the witnesses, and he thought the matter not so free from controversy as to constitute a mere matter of law. How long might the plaintiff reasonably expect that the promise to him would be carried out? Evidently the answer depends upon a number of circumstances. No time was fixed. The law, therefore, must imply that the "fixing" would be done so soon as it reasonably could, considering the urgency of the matter and the means the company had for supplying shields adapted to the purposes of the case.

The matter was not in its nature like the furnishing of a spike, a nail, a nut, or a common tool. Such articles, we might judicially know, are kept in stock and easily supplied. Delay about such an article would raise a doubt as to the purpose to supply it, and operate as notice that any reliance upon an assurance dependent upon the supplying of such an article was unjustified. But if lubricator shields were kept in stock, the defendant did not show it. The effort of plaintiff to show that they were not kept on hand was defeated by the objection of the defendant itself. An inference from evidence that the company bought its engines and did not build them, and that the shields were in place as a part of the appliances of a complete engine, might justify an inference that shields were not kept on hand, but would have to be ordered from the makers of the engine. If so, a delay of eight or ten days might occur between the promise and its fulfillment, and the plaintiff might not unreasonably continue in reliance upon the assurance that the danger should be removed as soon as such shields could be procured.

Then, again, there was evidence, which we have set out in the statement of the case, of the custom and practice of doing repairs according to their urgency and in their time. We do not, upon the whole, think the trial judge should be reversed for holding there was a case for the jury upon this matter of time.

The question of contributory negligence has been considered. The question as to whether the tube which broke was one put in by the plaintiff the morning of the accident, or one which he had not handled, was one dependent upon credibility of witnesses. Plaintiff denied that he replaced or repacked any tube the morning of his injury. There was evidence that he did, and of negligent

packing, and that the tube which burst was one negligently packed by him that morning. The issue was one for the jury.

The court did not err in refusing to instruct for the railway company, and the judgment is accordingly affirmed.

In re RUNG FURNITURE CO.

(Circuit Court of Appeals, Second Circuit. April 11, 1905.)

No. 29.

BANKRUPTCY—ACTS OF BANKRUPTCY—SUFFERING OR PERMITTING PREFERENCE THROUGH LEGAL PROCEEDINGS.

The failure of an insolvent to discharge a preference obtained by a creditor by the recovery of a judgment and the levy of an execution thereunder at least five days before the sale of the property levied on constitutes an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], although no affirmative action was taken by the debtor to aid the creditor in securing such preference.

Appeal from the District Court of the United States for the Western District of New York.

F. D. Casey, for appellant.

Martin Clark, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Question is made as to the sufficiency of the proof that the corporation was insolvent in December, 1902. It is conceded that its liabilities aggregated \$22,347.36. Its assets consisted of \$18, deposited in bank, and merchandise, which subsequently sold under levy for \$5,000. The appellant does not contend that such merchandise was worth more than \$10,600. It also had uncollected book accounts of the face value of \$22,000, but of which the manager of the company, who was familiar with the debtors and the accounts and the collections made on them, testified were worth at a fair valuation about \$4,500. This showed a case of insolvency to the extent of over \$7,000. The estimate of the manager is criticised, but no evidence to dispute its accuracy was introduced, nor did the appellant even bring out the items making up the \$22,000, nor inquire as to the facts touching the individual debtors on which the witness had based his estimate. A prima facie case of insolvency was made out, and the special master correctly so found.

The important question in the case, to which argument has been more particularly directed, is as to the construction to be given to section 3a, Bankr. Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422, which reads:

"Acts of bankruptcy by a person shall consist of his having: * * * (3) Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

In the case at bar an action upon commercial paper was brought by the bank against the furniture company, which interposed an answer and went to trial, the result being a judgment in favor of the bank. From this judgment an appeal was taken, but the judgment debtor did not attempt to stay execution and sale by giving security on appeal, as it might have done under the laws of New York. In consequence the stock of merchandise of the defendant was levied on and sold, thus securing a preference to the bank. The appellant contends that there must be some affirmative action on the part of the alleged bankrupt in aid of the recovery of judgment and sale thereunder in order to make out an act of bankruptcy. The first two courts of appeal before whom this question came differed as to the construction of the act. In the First Circuit it was held that the act of bankruptcy was in the failure to vacate the execution five days before the sale, and that what was thus "suffered or permitted" was the sale of the judgment debtor's property through legal proceedings. *Parmenter Co. v. Stoeber*, 97 Fed. 330, 38 C. C. A. 200. In the Third Circuit, the Court of Appeals, by a divided court, reached the opposite conclusion in a case where judgment had been entered by a creditor upon a judgment note executed by the debtor years prior to the passage of the bankrupt act. *Duncan v. Landis*, 106 Fed. 839, 45 C. C. A. 666. When the same question came before the Supreme Court, it also divided five to four. *Wilson v. Nelson*, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147. The majority held that the act of 1898, unlike the prior bankrupt act, makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact; and that by failing to vacate or discharge the preference secured by the judgment within five days before sale of the property he confessed that he was hopelessly insolvent, and consented to the preference that he failed to vacate. The judgment in *Wilson v. Nelson*, however, was entered upon a warrant of attorney to confess judgment given by the debtor nearly 13 years before, of which the majority opinion says: "Being irrevocable and continuing in force, the debtor thereby, without any further act of his, 'suffered or permitted' a judgment to be entered against him." In view of this circumstance the appellant contends that the case last cited does not finally settle the question where no judgment note or similar document was voluntarily given by the debtor. *Wilson v. Nelson* has been twice considered by courts of appeal. In the Fifth Circuit it was held that, "If a bankrupt fails to discharge a preference obtained through legal proceedings within at least five days before the property affected by the preference is disposed of, that is an act of bankruptcy." *Bradley Timber Co. v. White*, 121 Fed. 779, 58 C. C. A. 55. In the Sixth Circuit it was held, the court citing from *Wilson v. Nelson* the statement that "the result obtained by the creditor, and not the specific intent of the debtor, is the essential fact," that "a debtor who does not pay a lawful debt when due, and stands by while his creditor secures a judgment against him and levies upon his property, certainly suffers and permits such judgment to be taken, levy

made, and preference thereby obtained." *Bogen v. Protter*, 129 Fed. 533, 64 C. C. A. 63. In neither of these cases had any judgment note or warrant of attorney been given. Uniformity in the administration of the bankrupt law is manifestly a desideratum for the mercantile community, as we suggested in *Re Sagor*, 121 Fed. 658, 57 C. C. A. 412, and we therefore, without entering into any independent discussion of the subject, concur with the views expressed in the two opinions last quoted from.

The decree is affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. SOUTH FORK COAL CO.

(Circuit Court of Appeals, Sixth Circuit. June 21, 1905.)

No. 1,394.

1. RAILROADS—LIABILITY FOR LOSS BY NEGLIGENT FIRE—LUMBER STACKED ON RIGHT OF WAY.

A railroad company is liable to the owner of lumber piled on its right of way with its consent for the loss of such lumber by fire occurring through its negligence in the operation of its trains, the measure of its obligation to avoid a negligent fire causing the destruction of the lumber being precisely the same as it would have been had the lumber been stacked near to, but off, its premises.

2. NEGLIGENCE—EVIDENCE TO ESTABLISH—PRESUMPTIONS.

Whether the happening of an injurious accident raises a presumption that it was due to negligence depends upon the nature of the accident and the surrounding circumstances which characterize it and the relation of the parties affecting the measure of care required from the one sought to be charged. While the mere happening of the injury does not raise such presumption, it may reasonably be ascribed to negligence if it was one not likely to occur if due care had been exercised.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 218.]

3. RAILROADS—LIABILITY FOR FIRES—EVIDENCE OF NEGLIGENCE.

A rear end collision occurred between two trains on defendant's railroad, one of which was following the other on the same track, in which a number of cars containing tanks of oil were telescoped by the rear engine. Sparks from the engine falling on the oil started a fire, which spread to and destroyed lumber owned by plaintiff, piled on the right of way some 40 or 50 feet from the track. *Held*, that proof of such facts raised a presumption that the collision was due to want of ordinary care in the operation of the trains, and in the absence of any evidence on the part of defendant showing the cause warranted a verdict against defendant for the loss.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This was an action by the South Fork Coal Company, a corporation, which was operating a sawmill near Oneida, Tenn., for the loss by fire of a large quantity of lumber stacked upon the railway's right of way near its station at Oneida. The fire occurred October 23, 1902. The evidence tended to show that the lumber had been hauled from time to time from the mills of plaintiff and stacked on the right of way, several hundred feet from the station, but at a place customarily used for stacking lumber for shipment. On the night of October 23, 1902, there occurred a rear-end collision between two of the defendant company's freight trains at a point near this lumber. As a result certain cars containing tanks of oil were telescoped by the engine of the colliding train. The tanks were broken, and the escaping oil fired.

by fire from the engine. The fire thus started was communicated to the adjacent lumber. The defendant offered no evidence in explanation of the collision or upon any other matter, and at conclusion of plaintiff's evidence asked a peremptory instruction in its favor. This was denied, and the case submitted to the jury upon a charge found in the record, who found for the plaintiff.

Edward Colston and Head & Anderson, for plaintiff in error.

James F. Baker and Jerome Templeton, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and WANTY, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

Under an exception to the refusal of the court to withdraw the case from the jury and an exception to the charge and for refusal to charge certain requests submitted, just two questions are made. The first is, would the railroad company be liable for a loss of the plaintiff's lumber by fire originating from a negligent collision between two of its trains? and, second, if that be conceded, was there prima facie evidence that the collision was the result of negligence in the management of its trains? The gravamen of the plaintiff's case is negligence, for the essential thing which it must establish is that its lumber has been lost through a negligent act of the railroad company. It must show that the negligent act of which it complains was the breach of some duty which, under the circumstances, was due to the plaintiff. *Standard Oil Co. v. Murray*, 119 Fed. 572, 575, 57 C. C. A. 1. What was the duty or obligation of the railroad company in respect of this lumber burned upon its right of way? It had not been delivered to the railroad company for carriage. Carrier liability is therefore out of the case. But it is not essential that contract relations shall exist in order to give rise to a duty by one to another. A duty may arise to one who is nothing more than a trespasser to use all reasonable exertion to avoid unnecessary injury after discovery of the peril. But, if the plaintiff was not a trespasser, the obligation of the railroad company to avoid injuring their property would stand upon a higher plane. There was evidence from which the jury might well find that the railroad company had consented that the plaintiff might stack its lumber upon its right of way, at the customary place for receiving lumber for shipment, and keep it there until it should desire or direct its shipment. The jury were told, if they found this to be so, that the railroad company would owe the plaintiff the duty of exercising reasonable care to avoid injury to its lumber by the operation of its trains. In contrast the defendant insisted that if the lumber was not placed upon the right of way for shipment, but to be kept there until the plaintiff could obtain a price satisfactory, the company would owe no duty "other than not to wantonly or willfully destroy or injure its lumber." This ignores all distinction between a rightful and wrongful use of the right of way, and puts the duty of the railroad company upon the same

plane that it would have been if the plaintiffs had placed their lumber upon the railway premises without its knowledge or consent.

But there was evidence from which the jury could find, and, as matters now stand, from which they have found, that the railroad company assented to the use which was made of its right of way. If the company had assented to this use upon condition that the plaintiff should assume the dangers from sparks emitted from its engines, negligently or not, or from dangers incident to fire resulting from collision or otherwise, we are not prepared to say that the agreement would not have been valid, inasmuch as it was under no obligation to permit its premises to be so used, and might be unwilling to assume the risk incident to the proximity of the property to its tracks. *Hartford Ins. Co. v. Chicago, etc., Ry. Co.*, 91 U. S. 99; *Id.*, 36 U. S. App. 152, 70 Fed. 201, 17 C. C. A. 62; and *Griswold v. I. C. Rd. Co.*, 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647. But there is no pretense of any such agreement. The learned counsel for the railroad company have insisted that the mere fact that the plaintiff placed its lumber in such proximity to the railway track with knowledge of the danger of fire is an implied assumption of the risk of fire communicated from the engines of the company, and they have cited the cases of *Post v. Buffalo & Western R. Co.*, 108 Pa. 585, and *Railway Co. v. Bartlett*, 69 Tex. 79, 6 S. W. 549. The *Post* Case was decided upon the ground of contributory negligence, and the conclusion much influenced by the fact that the plaintiff was a naked trespasser in so far as it had stacked a part of its lumber upon the right of way of the railroad company without the company's knowledge or consent. But the ground of the decision was that one who voluntarily places combustible property in such proximity to a railway, in time of great dryness, and where fires were of daily occurrence along the line of the road, attributed to sparks, was so grossly negligent as to be debarred of an action, although the company might have been negligent in the matter of proper spark arresters. *Railway v. Bartlett* went off upon the same ground, namely, that if one voluntarily places property in a situation of great danger his own negligence will prevent a recovery, although there may have been negligence in not properly guarding against the emission of sparks. The facts in both cases tending to show contributory negligence were very strong, and somewhat peculiar. It might be sufficient to pass over these cases without comment as not applicable here, inasmuch as the defense of contributory negligence is one to be affirmatively set up. No such plea was filed, and no question of contributory negligence was touched in the charge, or by any request which was made. In so far as either opinion rests upon the ground that the plaintiffs had placed inflammable property upon the premises of the railway company without its knowledge or consent, at a time of great danger from engine sparks, we are not prepared to say that the plaintiffs were so free from culpable negligence proximately contributory to the loss as to entitle them to recover for ordinary negligence. But in so far as the opinions go upon the theory that a plaintiff must lose his right of compensation for the negligent destruction

of his own property situated upon his own premises because he had exposed it to dangers which could come to it only through the negligence of the railroad company, they do not meet our approval. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 473, 23 L. Ed. 356; *Kellogg v. R. Co.*, 26 Wis. 223, 7 Am. Rep. 69; *Fero v. The Buffalo, etc., R. Co.*, 22 N. Y. 209, 215, 78 Am. Dec. 178; *Burke v. R. R.*, 7 Heisk. 451, 464, 19 Am. Rep. 618. The rights of persons to the use and enjoyment of their own property are held upon no such tenure as this. The principle would forbid the use of property for many purposes if in such proximity to a railroad track as to expose it to dangers attributable to the negligent management of its business. Upon principle the case is not different if one places his property upon the premises of a railroad company without conditions, and with its assent. If he is not a trespasser, he is not beyond the protection of the law against injury due to the want of ordinary care. In *Railroad Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356, the Supreme Court, and in *Ann Arbor R. Co. v. Fox*, 92 Fed. 494, 497, 34 C. C. A. 497, 500, this court, speaking by Judge Taft, held that the statutory liability of a railway company for fire communicated by sparks was not affected by the fact that the property burned was in part situated upon the railway right of way, by consent of the railway company. After saying that the risk of fire might be increased Judge Taft said:

"But the relation of the parties to the risk and danger is just the same. It is an additional risk for each, but the loss must fall just where it would have fallen had a greater distance between the lumber and track been maintained; for they voluntarily assumed the burden from the increased danger."

By the ancient common law every man was obliged to keep his fire safe, and if one was started upon his premises by the act of himself or any one for whom he was responsible, and spread and injured his neighbor, except by some inevitable accident which could not have been foreseen, he was responsible without regard to the question of negligent origin. In 1 Bacon's Abridgment, title "Action on the Case," F, at page 85 (1st Am. Ed. of 1811), it is said:

"It was formerly holden that if a fire broke out accidentally in a man's house, and raged to that degree as to burn his neighbor's, that he in whose house the fire first happened was liable to an action on the case on the general custom of the realm quod quilibet ignem salve."

But the same author states that by the statute of 6 Anne, c. 31, it was provided the action should not lie if accidentally begun. See, also, Rolle's Ab. "Action on the Case," B, tit. "Fire," and 2 Shearman & Redfield on Negligence, §§ 665, 666; and *St. Louis, etc., Ry. Co. v. Matthews*, 165 U. S. 1, 5, 15, 17 Sup. Ct. 243, 41 L. Ed. 611. This statute of Anne constitutes a part of the common law of most of the states, and thus, when the matter is not the subject of regulation by state statute, the liability at common law is confined to a fire which was started through culpable negligence, which spreads and destroys property adjacent. *Shearman & Redfield on Negligence*, § 665, and cases cited. We conclude, therefore, that the railroad company is liable to the plaintiff for the loss

of its lumber, if same was stacked upon its premises with its consent, and was burned by a fire negligently started by itself upon its own premises. The measure of its obligation to avoid a negligent fire spreading to this lumber upon its own right of way is precisely the same as it would have been if it had been stacked near to, but off, its right of way.

That the fire, which was started by a collision between two railway freight trains, spread to plaintiff's lumber and consumed same, is beyond dispute. If that collision was a negligent one, it was the proximate cause of the destruction of plaintiff's property. There was no independent intervening cause. But did the unexplained and undisputed facts in respect of this collision make a *prima facie* case of negligence? The contention now is that there was no evidence from which an inference of negligence could be drawn, and that the court erred in not directing a verdict for the defendant upon this ground, and also erred in saying to the jury that the evidence, in the absence of any explanation of the cause of the collision, would constitute *prima facie* evidence of negligence. The argument pressed upon is that "there is no physical law that says that the collision of two freight trains, one following the other on the same track, may not occur from sheer accident." Counsel then suggest a number of ways in which such a collision might occur without want of ordinary care. All this may be conceded without advancing the argument, for the simple question we have here is whether, from evidence of certain facts, the inference of negligence, in the absence of explanation, may be logically and legally drawn. That the plaintiff's case must stand upon the ground of negligence is clear. That negligence is an affirmative fact to be shown by him who alleges it must also be conceded. Neither can it be denied, until the contrary appears, that there is a general presumption that a railroad company, in the conduct of a lawful business upon its own premises, will exercise due care. The question is not whether such a collision may not have occurred without culpable negligence, but whether, in the particular case, the circumstances do not raise a presumption that it was due to the want of ordinary care. In other words, does not the very nature of the catastrophe itself supply evidence of negligence? It is not necessary to go so far as to say that evidence of the happening of an injury always affords evidence of negligence even in a passenger case. The inference justifiably to be drawn must depend upon the particular situation shown by the evidence from which or by which it is sought to make a *prima facie* case of negligence.

Take the facts of this case. Two trains following each other upon the same track, both under the management of the same company, come into such violent collision as to cause the rear engine to telescope a number of cars at the rear end of the forward train. Fire escaping from the engine fires the wreck, and the fire thus started spreads, and consumes plaintiff's property 40 or 50 feet away. According to all human experience, such a collision cannot occur without something abnormal. It may be that that

abnormal cause may be one for which the defendant may not be legally liable, but the question is whether the burden of showing this to be the fact is not legally shifted to the defendant by evidence showing a state of things most unlikely to occur unless caused by the absence of due care. It cannot be unreasonable to ascribe to negligence the happening of a catastrophe, which was not likely to occur if due care had been exercised, until the cause is explained by other evidence. If, therefore, the nature of the accident is such as to make it altogether probable that it was caused by negligence, it makes a case which falls within the maxim *res ipsa loquitur*. Manifestly, a presumption of negligence does not arise upon mere evidence of an injury sustained. The inference logically as well as legally deducible is necessarily dependent upon the nature of the accident, the surrounding circumstances which characterize it, and the relation of the parties. 21 Am. & Eng. Ency. of Law, 521. Many accidents do not speak for themselves. The maxim *res ipsa loquitur* does not, therefore, apply when the circumstances in evidence are of doubtful solution. That there should not be uniformity of opinion as to the applicability of the maxim is due not only to the infinite variety of circumstances under which injuries are inflicted, but to differences in respect of the standard of diligence applicable in different situations. In cases between passengers and carriers it has been most often applied, and sometimes in such sweeping terms as suggest application only to an action for breach of contract, rather than one grounded upon tort. Thus Mr. Justice Lamar in *Gleeson v. Midland Rd. Co.*, 140 U. S. 435, 443, 11 Sup. Ct. 859, 862, 35 L. Ed. 458, says:

"Since the decisions in *Stokes v. Sattontall*, 13 Pet. 181, 10 L. Ed. 115, and *Railroad Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 877, it has been settled law in this court that the happening of an injurious accident is in passenger cases *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight."

Now, it is clear that the learned justice did not mean that a presumption of negligence would arise upon mere proof of injury to a passenger, without any regard to the nature of the injury or the circumstances connecting the carrier with its infliction. Neither of the cases referred to by the learned justice, nor the one in which his observation was made, involved any question of the presumption of negligence from mere proof of an injury to a passenger, and it is not likely, as such actions stand upon the ground of negligence, that negligence would be inferred from nothing more than evidence that a passenger sustained an injury while upon his journey. The evidence should go further, and at least show that the carrier was connected with the cause of his injury. In other words, the presumption is one which arises not from the mere naked fact of an injury, but from the circumstances which characterize the injury. Thus, in *Stokes v. Sattontall* the *prima facie* case of negligence was made upon evidence that the stage coach was upset, and the plaintiff injured. The fact that the coach was overturned while

being driven by the carrier's servant, and a passenger injured, was evidence of the happening of a thing which does not happen under normal conditions, and made a case which required explanation.

In *Railroad v. Pollard* there was evidence tending to show that Mrs. Pollard, by a sudden and unusual jolt, had been thrown against the arm of a seat and injured. In *Gleeson v. Virginia R. Co.* a railway postal clerk was injured through a partial derailment of the train in consequence of coming in contact with a landslide. From the higher measure of care required from a carrier of passengers a presumption of negligence may arise from evidence which would not be sufficient in other relations. But in principle there can be no difference between such cases and those in which a less degree of care is required for the exoneration of the party sued. In each action for a tortious injury the question as to what evidence will make a *prima facie* case of negligence and require an explanation from the defendant will depend upon the nature and circumstances of the injury and the measure of care due from the defendant. In passenger cases, as in other cases, the question at last is whether an inference of negligence may be logically inferred from the circumstances of the particular injury. *Penn. R. Co. v. MacKinney*, 124 Pa. 462, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. Rep. 601; *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *Seybolt v. L. E. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Railroad v. Mitchell*, 11 Heisk. 400; *Sommers v. R. Co.*, 7 Lea, 201; *Donovan v. Hartford R. Co.*, 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; *Yarnell v. K. C. Ry. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Bonce v. Dubuque R. Co.*, 53 Iowa, 278, 5 N. W. 177, 36 Am. Rep. 221; *Birmingham R. Co. v. Hale*, 90 Ala. 8, 8 South. 86, 24 Am. St. Rep. 748; *Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *Corpue v. London Ry. Co.*, 5 Q. B. 747. Thus a railroad is bound to use care to keep its track clear. An accident resulting from some obstruction upon the track is *prima facie* evidence that the obstruction was due to negligence. *Shearman & Redfield on Negligence*, § 516. The mere fact of a collision between two trains has always been held, in suits by passengers, *prima facie* evidence of negligence. *S. & R. on Neg.* § 516; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597; *Clark v. Chicago R. Co.*, 127 Mo. 197, 29 S. W. 1013; *Smith v. N. Y. R. Co.*, 46 N. J. Law, 7; *North Chicago R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Little Rock Ry. Co. v. Harrell*, 58 Ark. 454, 25 S. W. 117. So an injury resulting from derailment of a train is *prima facie* evidence of negligence, or the fall of a bridge, or the breaking of machinery. *S. & R. Neg.* § 516, and cases cited. The opening of a railway carriage door upon slight pressure, whereby the plaintiff was thrown out, was held *prima facie* evidence of negligent construction of the door. *Gee v. Metropolitan Ry.*, L. R. 8 Q. B. 161, 175. But this presumption of negligence from the nature of an injury is one which has been applied in many other kinds of action grounded upon negligence.

The case of the *Inland and Seaboard Coasting Co. v. Tolson*, 139

U. S. 551, 555, 11 Sup. Ct. 653, 654, 35 L. Ed. 270, was an action by a wharfinger against a steamboat company for crushing his foot between the timbers of a wharf by the violent striking of a steamboat against the wharf while touching to receive freight from him. The court said:

"As such damage to a wharf is not ordinarily done by a steamboat under control of the officers and carefully managed by them, evidence that such damage was done in this case was *prima facie* evidence, and, if unexplained, sufficient evidence of the negligence on their part, and the jury might properly be so instructed."

In *Kearney v. London & Ry. L. R.* 6 Q. B. 759, a brick fell out of a pier of a railway bridge, without any assignable cause except the slight vibration of a passing train, and injured the plaintiff upon a highway passing under. Held evidence of negligence.

In *Byrne v. Boadle*, 2 Hurl. & Culb. 721, 726, the plaintiff was walking in a public street past the defendant's shops, when a barrel of flour fell upon him from a window above the shop. Held sufficient *prima facie* evidence of negligence to cast upon the defendant the burden of showing that the accident was not due to negligence. Pollock, C. B., said:

"The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can a presumption of negligence arise from the facts of an accident. Suppose in this case the barrel had rolled out of the warehouse, and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence. Or if an article calculated to cause damage is put in a wrong place, and does mischief, I think that those whose duty it was to put it in the right place are *prima facie* responsible, and, if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this: A man is passing in the front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant, who occupied the premises, and who is responsible for the acts of his servants who had the control of it; and in my opinion the facts of its falling is *prima facie* evidence of negligence, and the plaintiff, who was injured by it, is not bound to show that it could not fall without negligence; but if there are any facts inconsistent with negligence it is for the defendant to prove them."

In *Scott v. The London Docks Co.*, 3 Hurl. & Colt, 596, 600, plaintiff, while passing in front of a warehouse in the dock, in discharge of his duty as a customs collector, was injured by bags of sugar falling upon him which were being lowered from above. An effort was made by counsel to distinguish the case from *Byrne v. Boadle*, cited above, because the place where the accident occurred was not, as there, a public highway, but a dock, the property of the company. Held evidence of negligence; Erle, C. J., saying:

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of the explanation by the defendants, that the accident arose from want of care."

To same effect is the able opinion of Judge Morrow in *The Joseph B. Thomas* (D. C.) 81 Fed. 578.

In the case of *The William Branfont*, 52 Fed. 390, 394, 3 C. C. A. 155, the rule of evidence applied in *Coasting Co. v. Tolson*, 139 U. S. 552, 554, 11 Sup. Ct. 653, 35 L. Ed. 270, and cited heretofore, was applied to a case of where a stevedore was injured by the fall of a stanchion. The opinion was by Fuller, C. J., who, in affirming the judgment of the District Judge, said:

"It is plain that in his judgment a *prima facie* case was made out, not simply from the mere happening of the accident, but because the surrounding circumstances raised the presumption that it happened in consequence of a failure of duty on the part of libelee. Undoubtedly there are cases where the very nature of an accident has been held of itself to supply the proof of negligence, but the conclusion was not rested on the mere naked, isolated fact of injury. The presumption of negligence was drawn from the fact of the injury, coupled with the circumstances surrounding its infliction, and characterizing the nature of the occurrence as attributable to want of the requisite care, or as demanding an explanation which the defendant alone could furnish."

It has been said that in action by employés for negligence injuries evidence of an accident carries with it no presumption of negligence. *Ill. Cent. R. Co. v. Coughlin*, 132 Fed. 801, 65 C. C. A. 101; *Patton v. T. P. R. Co.*, 179 U. S. 663, 21 Sup. Ct. 275, 45 L. Ed. 361; *T. & P. R. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. The reason is the peculiar contract of such an employé by which he assumes the risks incident to his employment, including the negligence of his fellow servants. He must therefore show that the injury of which he complains was the result of a risk he did not assume. It is also said that the explosion of a boiler does not afford *prima facie* evidence of negligence. For this the cases of *T. & P. Ry. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613, *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475, and *Marshall v. Welwood*, 38 N. J. Law, 339, 20 Am. Dec. 394, are cited. The case of the *T. & P. Ry. Co. v. Barrett* was a suit by an employé, and for reasons stated above is not in point. *Marshall v. Welwood* follows *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, in simply holding that there is no absolute responsibility for the consequences of the bursting of a boiler, and that there must be evidence of some negligence to sustain a recovery. Neither case involved the question as to whether evidence of the fact that a boiler had exploded supplied evidence of negligence in the absence of explanation. *Cosulich v. Standard Oil Co.* was the case of the explosion of a tank of oil in a coal oil refinery. Starting from the proposition that mere proof that fire had spread from the premises of one to those of another does not afford *prima facie* evidence of a negligent origin, the court held that evidence

that it had started from the explosion of a tank of oil in process of distillation in a manufacturing establishment did not point to negligence or carelessness. *Huff v. Austin* does squarely hold that the explosion of an ordinary steam boiler does not make a prima facie case of negligence. An opposite conclusion was reached by the Tennessee Supreme Court in *Young v. Bransford*, 12 Lea, 232, 241, where the question was considered in a careful opinion by Judge Cooper. In that case it was said:

"The fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace as above, 'that from the mere fact of an explosion it is competent for the jury to infer as a proposition of fact that there was some negligence in the management of the boiler or some defect in its condition.'"

To same effect is *Rose v. Transportation Co.*, 20 Blatchf. 411, 11 Fed. 438.

The presumption from evidence of a fire started by sparks from a railway engine is in many states determined by statute. But at the common law a prima facie case of negligence is not made out by mere evidence that it was started by sparks from a railway engine. The use of such engine being sanctioned by statute, there is no liability for a fire started from sparks unless the sparks were negligently suffered to escape. The ground of action being, therefore, for the negligent escape of sparks, a case is not made out by mere proof that it was started by sparks in view of the fact that some sparks will escape despite the use of appliances to arrest them. *Garrett v. Southern Ry. Co.*, 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645; 13 Am. & Eng. Ency. Law, 507, 508, and cases cited in notes. But evidence of escape of larger sparks than usual, or an unusual number of sparks, has been held prima facie evidence of want of due care. *Field v. N. Y. Cent. R.*, 32 N. Y. 339, 345; *Mo. Pac. Ry. Co. v. Texas, etc., Ry. Co.* (C. C.) 41 Fed. 917; *Fitch v. Pac. Ry. Co.*, 45 Mo. 322; *Henderson v. R. Co.*, 144 Pa. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652. There are, however, many jurisdictions in which the mere fact of fire started by sparks is held, irrespective of statute, to be prima facie evidence of negligence. The cases may be seen in 13 Am. & Eng. Ency. Law, p. 498 et seq., and notes.

But where the character of the accident is such as to strongly point to a cause which is abnormal and negligent, it devolves upon the defendant to explain that that abnormal cause was not due to want of due care. Thus in *Memphis Electric Lighting Co. v. Letson* (C. C. A.) 135 Fed. 969, we held that a prima facie case of negligence was made out upon evidence that the intestate received a fatal current of electricity when turning on an ordinary electric lamp, the current being supplied for lighting purposes by the defendant.

It is useless to multiply examples of the proper application of the presumptions arising from the circumstances of a particular acci-

dent. The court below tried the case carefully, and submitted the matters at issue under a sound charge, and the judgment must be affirmed.

HAVANA CITY RY. CO. v. CEBALLOS.

(Circuit Court of Appeals, Second Circuit. June 23, 1905.)

No. 160.

1. ESCROW AGREEMENT—CONSTRUCTION.

Where the holder of a Havana horse car franchise executed an assignment of his right to the concession, and agreed to follow the assignment by proper transfer when the Havana authorities should grant a right to use electricity as a motive power for the road, which assignment defendant acknowledged he had received, and was to hold in escrow in accordance with the terms of the agreement, which trust he thereby accepted, the receipt constituted a mere escrow contract, by which defendant agreed to hold the assignment until an electric concession was granted, and did not create a fiduciary relation between him and complainant.

2. SAME.

The assignment contract having been canceled three years after it was made, because of the inability of complainant and the assignor to then obtain an electric concession, the fact that defendant had acted as the holder of the escrow agreement for complainant, and had knowledge thereof, etc., did not preclude him, more than a year after the contract was canceled, from himself obtaining an assignment of the original concession.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On appeal from a decree of the United States Circuit Court for the Southern District of New York, entered July 28, 1904, dismissing the bill with costs.

On the 19th of June, 1893, the city of Havana granted to Mariano De La Torre a concession to build and operate a horse railway on certain designated streets in the said city, which concession was subsequently transferred by De La Torre to Francisco Pla. On October 22, 1895, Pla entered into a contract with the complainant pursuant to which he agreed to apply to the city of Havana, under article third of the concession, for the right to substitute electricity for horses as the motive power of the said railway and within 30 days after the grant of electricity the complainant agreed to pay to Pla \$15,000 in Spanish gold, and other sums after the completion of the road. The contract then proceeds as follows:

"Upon the signing hereof said Pla will execute an assignment of said Concession to the said Havana City Railway Company, which he will place in the hands of Mr. J. M. Ceballos of New York to so remain until the Company pays the Fifteen thousand dollars as agreed, or, when said J. M. Ceballos is satisfied by the Company's order upon the bankers engaging to underwrite the Company's bonds, he will then deliver such assignment to the company and will receive from said Pla the deed of the Electric Concession which will then be delivered to the company, so that it can issue its bonds and record its mortgage."

On the same day Pla executed the following instrument:

"80 Wall St., New York, Oct. 22, 1895.

"For value received I hereby sell, assign and transfer unto the Havana City Railway Company of West Virginia, U. S. A. all my right, title and interest into the Concession for a horse car line heretofore granted by the City of Havana to Manuel De La Torre, upon the plans filed by Col. J. Ruiz, and agree to follow this assignment by proper transfer by Deed to said Co. when said Havana authorities shall grant Electricity as a motive power for said road.

Fr. Pla 'y Picabla."

This assignment was delivered to the defendant who signed the following receipt:

"Chartering Department.

"J. M. Ceballos & Co.
Cable 'Ceballos'
P. O. Box 3434.
Agents
Havana City Ry. Co.,
New York.

80 Wall St.,
New York, Oct. 22, 1905.

"I have Rec'd from Mr. F. Pla of Havana, Cuba, an assignment to you of the Horse Car Concession granted by City of Havana to Manuel De La Torre which I am to hold in escrow in accordance with the terms of the agreement made yesterday between your Co. and Mr. Pla which trust I hereby accept.
J. M. Ceballos."

The complainant insists that by virtue of this receipt the defendant became trustee for the complainant in the matter of the acquisition of the right to use electricity as the motive power of the proposed railway and that he must account to complainant for all moneys received by him in the disposition and sale of the said concession and rights thereunder.

For opinion below, see 131 Fed. 381.

C. Godfrey Patterson, for appellant.
Jno. J. Adams, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). An examination of the receipt, which is the foundation of this action, discloses the fact that it is simply an escrow contract by which the defendant held the assignment in accordance with the agreement between the complainant and Pla. In other words, after Pla had secured the right to use electricity and the complainant had paid him \$15,000 the defendant was to deliver the assignment to the complainant and not until then. This escrow contract was drawn up by the complainant's president and uses the words "which trust I hereby accept" but we think the complainant places an erroneous interpretation upon these words when it insists that in all subsequent matters relating to the Havana concession the defendant acted as the complainant's trustee. The language of the instrument itself leaves no doubt as to the nature of the trust—namely, to hold the assignment in escrow as agreed.

A clear and comprehensive treatment of the subject of escrows will be found in 16 Cyc. 561. At page 575 the writer says:

"Until the escrow contract has been made, the depositary has no rights or authority enforceable at law. When this has been made and the instrument deposited, the depositary is not the agent of the grantor, obligor, or promisor alone, but he is the agent of both parties. When the condition upon the happening of which the instrument is to take effect is performed, the depositary becomes the mere agent or trustee of the grantee and the depositary's possession is the possession of the grantee. The depositary must have the power to judge whether the condition has been performed, in order to act, unless he is relieved of this duty by the stipulations of the parties. Where he has such power and exercises it, the nonperformance of the condition cannot be asserted against bona fide purchasers. A depositary who violates the terms of the escrow contract is liable in damages for the loss suffered thereby."

The condition upon which the defendant was to deliver the paper held by him in escrow never arose, and therefore he did not and

could not violate the escrow contract. He was not a party to any other contract with the complainant.

By the terms of the agreement of October 22, 1895, both parties agreed to use their influence and energies to procure the grant of electricity as soon as possible. It does not appear that complainant made any affirmative move to secure this grant. It does appear that Pla did endeavor to secure it, but was unable to do so owing in part, no doubt, to the disturbed condition of the island of Cuba at the time in question. On the 24th of August, 1897, Pla wrote the complainant's president, Alexander, saying that he had been working to secure the change to electricity, had been unable to do so and was convinced that further effort was useless. The letter concludes as follows: "You will consider our agreement cancelled and this will serve to notify you." It is said that the statements of fact in this letter are not worthy of credit because of statements made by Pla and others to Alexander a year afterwards and testified to by him. This testimony was clearly hearsay even though it came out on cross-examination. But even though it be true that both parties wholly ignored their contract obligation to procure the right to use electricity it is not easy to perceive how the defendant is affected thereby. He was under no obligation to procure a grant of electricity for either Pla or the complainant. An examination of the record makes it quite evident that neither party regarded the concession of the October agreement as of great value until other parties with capital, energy and skill had organized the Havana trolley system and made it a success. Pla did not agree to assign his horse car line concession; he only agreed to assign the electrical concession if he got it. We cannot see that others, not parties to this agreement, were precluded from entering the field as competitors, even though they knew of the relations between Pla and complainant. If Pla has broken his contract he is liable in damages, but in order to make the defendant liable it must appear that he has violated some duty or obligation which he owed to the complainant. He may have been a "go-between"; his knowledge of the Spanish language made his services as an interpreter valuable, but he was not an agent or a trustee; he was not employed or paid by the complainant; he received no money for it; he incurred no obligation on its behalf. The transaction with defendant took place in 1895. Two years afterwards the contract was canceled by Pla and more than a year after the cancellation, December 16, 1898, the horse car concession was assigned to defendant. The complainant's theory seems to be that the defendant, while acting in a fiduciary relation to the complainant, took advantage of the knowledge thus obtained to prevent the complainant from obtaining the concession in order that he might procure it for himself. To state the proposition more plainly the defendant is charged with having combined with Pla to defraud the complainant of valuable rights. We do not pause to analyze the legal aspects of this contention for the reason that it cannot be sustained upon the facts; the evidence falls far short of proving a fraudulent con-

spiracy. The defendant did not act in his individual capacity until long after it was manifest that the grant of electricity under the contract of October, 1895, could not be obtained.

The decree is affirmed.

GLASGOW SHIPOWNERS' CO., Limited, v. BACON.

(Circuit Court of Appeals, Second Circuit. June 9, 1905.)

No. 228.

1. SHIPPING—CHARTER HIRE—FOUL BOTTOM RETARDING SPEED.

The charterer of a vessel by a time charter is not entitled to a deduction from the charter hire because the vessel, owing to the foulness of her hull, failed to make the time he expected or that was made on a previous voyage, where he accepted her with knowledge that she had not been in dry dock for several months, during which time she had been employed in tropical waters, without any warranty as to speed, and where the clause in the printed charter for docking and cleaning was stricken out.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 156-164, 449, 450.]

2. SAME—EVIDENCE OF DAMAGES.

To entitle a time charterer to recover damages because of the slow speed made by the vessel on the voyage, on the ground that it was due to the foul condition of her bottom, there must be evidence to show with some definiteness how much of the loss of speed was due to such cause, rather than to others which may have lengthened the voyage.

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from decree entered by the District Court for the Southern District of New York in favor of the libellant for \$1,449.95, the amount, with interest and costs, found to be due the owners of the steamship Nile on a time charter party to the respondent. The opinion below is reported in 132 Fed. 881.

Charles S. Haight and John W. Griffin, for appellant.

J. Parker Kirlin and Charles R. Hickox, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This action is to recover the balance due on a charter party. The defense is that the owner did not deliver the vessel in the condition required by the charter. It is alleged that her bottom was exceedingly foul, and that this condition greatly reduced her speed, and required the consumption of additional coal. The appellant insists that the loss thus occasioned, which he computes at \$1,262.99, and which he has withheld, should be deducted from the amount stipulated in the charter.

The question is a narrow one, and is fully discussed, and, we think, correctly decided, by the district judge. The decision should be affirmed, for reasons which may be stated as follows:

First. The charter contained no guaranty of speed. If the charterer had insisted upon a fixed speed, it is a fair inference that the owners would have required a larger sum for the use of their vessel than £600 per month. They, at least, knew that the steamer had

not been in a dry dock for nine months, and yet the attempt is made to construe the agreement as if they had expressly obligated themselves that the steamer should maintain the same rate of speed made on a previous voyage under differing conditions and immediately after coming off the dry dock. If the charterer deemed a speed guaranty essential, he should have insisted on it and paid for it. It is enough that he did neither.

Second. The steamer was stanch, strong, and seaworthy in every particular. This is not denied, unless the accumulation of grass, shells, and barnacles on her bottom rendered her unseaworthy. Undoubtedly her bottom was foul, but this condition has been very much exaggerated; there were no six-inch barnacles formed there. The master of the Nile saw her on the dry dock at Shields after she had made the additional voyage under the charter in controversy, and he says that the "very largest" barnacle would not extend more than an inch, or an inch and a quarter, from the hull of the ship. The exact condition of the ship's bottom when she was accepted by the charterer is not known. That it was to some extent foul and dirty, and that this condition would tend to lessen her speed, is known, but this is all. Nothing has been proved which amounts to a breach of the agreement to deliver a steamer "tight, staunch, strong and in every way fitted for the service," and "maintain her in a thoroughly efficient state in hull and machinery." A ship may be all this and still, after returning from a voyage to tropical waters, may have grass and shells on her bottom.

Third. The charter is dated July 2, and the steamer was delivered under it July 24, 1903. At the time of the delivery the appellant knew all the facts regarding the condition of the Nile that were known to her master, for the latter informed him, saying that "he expected he would not be apt to make his usual speed as he had before, unless the ship would dock." The owners declined to dock her, and yet appellant accepted her. Before he signed the charter he was aware of facts which should have put him on his inquiry as to the ship's condition. There had been a previous charter of the Nile to appellant, which expired May 28, 1903. She was then immediately chartered to Thibeaud Bros., and on her return she was taken under the present charter. Under both of these charters she had been trading in southern waters—Cuba, Mexico, and the West Indies. She had not been in a dry dock during all this period, and the appellant knew it. If he did not know that such long cruising in tropical waters would produce the condition of which he now complains, he should have known it. The appellant's brief, referring to the steamer, says:

"She had therefore been employed in tropical waters for eight or nine months prior to the charter in suit without docking—a period sufficient to render it certain that she must be foul."

Fourth. The provision in the printed form for docking and cleaning the steamer was deleted. It is said that this is customary where the charter is for one voyage only, but, however this may be, the

striking out of this clause must have called the attention of the appellant sharply to the subject, especially in view of the fact that in his previous charter the clause was retained. Is it not apparent that he made the agreement with full knowledge of the facts, and with no provision, express or implied, for the docking of the ship?

Fifth. The contention that the foul bottom of the steamer occasioned damages to the extent of the amount withheld is based largely on conjecture. Some of the loss of speed can no doubt be attributed to this cause, but how much? The appellant's brief concedes that the amount retained was incorrect by \$324. If the loss of speed can be attributed, even in part, to other causes; if the speed made on previous voyages, under conditions essentially different, forms an inaccurate basis of comparison; if the proof as to what extent the steamer's bottom was covered with grass and barnacles be vague and uncertain—is it not plain that the claim for damages depends upon too many contingencies to be sustained?

The decree is affirmed, with interest and costs.

MEARNS v. CENTRAL R. R. OF NEW JERSEY.

(Circuit Court of Appeals, Second Circuit. June 10, 1905.)

No. 235.

1. FEDERAL COURTS—STATE DECISIONS—COMITY.

Where an action against a carrier to recover damages for injuries to a passenger had been dismissed pursuant to the unanimous opinion of the highest state court, and the questions of negligence presented were not questions as to which the federal and state courts were at variance, comity required such decision to be followed by the federal courts in a subsequent action therein by the same parties for the same cause, though such opinion was not controlling authority.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 950, 977-979.]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. CARRIERS—INJURIES TO PASSENGERS—INVITATION TO ALIGHT.

Where the porter or guard of a passenger train called out, "Jersey City; last stop; all out"—and followed it by opening the vestibule door of the car, such statement and act did not constitute a positive assurance to passengers that the car had stopped, nor an invitation to passengers to alight before the car had in fact stopped.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1224-1226.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

Where, after the porter of a railroad train had announced the last station and opened the vestibule door of the car, plaintiff, erroneously supposing that the train had stopped, stepped out into the vestibule, passed down the steps, and thence to the platform, while the train was moving, and was injured in so doing, he was guilty of contributory negligence, precluding a recovery.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1391-1393.]

In Error to the Circuit Court of the United States for the Southern District of New York.

In the spring of 1895 the plaintiff commenced a suit in the Supreme Court of New York upon the same cause of action stated in the complaint herein, the venue being laid in New York county. At the trial, which occurred in May, 1897, the plaintiff was nonsuited. The plaintiff appealed to the Appellate Division for the First Department where the judgment was reversed and a new trial granted. The opinion is reported in 23 App. Div. 298, 48 N. Y. Supp. 366. The defendant thereupon appealed to the Court of Appeals of New York, where the judgment of reversal was reversed and the judgment of nonsuit was affirmed. The opinion of the Court of Appeals is reported in 163 N. Y. 108, 57 N. E. 292. A motion for a reargument was made and denied. 164 N. Y. 598, 58 N. E. 1089. After the final defeat of the plaintiff in the state courts he commenced this action in June, 1901, obtaining jurisdiction on the ground of the diverse citizenship of the parties. At the trial in the Circuit Court the judge directed a verdict for the defendant upon the opening of the plaintiff's counsel and the plaintiff sued out a writ of error to this court. The facts will be found in the opinions delivered in the state courts. Although the inferences and presumptions drawn from the facts differ somewhat in the two tribunals the statements are, in their essential features, alike and do not differ materially from the statement presented to the Circuit Court which lead to a dismissal of the complaint.

Thomas P. Wickes, for plaintiff in error.

Austin G. Fox, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge (after stating the facts). The plaintiff selected his forum and was defeated there by the unanimous decision of the court of last resort. We should, therefore, be clearly convinced that the Court of Appeals has taken an erroneous view of the law before holding the action of the trial judge in following their decision, to be error. We do not deem it important to enter upon a minute analysis of the opinion of the state court for the reason that, even if the facts were stated there precisely as the plaintiff's counsel contends they should have been, the same result would inevitably have followed. That other learned judges of the state took a different view is of no moment here; their opinion is not law; so far as the state courts are concerned the law is irrevocably fixed by the judgment of the Court of Appeals.

The questions of negligence presented are not questions where the federal and state courts are at variance, and although the opinion of the state court is not controlling upon us, every consideration based upon comity and the orderly administration of the law requires us to follow it in an action between the same parties and upon the same facts. Even in a case where we were not wholly in accord with the conclusions of the state court this would be true, but in the case at bar we are strongly inclined to the opinion that the case was properly disposed of there.

The contention of the plaintiff is, in effect, that when the porter, or guard, made the statement "Jersey City; last stop; all out," and followed it by opening the vestibule door, it amounted to a positive assurance by the defendant that the car had stopped and was an "invitation" to the plaintiff to alight accompanied with a guarantee that he could do so with safety. It is argued that it was

the duty of the porter to know whether the car had stopped or not; if he did not know it was negligence. If, on the other hand, he did know he should have warned the plaintiff not to get off, and his failure to do so was negligence. We do not think this contention can be maintained. It places upon carriers obligations which practically make them insurers of the lives and limbs of their passengers. It lays down a new, a stringent and an impracticable rule which will extend their liability far beyond its present limit and will, in effect, render them liable for injuries sustained by passengers in alighting from moving trains, whether made up of vestibuled or ordinary coaches, whenever a guard who has announced a station and opened the car door fails to inform them that the train is in motion and the party injured testifies that he supposed that the train was at a standstill. We prefer to take the view of the facts entertained by the Court of Appeals. The statement of the porter was not an "invitation" to alight, but was the usual announcement of a fact of interest to the passengers, namely that they had reached or were about to reach the end of their journey. The opening of the door of the vestibule did not warrant the inference that the car had stopped, but was only another act to facilitate the rapid and orderly egress of the passengers, after the train had stopped. Even though it be assumed that the porter knew that the train was in motion and that he saw the plaintiff step down from the platform, this falls far short of showing that he knew or ought to have known that the plaintiff intended to step off. It is so common for eager passengers in approaching a station to descend to the last step in order to avail themselves of the first opportunity to alight, that a guard who called out to a passenger in such a situation "Don't get off; the train has not stopped" would probably be denounced as an impertinent interloper. We cannot resist the conclusion that the deplorable accident which befell the plaintiff was attributable to his own lack of caution and was not due to the negligence of the defendant.

We agree with the Supreme Court of Massachusetts when they say in a case very similar upon the facts:

"Assuming that the action of the brakeman in calling the station and fastening back the door was to be regarded as an invitation, it was clearly not an invitation to alight from a moving train, but from the train after it had come to a stop. It did not authorize the plaintiff to attempt to get off from the train when in motion. But we do not think the action of the brakeman can, as a matter of law, be regarded as an invitation. It was, at the most, simply an announcement that the train was near the station, and would presently stop, and was given in order that passengers intending to alight there might prepare themselves to do so when the train stopped." *England v. B. & M. R.*, 153 Mass. 490, 27 N. E. 1.

Although as a general rule it is unsatisfactory and unsafe to dispose of causes upon the opening statements of counsel we cannot see that in this particular case the plaintiff's rights have been jeopardized in any way. The plaintiff had once given his testimony and all the facts were known to his counsel who was accorded the fullest opportunity to state them in detail.

The judgment is affirmed.

In re MUNCIE PULP CO.

(Circuit Court of Appeals, Second Circuit. June 10, 1905.)

No. 237.

1. **BANKRUPTCY—RECOVERY OF ASSETS—CORPORATIONS.**

Where a bankrupt corporation had organized another corporation to develop oil and gas wells to furnish the bankrupt corporation with fuel to operate its business, and the officers of the bankrupt owned all the stock of the oil company, and used it as a mere agent of the bankrupt, and not as engaged in a separate business, they were properly required to surrender the capital stock thereof to the bankrupt's receiver.

2. **SAME—RIGHTS OF RECEIVERS.**

The receiver of a bankrupt corporation after adjudication was entitled to maintain summary proceedings to recover such stock for the preservation of the bankrupt's estate.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York.

On petition to review an order in bankruptcy, made by the District Court for the Southern District of New York, and entered December 30, 1904, directing the petitioner, The Great Western Natural Gas & Oil Company, to deliver all its assets and property to Leo Oppenheimer, as receiver of the Muncie Pulp Company, and further directing the petitioners, Henry Blackman and Gustav L. Jaeger, to transfer to the receiver all of the capital stock of the said Great Western Company standing in their names, respectively.

Wm. Jno. Barr, for petitioners.

Abram I. Elkus, for receiver.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The Muncie Pulp Company is a New York corporation engaged in manufacturing pulp at Muncie, Ind., Henry Blackman being its president and Gustav L. Jaeger its treasurer. The stock is owned by these two men, Blackman being the majority stockholder. In order to supply a cheap motive power for the operation of its plant the pulp company purchased and leased various natural gas and oil wells and lands upon which natural gas and oil wells were drilled. The pulp company finding difficulty in acquiring rights of way from its plant to these wells, a new and independent company, known as the Buck Creek Natural Gas Company, was organized under the laws of Indiana "to furnish the Muncie Pulp Company with gas or oil." For technical reasons a new company, known as the Great Western Natural Gas & Oil Company, was organized to take the place of the Buck Creek Company. Blackman is the president and majority stockholder, holding 53 per cent., in the Great Western Company, Jaeger is the treasurer and minority stockholder, holding 47 per cent. of the stock. To the Great Western Company was transferred the gas and oil well property formerly owned by the Muncie Pulp Company and by it transferred to the Buck Creek Company. The Muncie Pulp Company made various expenditures of its own money for the benefit of

the Great Western Company, treating the latter merely as an agent which the law made necessary for the full development of its business. The Great Western Company kept no separate set of books, its entire administrative department being under the control of the Muncie Company. The record fails to show that there are any creditors of the Great Western Company. A petition in involuntary bankruptcy was filed August 3, 1904, against the Muncie Pulp Company, and on the 16th of December, 1904, an order adjudicating the said company a bankrupt was duly entered. On or about August 3, 1904, a receiver of the pulp company was appointed who, on December 2, 1904, presented a petition to the District Court praying that the Great Western Company turn over to him the above-described property. On this petition an order to show cause was granted and after hearing the parties the court, on December 23, 1904, granted the prayer of the petition indorsing on the papers the following memorandum:

"The proof shows, in my opinion, that Buck Creek Company and the Great Western Company were merely agents of the Muncie Company to hold property for it; that the assets held by the Great Western Company are assets of the Muncie Company. That the stock of the Great Western Company held by Blackman and Jaeger belongs to the Muncie Company and is held by them as trustees for it. Motion granted. Settle order on notice."

The petitioners maintain that the order entered upon this decision was beyond the jurisdiction of the District Court; that they hold the property which they are thus directed to turn over in their own proper right, owning, holding and claiming to own and hold the same adversely to the Muncie Pulp Company and to the receiver of said company, and that the said order is unlawful and violates the constitutional rights of the petitioners in that it takes away their property summarily without trial and without due process of law.

The principal question presented is one of fact; this being determined, there is little difficulty about the law. Indeed, we understood the counsel for the petitioners to concede at the argument that if the Great Western Company were merely the agent of the pulp company the property held by it could be reached by summary proceeding and without the commencement of a plenary suit.

Frank L. Norris, who was secretary of the pulp company until 1903, briefly and clearly states the situation as follows:

"Henry Blackman was at all times, while I was secretary of the Muncie Pulp Company, president thereof, and Gustav L. Jaeger the treasurer of the Muncie Pulp Company. These gentlemen held the same offices in the Great Western Natural Gas & Oil Company. The Great Western Natural Gas & Oil Company at no time paid to the Muncie Pulp Company any consideration whatsoever for the transfer to it of the various properties owned by it, and its only assets are assets acquired from the Muncie Pulp Company. The stock of the Great Western Natural Gas & Oil Company was issued in part to Mr. Blackman and in part to Mr. Jaeger, and one share was given to the secretary of the Great Western Natural Gas & Oil Company for the purpose of having a resident director in Indiana. All this stock was, however, actually owned by the Muncie Pulp Company, and it was placed in the names of these persons simply as a matter of legal form and convenience, and Mr. Jaeger and Mr. Blackman so informed me. Neither Mr. Blackman nor Mr.

Jaeger paid any value for the stock of the Great Western Natural Gas & Oil company; on the contrary, the assets of the Great Western Natural Gas & Oil Company came solely from the Muncie Pulp Company."

That this testimony fairly and accurately states the facts there can be no doubt and, if we exclude fictitious entries purporting to be made in January, but actually made in May, prior to the filing of the petition in bankruptcy, there is nothing in the record opposed to it but assertion, theory and speculation. These entries were made by an unwilling bookkeeper on compulsion from the president of the pulp company and instead of strengthening tend to weaken the petitioners' position.

The Great Western Company was undoubtedly a mere creature of the pulp company, having no independent business existence and organized solely for the purpose of facilitating the business of the latter. The Great Western Company has no shadow of claim to the property in controversy, and to permit it, or its president, or shareholders, to dispose of such property, is to sanction a fraud upon the creditors of the pulp company. We deem it of no importance that the transfer passed through the Buck Creek Company, rather than directly from the pulp company. The new oil company was the old company under another name. In legal effect it was as if the pulp company had, for convenience in transacting business, transferred its oil lands, in trust, to an individual agent and, upon his becoming incapacitated, to a second agent for a like purpose. Can there be a serious doubt that the court would peremptorily reject a claim that these agents, or either of them, had acquired a title adverse to their principal? Having determined that the transaction was a mere transfer to the pulp company's agent it is unnecessary to determine what it was not; it surely was not an absolute conveyance for a valuable consideration and it was not a gift. If the petitioners succeed in their contention the result will be that, upon liquidation, there being no creditors of the Great Western Company, the valuable property transferred to it will be divided among its shareholders, namely Blackman and Jaeger—the president and treasurer of the pulp company and the men who, of all others, should be most solicitous to protect the company and its creditors from such spoliation. As Jaeger has disclaimed the right to share in property acquired by such means it is probable that Blackman, to the extent of his interest, would be the sole beneficiary.

The facts being so plain an extended discussion of the law seems unnecessary. Surely the bankrupt law is not so vitally defective that the court cannot direct the president of a bankrupt corporation to turn over property of the bankrupt in his hands or under his control.

In *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, the Supreme Court held that an order similar to the one in dispute might be made, before the appointment of a trustee, by the District Court to reach property of the bankrupt in the hands of a third person.

In *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, the court, at page 15 of 184 U. S., page 275 of 22 Sup. Ct. (46 L. Ed. 405), says:

"But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of filing of the petition. The court would have been bound to enter upon that inquiry, and in so doing would have undoubtedly acted within its jurisdiction."

In *Re Thompson*, 128 Fed. 575, 63 C. C. A. 217, this court held that a court of bankruptcy has jurisdiction to require an accounting from an assignee who has taken the property under a state assignment, and, where he appears and submits his account, the court can require him to turn over the property even though he asserts title to a part of it in his individual capacity.

In *Re Tune* (D. C.) 8 Am. Bankr. R. 285, 115 Fed. 906, the court says, at page 296 of 8 Am. Bankr. R., and page 914 of 115 Fed.:

"When a trustee claims property to which another sets up title, and asks the assistance of the court of bankruptcy, the court, to use the language of *Nugent's Case*, 'is bound to enter upon that inquiry.' If, as the Supreme Court says, 'it is bound to enter upon that inquiry,' and 'in doing so undoubtedly acted within its jurisdiction,' is not the court, if it finds the claim merely colorable, bound to direct the surrender of the property to the trustee? * * * If the facts in the particular case show that the detention is without color of right, then it is bound to take and administer the property."

See, also, *Matter of Andre*, 13 Am. Bankr. R. 132, 135 Fed. 736, and cases cited.

The proposition that the proceeding in no event could be brought by a receiver cannot be sustained. The order complained of was entered after adjudication and a trustee has in all probability been appointed who could without doubt renew the application and maintain it if the present proceeding should fail for the reason stated. The question then is, in a sense, academic but we do not rest the decision on this ground as we are convinced that upon the facts as found by the District Court the order was necessary for the preservation of the estate.

The court had jurisdiction to order the property of the bankrupt, in the possession of a bailee or agent, delivered into the custody of the receiver pending the appointment of a trustee.

Order affirmed.

UNITED STATES v. S. SCHIFF & CO.

(Circuit Court of Appeals, Second Circuit. June 9, 1905.)

No. 200 (3,533).

CUSTOMS DUTIES—CLASSIFICATION—JEWELRY—MILLINERY ORNAMENTS.

In construing the provision in paragraph 434, Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for "articles commonly known as jewelry," held, that it does not include so-called "millinery ornaments," used in trimming hats, which are flimsy articles, intended for ephemeral use, are not made by jewelers, and contain no gems or precious metals, but are made of base metal either wholly or in combination with imitation jet or imitation precious stones.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On appeal from a decision of the Circuit Court for the Southern District of New York, affirming, without opinion, a decision of the Board of General Appraisers (G. A. 5,624, T. D. 25,152), which reversed the action of the collector in the classification and assessment of the merchandise in controversy.

Charles Duane Baker, Asst. U. S. Atty.

Comstock & Washburn (Albert Comstock, of counsel), for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The collector assessed duties at the rate of 60 per centum ad valorem on the imported merchandise, as jewelry, under paragraph 434 of the act of July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], which reads as follows:

"Articles commonly known as jewelry, and parts thereof finished or unfinished, not specially provided for in this act, including precious stones set, pearls set or strung, and cameos in frames, sixty per centum ad valorem."

The importers protested, pointing out, among others, paragraphs 112 and 193 of the same act, as the proper paragraphs under which duty should be laid. The board sustained the contention of the importers in this respect. The relevant portion of paragraph 112 is as follows:

"All glass or manufactures of glass or paste, or of which glass or paste is the component material of chief value, not specially provided for in this act, forty-five per centum ad valorem." Schedule B, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635].

Paragraph 193 (Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645] provides for a similar duty on manufactures of metal. We do not deem it important to attempt a comprehensive definition of the word "jewelry" or of the phrase "articles commonly known as jewelry." The only relevant question now before the court is, were the articles in controversy, at the date of importation, commonly known as jewelry? If they were so known the collector was right; if not the board and Circuit Court were right. The question is one of fact and we see no reason to disturb the finding of the board; in fact we fail to see how any other conclusion could be drawn from the testimony, which is practically unanimous and uncontradicted in favor of the importers' contention. The merchandise in question consists of cheap, flimsy ornaments in the form of buckles, slides, cabochons and bars, made wholly of base metal, or of such metal set with imitation jet or imitation precious stones, made of glass and known as paste, strass or rhinestone. These ornaments are designed to be permanently fastened to women's hats and, together with ribbons, laces, feathers and flowers, form the trimming thereof. They are dealt in almost exclusively by millinery houses and are known as millinery ornaments. They are also known as "fashion goods," designed for a single season's

use and if carried over to the next season they become rusty and unsalable. They are of a delicate construction, easily broken and not sufficiently strong to endure the strain of being frequently put on and taken off the person; once attached to a hat one of these ornaments remains, as a feather or a rose remains, until the hat is re-trimmed or discarded. No testimony was taken in the Circuit Court. Four witnesses were sworn before the board and their testimony fully supports the foregoing statements. They united in saying that the ornaments in question are not known commercially, commonly, or in any sense, as jewelry, and are known as millinery ornaments for hat trimming. No one contradicts them. Samples of the importations were produced in court and a casual inspection served to corroborate the statements of the witnesses. These ornaments have very few of the characteristics of jewelry, as that term is popularly used. They were not made by jewelers, no gems or precious metals were used in their construction; they were not valuable, but were merely ephemeral trinkets, intended to be used for a single season and then to be thrown aside.

The decision is affirmed.

SANITAS NUT FOOD CO., Limited, v. VOIGT et al.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1905.)

No. 1,388.

1. PATENTS—NOVELTY—CHANGE IN FORM OF COOKED GRAIN.

Whatever novelty, in a patentable sense, there may be in flakes of cooked wheat, must be found in some superior efficaciousness or some new properties which they possess, and not in any mere change of form produced by mechanical division of the cooked grain either before or after the last step in cooking. Nor does the fact that such flakes contain some dextrin make them a new product in a patentable sense, that being true to a greater or less extent of other forms of cooked wheat.

2. SAME—COOKED WHEAT PRODUCTS—GRANOSE FLAKES.

The Kellogg patent, No. 558,393, claim 2, for an improved cooked alimentary product from grain, such as wheat, in the form of "large, attenuated, baked, crisp, and slightly brown flakes of practically uniform thickness, the same being readily soluble, and containing dextrin," is void for lack of patentable invention, it appearing that such product does not differ in its properties or food value from other forms of cooked wheat previously known, except perhaps slightly in degree.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

This is a bill to enjoin infringement of patent No. 558,393, issued to John Henry Kellogg, of Battle Creek, Mich., for "a certain new and useful alimentary product and process of making the same." This patent was assigned to the complainant, a partnership association under the laws of Michigan, doing business as the Sanitas Nut Food Company, of which the patentee and W. K. Kellogg and W. C. Kellogg are the sole members. The claims of the patent are two in number, one for a process and one for the product. They are as follows:

"(1) The process hereinbefore described for the manufacture of an improved alimentary product, which consists, first, in soaking the grain in water for

some hours, whereby it is subjected to a preliminary digestion with its contained cereal, and at temperature which prevents actual fermentation; second, subjecting the previously soaked grain to heat for a time sufficient to completely cook the starch; third, drying the grain; fourth, rolling the grain between cold rollers; and, fifth, baking the flakes until thoroughly dry and crisp, as specified.

"(2) The improved cooked alimentary product from grain such as wheat, hereinbefore described, which exists in the form of large, attenuated, baked, crisp, and slightly brown flakes of practically uniform thickness, the same being readily soluble, and containing dextrin, as specified."

The bill charged infringement of both claims, but upon the hearing the process claim was abandoned. The defense was nonpatentability and non-infringement. Upon a final hearing District Judge Wanty held the claim for the product to be void for want of novelty.

Fred L. Chappell (Otis A. Earl and Wylie C. Margeson, of counsel), for appellant.

Albert Crane and Mark Norris, for appellees.

Before LURTON and SEVERNS, Circuit Judges, and EVANS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

That the defendants produce a product substantially identical with that of the patent may for the purposes of the case be conceded. That they do this without following all of the steps of the process described in the Kellogg specifications is conceded. Thus they do not subject the grain to the preliminary soaking in water which is the first step of the patent, a step by which Kellogg claims to secure "a preliminary digestion by aid of cereal, a starch digesting organic ferment contained in the hull of the grain or just beneath it." "This digestion," says the patent, "adds to the sweetness and flavor of the product." Neither do the defendants subject their flakes of grain just before baking or roasting them "to the steaming process" of the specifications. It would seem to follow, if the product of the defendants is substantially that of the patent, that the patentee included steps in his method of making his product which were immaterial to the production of his product and misleading. But the contention is that the second claim of the patent covers the product there described and claimed by whatever process it is produced, and that the specifications point out a process by which the product may be produced if followed. That there may coexist both a patentable process and product is plain. In such case both the process and the product must be new and useful. So it may be conceded that a process may be old, but the product new, or the product old and the process new. In such case the one will be patentable and the other not. In *Provident Rubber Co. v. Goodyear*, 9 Wall. 788, 796, 19 L. Ed. 566, it was said:

"The patentability, or the issuing of a patent as to one, in no wise affects the rights of the inventor or discoverer in respect to the other. They are wholly disconnected and independent facts."

Nevertheless it does not follow that a single patent may issue for both a process and a product when the latter is wholly independent

of the other. The Goodyear patent, referred to above, originally issued for both a process and a manufacture. It was surrendered, and two patents taken, one for the process and one for the product.

The process patent was held void, as being too broad. The product patent was held valid, and what was said upon the independent character of process and product patents was said in the appeal, which involved the validity of the separate product patent.

But we shall waive the question of the effect of including in one patent two claims, one for a process and the other for a product independent of the process, however produced. We shall assume for the purposes of this case that the product claim is for the product independent of the process, although there is much in the patent tending to limit the product claim to the product of the process of the patent. Counsel for the patent having staked the whole case upon a broader interpretation, we shall pass by either of the troubles in appellant's path mentioned above, and examine the claim as one for an article of manufacture, independent of the process of its making, treating the specifications as an effort to point out the best method of manufacture known to the inventor. Thus considered, the claim is for cooked flakes of grain, usually wheat, as a patentable article of manufacture. The complainants make and sell this article under allied names, such as "Granose Flakes," "Toasted Wheat Flakes," and as "Granose Biscuit," the latter being flakes assembled in a biscuit form. After all has been conceded that can be reasonably claimed in favor of the nourishing quality of grain when prepared according to the patent, it is at last an article which pertains to the cooking art; an art, if it may properly be called an art, which is as old as the discovery of the uses of fire, and as varied in its exemplifications as the sands of the sea. Whatever novelty in a patentable sense there may be in flakes of cooked wheat which are thin, crisp, and slightly brown, must be found in some superior efficaciousness, or some new properties which they possess, and not in any mere change of form produced by mechanical division of the cooked grain either before or after the last step in cooking. In *Glue Co. v. Upton*, 97 U. S. 3, 6. 24 L. Ed. 985, this point is very clearly stated, where the patentability of a readily soluble form of glue, resulting from a mechanical subdivision of the old commercial form of the article, was under consideration. "The whole claim," said the court, "is to an old article of commerce in a state of mechanical division greater than previously used, but unchanged in composition and properties, and the benefits arising from the increased division are such as appertain to every soluble substance when divided into minute particles. * * * A distinction must be observed between a new article of commerce and a new article which, as such, is patentable. Any change in form from a previous condition may render the article new in commerce, as powdered sugar is a different article in commerce from loaf sugar, and ground coffee is a different article in commerce from coffee in the berry. But to render the article new in the sense of the patent law, it must be more or less efficacious, or possess new properties by a

combination with other ingredients; not from a mere change of form produced by a mechanical division." See, also, *Cerealine Mfg. Co. v. Bates*, 101 Fed. 272, 280, 41 C. C. A. 341, and *Maryland Hominy Co. v. Dorr* (C. C.) 46 Fed. 773. Even the form in which the Kellogg grain is offered is not new. The flaking of grain, cooked and uncooked, was a well-known method of preparing grain for consumption. See, among the many patents in this record, those to Gilman & Spencer for a process of preparing flaked cereals issued in 1885, and the British patent to Perry for cooked filaments of rice. There is no patentable difference between cooked shreds of grain and cooked flakes. The patent to Perky and Ford of 1893 was for a machine for the preparation of cereals for food. The prepared grain according to that patent was compressed between rollers into "threads, lace, or ribbons or sheets," the form depending upon the proximity of the rollers to one another. But Kellogg's claim covers cooked grain when specialized by the application of many adjectives, and, if it is to be sustained at all, these adjectives must be given emphasis. Thus his product is for flakes, not meal nor shreds, nor any other form or subdivision of grains. They must be "large," "attenuated," "baked," "crisp," "slightly brown," and "of practically uniform thickness." Cooked grain thus prepared, and having all of the characteristics called for by the claim, may constitute a new article of commerce. But do they render the article new in a patentable sense? If so, it must be due to some new properties, or improved efficacy as a food. The object of the inventor, as stated in his specifications, "is to provide a food product which is in proper condition to be readily digested without any preliminary cooking or heating operations, and which is highly nutritive, and of an agreeable taste; thus affording a food product particularly well adapted for sick and convalescent persons." These results, he claims, are due to his process or method of preparing the article. Thus his first step is to soak the grain "for some hours, say eight to twelve, in water at a temperature which is either between 40 degrees and 60 degrees Fahrenheit, or 110 and 140 degrees Fahrenheit, thus securing a preliminary digestion by aid of cerealine, a starch-digesting organic ferment contained in the hull of the grain, or just beneath it." The results he claims from this long preliminary soaking are that this preliminary "cerealine digestion" converts a part of the starch into dextrin, and "add to the sweetness and flavor of the product." The defendant does not put his grain through the long preliminary soaking made a step in the process claim of the patent. Nevertheless, defendant's flakes are claimed to infringe, and the evidence establishes that in form, appearance, and chemical constituents the flakes produced without the "cerealine digestion" resulting from the preliminary soaking of the patent are in all material matters identical with the product made according to the process of the patent, and with the Granose Flakes made and sold by complainant. The explanation is doubtless due to the fact that this "cerealine digestion" only results in the conversion of a small proportion of the starch into dextrin, a

result likewise reached by the boiling and baking to which the defendants subject their grain.

But the patentee also claims as a result of grain prepared as he directs a degree of solubility "readily distinguishable from ordinary preparations of wheat or allied grains," and in his product claim he claims the article to be "readily soluble, and containing dextrin." To be digestible, food must be soluble, otherwise it is not absorbed. All cooked grains are more or less soluble in the human stomach. It is not new, but old, that the digestibility of any cooked food depends in a large degree upon its proper cooking. Either underdone or overdone, and digestibility is affected. If bread or grain or any other starch-containing food be subjected to the right degree of temperature, a certain proportion of starch is converted into dextrin, and dextrin is a valuable digestive agent. Thus the well-done crust of bread is more soluble, and therefore more digestible, than the underdone and dough-like interior. If the crust be baked until it is brown, it is evidence that a portion of the starch has been converted into dextrin. These are matters of common knowledge. Kellogg claims a patentable article because his cooked flakes are large, thin, crisp, and slightly brown, "same being readily soluble, and containing dextrin." The claim does not state what per cent. of dextrin is necessary to constitute the patented article. As we are not concerned with the complainant's process as a process, and are dealing only with his claim for a patentable article of food, however produced, we are driven to assume that evidence of the presence of some dextrin is afforded whenever we find cooked flakes of grain which are crisp and slightly brown; the inference being that they have been subjected to the proper temperature to dextrinize some of the starch in the grain because they are crisp and slightly brown. It follows, then, that any per cent. of dextrin which may result when such flakes are subjected to cooking sufficient to make them crisp and brown will constitute an infringing article. But dextrin results in greater or less quantity whenever any starchy food is cooked enough to brown the exterior. Not that the browning is essential to the production of dextrin, for subjection to moist heat of from 280 degrees to 320 degrees Fahrenheit will convert some portion of the starch into dextrin; but the browning of the surface of any kind of bread is evidence of having been subjected to heat enough to convert the starch of the browned exterior into dextrin, and this, we take it, is the significance of the claim for "crisp," "slightly browned" flakes.

But the fact that cooked flakes of wheat contain some dextrin will not make a new article in a patentable sense. It is at most a new form of cooked wheat, and possibly a new article of commerce, by reason of some advantages it may possess over any earlier form, but, as no new product has resulted, it cannot be regarded as a new article in a patentable sense. The fact that Kellogg's flakes include the whole wheat, the bran covering being broken into small particles by the process of compression, does not distinguish his product from other and earlier methods of preparing grains for food. In-

deed, the shredded biscuit of Perky, covered by his patent of October 15, 1895, his application having been filed March 15, 1894, is a complete anticipation of the cooked flakes of Kellogg, except that the grain in Perky is in form of long, thin, crisp and slightly brown filaments or shreds instead of flakes. There may be some slight advantage in the flake over the shred as a form presenting more surface to the drying effect of heat, and making a food which may keep longer. So, too, the shred may not be so much dextrinized as the flake for the same reason. We do not say that this is so, for the weight of the scientific evidence in this transcript is that the Perky biscuit keeps thoroughly, and contains about the same per cent. of dextrin as the Kellogg Granose Biscuit, or his Granose Flakes. There is, indeed, very convincing evidence that the idea which resulted in complainant's cooked flakes was taken from Perky's shredded biscuit. Certain it is that in the winter of 1893-94, or early spring of 1894, Dr. Kellogg visited Denver, saw Perky, and closely inquired into his shredded biscuit. Perky's shredded biscuit at that time were being made and sold in great quantities at Denver. It may be that then they were not so perfectly dried as to keep well, and that Perky received some notion that a more thorough baking of his shreds would enable him to sell a biscuit which would keep long. Precisely the time when Perky found it desirable to more thoroughly bake his shredded biscuits as a means of preservation is not clear. But if it be admitted that in respect to keeping qualities the cooked flake was an improvement over the cooked shred, still it is only a question of degree, an improvement which did not require the exercise of invention. It is at most an improvement which any one acquainted with the industry would fall upon as an advantage, if it was desirable to add to the keeping qualities of the food.

The cooked flakes of the Kellogg patent are not, in our judgment, a new product. It is at most a step in advance upon products well-known in trade and to the breakfast table. The cases most nearly in point are hostile to the claim. *Maryland Hominy Co. v. Dorr* (C. C.) 46 Fed. 773; *Cerealine Mfg. Co. v. Bates*, 101 Fed. 272, 41 C. C. A. 341.

We find no error in the decree dismissing the bill, and it is therefore affirmed.

JENNER v. BOWEN.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1905.)

No. 1,393.

1. PATENTS—PRIOR PUBLIC USE—EXPERIMENTAL USE.

The duplication of a set of rollers on a machine which was before complete and operative, and had been in use for two years, the purpose being merely to re-enforce the work of the original rollers in certain cases where necessary, did not constitute a part of the invention of the machine, so as to extend the time within which a patent might be applied for.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 99, 100.]

2. SAME—PUBLIC USE.

Where the inventor of a machine made and set up one for a customer, who paid for it and used it commercially, selling the product, as was intended, neither he nor his employes being under any obligation of secrecy, such use was public and not private, and its continuance for more than two years before application for a patent deprived the inventor of the right to a patent.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 93-97.]

3. SAME—EFFECT OF INVENTOR'S INSANITY.

The right of one who purchased an unpatented machine from the inventor, with the intention and understanding that it was to be used commercially, to so use the same, is not terminated by the subsequent insanity of the inventor, and such continued use prior to the application for a patent constitutes a prior public use within the meaning of the patent law.

4. SAME—STATUTE AUTHORIZING APPLICATION BY GUARDIAN—SCOPE.

The amendment of February 28, 1899, c. 227, 30 Stat. 915 [U. S. Comp. St. 1901, p. 3385], to Rev. St. § 4896, authorizing the guardian of an insane person to file an application for a patent upon an invention made by such person before his insanity, and providing that it shall cover "all applications now on file in the Patent Office or which may be hereafter made," is at least limited as to its retroactive effect to giving effect to pending applications as of the date of their filing, and, if at that time the invention had been in public use for more than two years, the right to a patent thereon is not saved by the fact that the inventor became insane before the expiration of that time.

5. SAME—PRIOR PUBLIC USE—MACHINE FOR MAKING BOTTLE WRAPPERS.

The Biedinger patent, No. 639,395, for a machine for making bottle wrappers, is void for prior public use of the machine for more than two years before the filing of the application.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

The following is the opinion of the court below:

In performance of the contract of September 4, 1890, Biedinger furnished Bowen a machine for making bottle wrappers, in using which it was necessary to cut off the diagonal wings at the neck of the wrapper and afterwards paste them on by hand. The expense for labor in pasting them on by hand was considerable. In March, 1892, Biedinger made material and valuable improvements upon the machine, whereby the wrapper complete was automatically produced, and the expense of hand labor was dispensed with. The machine, so improved, is the device of the patent in suit. Afterwards Biedinger became insane, and on the 18th day of December, 1893, was committed to the asylum at Longview. On or about the 26th day of January, 1894, Jenner was appointed his guardian, and on the 20th day of November, 1895, filed the application for the patent in suit, which was thereafter issued on the 19th day of December, 1899.

Of the defenses set up, only that of prior use will be considered. The machine was operated from March, 1892, to November 20, 1895, when the application was made, and the evidence shows beyond question that during that time wrappers were made and sold to the trade; but it is claimed by the complainant that this was not a public use, and that the making of the wrappers was merely incidental to experimental operation of the machine, conducted for the purpose of perfecting it, and with a view to obtaining a patent therefor when so perfected. The law will permit experimental use and the sale of the thing made, provided that such making and sale be strictly incidental to, and not the object of, the use. *Lettelier v. Mann* (C. C.) 91 Fed. 917; *Smith & Griggs Mfg. Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. 122, 31 L. Ed. 141. Here the evidence shows conclusively that whatever was done in perfecting the machine was wholly incidental to, and in occasional interruption of, a large and flourishing business in the manufacture of bottle

wrappers. The machine would make 200 wrappers in a minute, and was operated about 9 hours a day. Biedinger traveled about the country soliciting the patronage of wrapper users, and the net profits of the business for the years 1892, 1893, and 1894 were \$1,062.79. A profit of \$1,468.27 was made from May 1 to September 1, 1893, but there was a large increase of merchandise on hand. The contract of September 4, 1890, required that the machine should be used for carrying on business, and Biedinger's livelihood depended upon the income derived from it. Nor can the delay in applying for the patent be justified upon the ground that the additional press rolls which were supplied in February, 1894, were necessary to the practical operation of the machine. These would further facilitate its efficient working, but would add nothing to the invention. Nor can the delay be excused upon the ground of the inventor's physical and mental weakness. The invention having been reduced to practice, the statute began to run, and its running could not be stayed otherwise than by filing the application. *Sisson v. Gilbert*, Fed. Cas. No. 12,912, 22 Fed. Cas. 236. The statute authorizing the guardian to sue was passed after the application was filed, and provides that the right of the insane inventor to apply for and obtain the patent shall devolve upon his guardian "in as full manner and on the same terms and conditions" as the same might have been claimed or enjoyed by the inventor. Nor does the evidence sustain the complainant's claim that the use was secret; the great weight of the evidence is to the contrary. The defense of prior use, therefore, must be sustained.

I have reluctantly reached this conclusion, because of the hardship to which it subjects the inventor. Whatever may be said of the defendant's right under the contract of September 4, 1890, to use the machine of 1892, he certainly has no right to use the machine of 1899, made for him by Muenzenmeier, other than such as results from the constructive abandonment of the invention because of the inventor's failure to file his application within the statutory limitation. The invention was Biedinger's, and was a valuable one. He was deprived of the benefit of it through the misfortune that befell him when he was committed to Longview. It may be that the guardian would have filed the application in time but for the unjustifiable action of the defendant in refusing to allow Mrs. Biedinger to obtain drawings of the machine, and, if the complainant and defendant were the only parties concerned, the defendant might, upon that ground, be held to be estopped from setting up the defense of prior use; but the interest of the public in the invention cannot be ignored. The limitation of the statute is founded upon public policy, and that policy must be enforced, even though it may work a hardship to the inventor.

There will be a finding in favor of the defendant.

Walter F. Murray, for appellant.

A. F. Herbsleb and W. H. Jones, for appellee.

Before LURTON and SEVERENS, Circuit Judges.

LURTON, Circuit Judge. This is a bill to enjoin infringement of a patent issued to Charles G. Jenner, as guardian for Charles G. Biedinger, an insane person. The patent is numbered 639,395, and is for certain improvements in machines for making bottle wrappers. The principal defense, and the only one which seems to have any very solid foundation, is that the patented invention was in public use for more than two years prior to the date of the application for a patent. We come at once to a consideration of this defense.

The application upon which the patent issued was filed November 20, 1895. The evidence establishes beyond the shadow of a doubt that a machine constructed according to the claims of the patent has been in the possession and use of the defendant Bowen since March, 1892. Was that use such a public use as to amount to a surrender of the patent to the public?

The machine in Bowen's possession was made under plans devised by Biedinger, and was set up in Bowen's shop by the inventor under a written contract between Biedinger and Bowen of November 4, 1890. That contract was an agreement by which Biedinger assigned to Bowen the exclusive right to make and sell an "improved paper bottle wrapper" devised by Biedinger, and for which he had applied for a patent. For this exclusive right Bowen agreed to pay a royalty upon all wrappers made and sold by him. To enable Bowen to manufacture such wrappers, Biedinger agreed to make and supply Bowen with an efficient machine, for which Bowen was to pay him \$500 in installments. Biedinger failed to get a patent upon his "bottle wrappers," but he did plan and make a working machine for their manufacture according to his agreement, and did set same up in Bowen's shop, and was paid according to the contract. That machine completed, and operating in all substantial respects according to the terms of the patent in suit, was put in operation in March, 1892, and ever since has been turning out improved bottle wrappers, and upon them Bowen paid the royalty mentioned in the patent for several years, and avows that the contract still subsists, and that he is willing to account for royalty as provided in the agreement of November 4, 1890. Concerning this use, the counsel for the complainant have insisted: First, that it was experimental; second, that it was a secret use; and, third, that the patentability of the invention was saved to the inventor by the occurrence of his insanity before the two years allowed for filing an application. These in the order stated.

The first machine made by Biedinger for Bowen cut off the corners of a paper tube, formed during the earlier steps in the operation of the machine, and these corners had to be gathered up and pasted by hand across the severed corners to form the finished bottle wrapper. This involved no slight expenditure of labor, and limited the output. To avoid this, Biedinger made certain changes in the machine, by which the corners, instead of being cut off and pasted back, were mechanically turned back in proper position and then glued down. This doing by mechanism a part of the operation originally done by hand involved the passing of the wrapper, after the corners had been turned down and glue applied, through rollers to compress the corners and cause the glue to adhere. The rollers used for this purpose are the rollers, S, S, of the patent. When the paper used was extra heavy, it was found that more than one set of rollers might be used to cause the corners to adhere closely as folded back, and the addition of such rollers, if found useful, was contemplated from about the time the machine was first adapted to fold back the corners. The possible value of such additional rollers is mentioned in the specifications, where it is said:

"From the rolls, S, the finished bottle wrappers may be fed on through steam-heated drying rolls (not shown) to effectually dry the paste, both at the joint forming the tube and at the overwrapped neck portions."

The change in the original machine was made and the improved machine put in use as early as March, 1892, though it had but one set of rollers, until some time in 1894, when it was found expedient and convenient to add additional rollers for use with heavy paper, though "steam-heated drying rolls" have never been added or found useful, the heat tending to keep the glue soft and thus prevent adherence. The contention that the addition of other sets of rollers constituted such an addition to an unfinished machine as to enable the inventor to obtain a valid patent upon the old machine cannot be sustained. The invention was embodied in the machine as completed in March, 1892. It was a workable and commercially valuable machine without additional rollers. The rollers, S, S, through which the completed wrappers were fed, had no other function than to compress the glued corners in place and cause them to adhere. If the paper was so stiff as that the adherence was imperfect in some cases, it was a perfectly obvious expedient to duplicate the roller for the purpose of giving the glue or paste more time to set. If the paper was thin, additional rollers were not needed, and for nearly two years no additional rollers were used; but with heavy paper the corner or wing was liable to spring open and require some manipulation by hand. It is very clear that the mere duplication of the rollers did not constitute any part of the real invention, or in any substantial way change its character. The invention was in its essence complete before they were added, and its patentability is not saved by the subsequent addition of rollers.

But it is said that the use of the machine in Bowen's shop was secret, and not public. We have examined the evidence upon this subject with a good deal of care, being inclined to save this patent, if it could be done under the law, but only to find that neither the inventor nor Bowen used any of the precautions usual when it is desired to keep an invention secret. There was little or no difficulty in any one who chose seeing its operation, and the employes were placed under no obligation of secrecy. That the number of persons who had an opportunity to see the machine in operation was limited, and included some who, by reason of youth and inexperience, were not likely to understand or be able to describe the mechanism, is of no great importance, in view of the fact that the inventor made and set up this machine for Bowen for the purpose of being commercially operated. Bowen understood its mechanism and its method of use, and was under no restriction as to the place or manner of its operation, and under no obligation of secrecy. In *Egbert v. Lippman*, 104 U. S. 333, 336, 26 L. Ed. 755, it was said:

"Whether the use of an inventor is public or private, does not necessarily depend upon the number of persons to whom its use is known. If an inventor, having made his invention, gives or sells it to another to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is used, such use is public, within the meaning of the statute, even though the use and knowledge of the use may be confined to one person."

When the object of the use is the perfecting of an invention, the sale of the product, if strictly incidental to an experimental use,

is not a public use under section 4886 of the Revised Statutes, and will not defeat a patent. A use which is impliedly excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment. "When the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition." *Smith & Griggs Mfg. Co. v. Sprague*, 123 U. S. 249, 256, 8 Sup. Ct. 122, 31 L. Ed. 141; *International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 63, 11 Sup. Ct. 716, 35 L. Ed. 347; *Root v. Third Ave. Rd.*, 146 U. S. 210, 225, 13 Sup. Ct. 100, 36 L. Ed. 946; *Eastman v. Mayor, etc., of New York (C. C. A.)* 134 Fed. 844.

Aside from the general consequence of a sale of a machine to Bowen, embodying the principles of Biedinger's invention, for the purpose of being commercially used, the fact that Bowen did use the machine, not experimentally, not for the purpose of testing its capability of forming wrappers, but for profit, is too plain to need argument. It was capable of making about 200 finished wrappers per minute, and was operated about 9 hours per day for more than 3 years before application filed. Biedinger knew this. He sold the machine that it might be so used. He claimed and was paid a royalty upon the wrappers so made, and for a considerable part of the time was in the service of Bowen, as a salesman for the wrappers. Counsel attempt to explain or justify this use by saying that the object was:

"First, to determine whether or not the machine would produce good, salable wrappers; and, second, would it produce them at a cost which would prove profitable? To determine this latter question, it would be necessary to make and sell the wrapper."

This extraordinary contention is supported by the citations of *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000. The subject of the patent in that case was a pavement. Durability when subjected to the wear of a pavement was essential to the usefulness of the invention. The patentee, to determine this, after suing out a caveat, put down at his own cost a small section upon a public street, where it was in use for more than two years before he filed his application for a patent. This use was, having regard to the subject-matter, experimental. It was the only kind of experiment which was available as a test of the durability of the discovery. It was not for profit. That no such use as that to which Bowen put Biedinger's invention was necessary to determine whether it would make a wrapper, is manifest. The operation of the machine for a few hours would determine whether it would do what it was intended to do. The determination of whether the wrapper produced would be salable at a price which would be profitable was not an inventor's test, but that of a manufacturer or dealer in wrappers. To say that a use of an invention before application for such purposes is not a public use would be to carve out an exception to the statute which makes the granting of a patent conditional upon the invention not having been in public use for two years before application filed. *Smith & Davis Co. v. Mellon*, 58 Fed. 705, 707, 7 C. C.

A. 439. There is no room for the application of *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000, to facts so dissimilar as those presented by the case before us.

That Biedinger's invention was in public use for more than three years before an application was filed for a patent is the conclusion we reach, and that this fact must defeat his patent is also plain, unless there be some salvation for him in the fact that he became insane before there had been two entire years of public use. This insanity suddenly manifested itself late in December of 1893, and in January he was duly found insane, and the complainant Jenner was made his guardian. At this crisis there remained three months' time during which an application might have been filed, if there had been any one legally capable of making an application. The trouble was that there was then no law authorizing the guardian to file an application for a patent upon an invention made by an insane person. The law which for the first time took cognizance of such a situation was passed February 28, 1899, c. 227, 30 Stat. 915 [U. S. Comp. St. 1901, p. 3385]. The act of that date amended section 4896, Rev. St., which authorizes the administrator or executor of a deceased inventor to file an application for an invention, made by his intestate or testator, by providing that the guardian of an insane person might file an application upon an invention made by such person before his insanity. The last clause of that act provides that it "is to cover all applications now on file in the Patent Office or which may be hereafter made." Jenner, as guardian, at date of this act had on file an application for a patent upon Biedinger's invention. That application was filed November 20, 1895, and is the application upon which the patent in suit issued. There was no authority of law for its filing at the time it was filed; but that trouble, we shall assume, was cured by the retroactive effect of the act of 1899. But as the date of that application was November 20, 1895, we are confronted with the fact that at that date the invention of Biedinger had been in public use for more than three years. The contention of the complainant is that after Biedinger's insanity the use of his invention by Bowen was an illegal and fraudulent use, a use without the knowledge or consent of the inventor, and therefore not the kind of public use prohibited by the statute. But the use of this machine by Bowen was neither fraudulent, surreptitious, nor piratical. The inventor made and sold him the machine with the intent and purpose that it should be used for commercial purposes. Section 4899 expressly provides that every one "who purchases of the inventor or discoverer or with the knowledge and consent constructs any newly invented or constructed machine, or other patentable article, prior to the application by the inventor or discoverer for a patent, or who sells or uses one so constructed, shall have the right to use, and rent to others to be used, the specific thing so made or purchased, without liability therefor." So much for Bowen's right to use the Biedinger machine.

By section 4886, Rev. St. [U. S. Comp. St. 1901, p. 3382], the right

of an inventor to obtain the exclusive benefit of his discovery is made dependent upon its not having been "in public use or on sale for more than two years prior to his application." The question as to whether a fraudulent and piratical use of an invention, without the knowledge of the inventor, for more than two years before application, will defeat a patent, is not before us. Bowen's use was with the knowledge and consent of the inventor, and his right is absolutely protected, in the specific thing, by the express terms of the law. If that use was continued for more than two years before an application, time ascertained by counting back from date of application, we can see no exception in favor of an insane inventor. Under the provisions of the statute, the application must be made before a public use of two years. Knowledge of the invention not having been obtained from the inventor by fraud, there is no room for the application of the doctrine of *Kendell v. Winsor*, 21 How. 322, 16 L. Ed. 165, even if there is room for the view there expressed, since the act of 1836 was superseded by other legislation. The subject is fully considered, and the cases all examined, in *Andrews v. Hovey*, 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160, and same case on rehearing in 124 U. S. 694, 8 Sup. Ct. 676, 31 L. Ed. 557, and by Judge Coxe for the Second Circuit Court of Appeals in *Eastman v. Mayor of New York* (C. C. A.) 134 Fed. 844, 851.

Congress, having created the monopoly, may put such restrictions upon it as it pleases. Having made no exception in favor of an insane person, we can make none. Indeed, Congress made no provision whatever whereby an inventor who becomes insane before filing an application could obtain the benefit of his discovery until this invention had been in public use nearly seven years. That act did retroact so as to apply to pending applications, but this is all. It in no way provides that the effect of a prior public use for two years shall be any the less fatal if the negligent inventor is insane than if he was sane. Neither does the act of February, 1899, in so far as it applies to pending applications, operate as a congressional grant of a valid patent to pending applications in behalf of insane persons. The legislation is general in its terms, and the individual motive of a particular congressman cannot affect the interpretation of the law or extend its application. Its curative or retroactive effect is limited, at most, to giving effect to pending applications as of the date of their filing. If, when this is done, it then appears that there had been a public use of the invention for more than two years before the date of filing, the invention is open to the public, and the public right is paramount to that of the inventor. We therefore regretfully conclude, that Biedinger's invention was not entitled to a patent, and that the public are entitled to the benefit of his discovery.

The decree dismissing the bill is accordingly affirmed.

AMERICAN CRAYON CO. v. SEXTON et al.

(Circuit Court of Appeals, Sixth Circuit. June 12, 1905.)

No. 1,368.

1. PATENTS—PATENTABILITY—MOVEMENT OF MACHINE.

The movement of a machine irrespective of the mechanism which causes it is not patentable.

2. SAME—INFRINGEMENT—MACHINE FOR MAKING CRAYONS.

The Liedke patent, No. 476,051, for a machine for making crayons, claim 2, covering a rocking or tilting device for loosening and discharging the crayons from the mold, is valid, and of a primary character, entitled to a liberal range of equivalents. It is not infringed, however, by mechanism for lifting and dropping the molds to accomplish the same purpose, which is not the equivalent of that of the patent.

3. SAME.

The Cowdery, Curtis & Liedke patent, No. 476,038, for a machine for making crayons, claims 1, 6, and 9, covering mechanism for alternately lifting and dropping the molds for the purpose of jarring the crayons loose, construed, and *held* valid and infringed.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Thomas B. Hall, for appellant.

R. B. Wilson and Hamilton & Kirby, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit for the infringement of three patents relating to machines for making crayons, but in the court below the complainant (appellant) confined itself to claim 2 of patent No. 476,051, granted May 31, 1892 (application filed October 3, 1887), and claims 1, 6, and 9 of patent No. 476,038, granted May 31, 1892 (application filed January 17, 1889). It comes here on appeal from a decree finding "that the machines owned and used by the defendants, as shown in the proofs and exhibits, do not infringe any of the patents set out in the bill of complaint." There is no opinion of record.

Crayons when molded, tend to adhere to the mold plates. Early in the art—indeed, up to the time of the making of the inventions embodied in the above claims—they were loosened and discharged by hand. These inventions had for their object the loosening and discharging of the crayons by mechanical means: First, through a movement in and by a machine having a rocking or tilting device, of the mold plates relative to one another in line with the length of the mold, so as in turn to strip the crayon from each mold plate (patent No. 476,051); and, second, through a movement, in and by a machine, of the mold plates upwardly and downwardly, alternately being lifted and dropped, so as not only to strip but jar the crayons loose (patent No. 476,038).

1. Patent No. 476,051, as stated in the specification, had for its object "an improved form of mold plates and mold plate frames, the mold plates being pivoted or axially journaled that they may be partially rotated and the crayons loosened or forced from the mold plates." In the description of the mode of operation of the machine it is pointed out that the tilting or partial rotation of the pivoted mold plates results in a movement of the mold plates relative to one another in line with the length of the mold, which causes the crayon to be "loosened or freed forcibly" first from one mold plate and then from the other. "As the force exerted," says the specification, "is applied in the direction of the crayons' length, there is no possibility of the crayons being broken." Patent No. 476,051 contains 22 claims, but the following is the only one involved:

Claim 2: "In a machine for the manufacture of crayons, carpenters' chalk, or other like articles, the combination of two sectional mold plates together forming a complete mold, said mold being open at one end, said mold plates adjustable relative to each other in line with the length of the mold, substantially as set forth."

It is urged in opposition that this is either a claim for the movement of the mold plates relative to one another, or for the mechanism which produces the movement. If for the former, the claim is void, because it is merely for a function, mode of operation, or result, which cannot be patented. If for the latter, there is no infringement, because the mechanism employed by the appellees differs essentially from that described in the patent, to which, or its equivalent, the words "substantially as set forth" limits the invention.

It is also insisted that if a patent could be taken out for the relative movement of the mold plates, an examination of the prior art will disclose that such relative movement was old, and therefore not patentable. In support of this charge of anticipation the patents of Magers, November 13, 1840; Driver, January 13, 1863; Bill, October 22, 1878; Knight, September 14, 1858; Fuchs, May 22, 1888; and others—are cited.

Taking up the last point first, while the machines covered by these patents, some for molding bullets, some for making crayons, disclose mold plates fitted in a frame, and movable in some way by mechanism for the purpose of discharging the crayon or bullet, not one shows a movement of the mold plates relative to one another in line with the length of the mold; in other words, the movement which the appellees' machine was invented to secure. It may be conceded that mold plates must be moved relative to one another in order to discharge the molded articles. This has been true from the beginning of the art. And long before this invention there were machines in and by which the mold plates were moved in order to discharge the molded article. But this invention was to secure a particular kind of movement of the mold plates, one in the line of the length of the mold, so that the crayon held in one of the

mold plates would, by this movement, be stripped from the other, and then, held in the second, be stripped from the first. None of the patents referred to suggest any such movement, and yet this is the only movement which secures the desired result. The conception of a machine to secure this movement solved the serious problem in the art of crayon making.

Coming now to the more difficult question, we think it must be conceded that the movement of a machine irrespective of the mechanism which causes it cannot be patented. *Burr v. Duryee*, 1 Wall. 531, 568, et seq, 17 L. Ed. 650, 660, 661; *Case v. Brown*, 2 Wall. 320, 328, 17 L. Ed. 817; *Merrill v. Yeomans*, 94 U. S. 568, 573, 24 L. Ed. 235; *Wessell v. United Mattress Machinery Co.* (opinion of this court just handed down) 139 Fed. 11. The claim must be restricted to the mechanism which causes the movement, subject, of course, to the rule of equivalents, which operates liberally in favor of the grantee where the patent is primary in nature, making a distinct advance in the progress of the art; and this patent, in our opinion, is of that character. When we examine the mechanism, we find in the appellant's machine described in the patent a rocking or tilting device, and in the appellees' a lifting and dropping device. The appliances are essentially different. They do different things in distinct ways. The one rocks or tilts the mold plates, the other alternately lifts and drops them. It is true the tilting motion causes the mold plates to move relative to one another in line with the length of the mold, which is just what the lifting and dropping motion does; but are we justified in holding that these two essentially distinct devices are equivalents, simply because the ultimate result, namely, the movement of the mold plates relative to one another in line with the length of the mold, is the same? We think not, for that would be construing the claim so as to cover the movement alone and not the mechanism producing it. It would be virtually giving a patent for the result, regardless of how reached.

2. Claims 1, 6, and 9 of patent No. 476,038 read as follows:

Claim 1: "In a machine for making crayons, carpenters' chalk, or other like articles, the combination of an upwardly and downwardly movable mold plate having downwardly discharging mold formation with an actuating cam, said cam engaging with said mold plate and thus raising it and then disengaging itself therefrom, substantially as set forth."

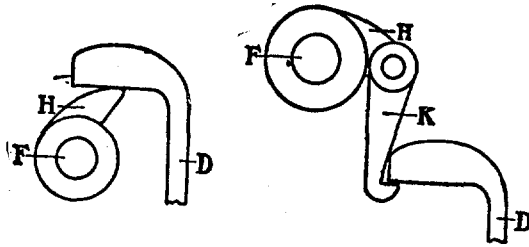
Claim 6: "In a machine for the manufacture of crayons, carpenters' chalk, or other like articles, the combination, with a number of cams, the projecting portion of one cam alternating with the depressed portion of the next cam, of a number of mold plates respectively having engagements with said cams, substantially as set forth."

Claim 9: "In a machine for the manufacture of crayons, carpenters' chalk, or other like articles, the combination of a mold plate frame provided on its opposite sides with shoulders, a series of mold plates having their opposite extremities engaging with said shoulders, and two rows of rotary cams respectively engaging with opposite extremities of said mold plates, the projecting portions of alternate cams of each row being located spirally on a pitch with respect to each other, the projecting portions of companion cams of the two rows being located substantially in the same horizontal plane, substantially as set forth."

These are for the mechanism which alternately lifts and drops the mold plates, and, after stripping the crayons free, jars them out. Of course, the use of a sudden shock or jar to loosen a molded article is old. In the record it appears that the appellant at one time used a machine called the "Waltham machine," in which the mold plates were drawn out by hand, and, being held over a tray, struck with a mallet in order to jar the crayons loose. But the machine covered by this patent, which automatically jars the mold members so as to loosen and discharge the crayons, was both novel and patentable. For the purpose mentioned the appellant used a rotary cam, which alternately lifted and dropped the mold plates. In the specification it was stated that:

"The leading features of this invention comprise mechanism which operates the mold plates in an upward and downward movement, said mold plates having downwardly discharging mold formation, the arrest of such downward movement adapted to cause the loosening or discharge of the crayons and spring mechanism which causes the said mold plates to descend in their said downward movement with speed and force over their gravity tendency, so as to insure certainty in the loosening or discharge of the crayons."

The defendant's machine, as first used, described in patent No. 658,680, granted September 25, 1900, on an application filed March 15, 1900, also used a rotary cam to lift and drop the mold members, but the mold members were arranged in an annular, instead of a rectangular, frame. Later (whether for the purpose of avoiding a charge of infringement or to improve the machine it is unnecessary to discuss) a rock shaft with a hook was substituted for the rotary cam. In our opinion, the appellees could not avoid the effect of the appellant's patents by arranging the molds in rings instead of rectangles. They used sectional molds just as the appellant, their machine, employing the same actuating cam, moved the mold members relative to one another in the line of the length of the mold, stripping the crayon from the mold members, and by the same sort of a jar, secured by lifting and dropping the mold members, shook the crayons loose. Thus by an immaterial change the appellees sought to secure all the benefit of the appellant's inventions. This could not be done. Even if the arrangement of the molds in rings instead of rectangles was an improvement, the appellees could not obtain the benefit of it without first obtaining the right to use the original inventions. *Morley v. Lancaster*, 129 U. S. 263, 278, 9 Sup. Ct. 299, 32 L. Ed. 715. Subsequently, instead of using the rotating cam, a rock shaft with a hook was substituted for the purpose of lifting and dropping the mold members and thus jarring the crayons loose. We are satisfied from a careful examination of the lifting mechanism of these two machines that the rock shaft with a hook is no more than a mechanical equivalent for the rotating cam. In one case the rotating cam, engaging with the mold member, lifts it; in the other, the hook attached to the rock shaft, which operates as a cam, engages with the mold member. The similarity of these devices, their essential equivalency, is illustrated in the following cuts. The first may be taken as representing the cam device, the second, the hook device:



In the latter, the projection, H, on the rock shaft, F, indirectly lifts the bracket, D, of the mold member by the use of the hook, K. In the former, the same projection, H, now regarded as a part of a cam, raises the mold member, D, by directly engaging with it.

We have had frequent occasion in this court to pass upon the equivalency of mechanical devices, and we have never held that so slight a change as that indicated above in one of the parts of a machine would deprive its owner of the benefit of his patent. *Columbus Watch Co. v. Robbins*, 64 Fed. 384, 12 C. C. A. 174; *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 101 Fed. 716, 41 C. C. A. 627; *McCormick Harvesting Mach. Co. v. Aultman & Co.*, 69 Fed. 371, 16 C. C. A. 259, 274; *Bundy Mfg. Co. v. Detroit Time Register Co.*, 94 Fed. 524, 36 C. C. A. 375, 391; *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 101 Fed. 716, 41 C. C. A. 627, 632; *Dowagiac Mfg. Co. v. Superior Drill Co.*, 115 Fed. 886, 53 C. C. A. 36, 54; *Eames v. Worcester Polytechnic Institute*, 123 Fed. 67, 60 C. C. A. 37, 43.

These claims are, in our opinion, good, and are all infringed. With respect to them the decree below is reversed, and the case remanded for further proceedings not inconsistent with this opinion. As to claim 2 of patent No. 476,051, the decree is affirmed.

GENERAL ELECTRIC CO. v. YOST ELECTRIC MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. May 24, 1905.)

No. 149.

1. PATENTS—INVENTION.

Merely making in one piece what was before made in two does not constitute patentable invention, nor does it because of the fact alone that the one-piece device is cheaper or more durable, when such results are merely such ordinary consequences of dispensing with joints as would naturally be anticipated by a workman.

2. SAME—NEW FUNCTION.

The assertion of a new function or effect, to give patentability to a device, should only be sustained upon proof of novel or unexpected properties or uses capable of producing novel results.

3. SAME—INSULATING LINING FOR LAMP SOCKETS.

The Painter patent, No. 718,378, for an insulating lining used in incandescent lamp sockets and a process of making the same, so far as relates to the claims covering the product, is void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 131 Fed. 874.

Charles Neave and Richard N. Dyer, for appellant.

Marcellus Bailey, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The court below reached the conclusion that "complainant's device consists merely in making in one piece that which was formerly made in two parts, and performs no new function"; and that "the production of a seamless insulating lining having a shoulder intermediate its length required nothing more than the knowledge of the trained engineer or workman." The correctness of this conclusion is challenged on the following grounds: "The fact that Painter's lining is made in one piece is only incidental. The important fact is that Painter's lining is made without open seams or breaks exposing the metallic shell to electrical contact from the inside, * * * the important thing being the continuity of the insulating barrier," which introduced "a new construction, involving a new function," dependent upon "the discovery that a thin sheet-like tube of insulating fiber could be subjected to this character of compression," etc.; and that this was not obvious, but "involved the exercise of the inventive faculty." That the contention as to the one-piece lining is not the one insisted on by appellant in the Patent Office appears from the following statement of his attorney after the rejection of some 18 claims by the examiner:

"It is submitted that applicant is entitled to such claims as will protect him against the use by infringers of any one-piece lining of insulating material of substantially the character described, which is provided with a shoulder intermediate the ends to fit the shoulder of the shell, it being immaterial whether the lining be formed from a closed cylinder or from a flat strip such as that shown in the Perkins patent."

This construction would cover every one-piece lining of the confessedly old material if made in the patented shape, whether it did or did not have seams. That this construction was not dependent upon a new discovery is proved by the Taylor patent of 1885, where the patentee, describing his process of manufacturing vulcanized wheels, says:

"Vulcanized fiber wheels have heretofore been largely used for various purposes in machinery. * * * My present invention consists primarily in making the rollers by cutting the blanks from a sheet or block of the material and then forming the wheel under heavy pressure in a die of the desired shape. I have discovered that by this method the material behaves very well, and 'flows' in the die so as to fill the die completely and assume permanent lasting shape."

The patentee of the patent in suit says:

"I have discovered that it is possible to work insulating material—such as fiber, hard rubber, etc.—by a treatment that is not applicable to metal, and to work a simple cylinder into fairly complex forms by dies suitably shaped."

That this statement is erroneous is proved. The identical process in making cartridge shells is described in the Salisbury & Wells patent of 1875, and in practically the identical language of the patentee herein.

The single question herein is whether this new construction "involved the exercise of the inventive faculty." The prior art shows and the patent admits that such a lining in two pieces was old. That it does not involve invention merely to make such a lining in one piece is well settled. *Howard v. Detroit Stove Works*, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039; *Standard Caster & Wheel Co. v. Caster Socket Co.*, 113 Fed. 162, 51 C. C. A. 109. Nor would the mere fact that the one-piece device was cheaper or more durable constitute invention when such results were merely such ordinary consequences of dispensing with joints as would naturally be anticipated by the workman. *Manufacturing Co. v. Holtzer*, 67 Fed. 907, 15 C. C. A. 63. In *Standard Caster & Wheel Co. v. Caster Socket Co.*, *supra*, the court says:

"In *Manufacturing Co. v. Holtzer*, 67 Fed. 907, 15 C. C. A. 63. the Circuit Court of Appeals for the First Circuit held that the right to improve on prior devices by making solid castings in lieu of attached parts is so common and universal in the arts as to cast a heavy burden upon any one claiming patentability for such an improvement to show special reasons in support of his claim."

Counsel for complainant, however, invokes the application of the rule that invention may be predicated upon the discharge of a new function, and he repeatedly asserts that the new one-piece construction did involve a new function. It is nowhere distinctly stated what this new function is, but from expressions found in complainant's brief it would seem to be based on the fact that the lining being free from open seams prevented the wires from coming in electrical contact with the outer shell. This was not new, because the old one-piece lining effected the same result in the same way, the only difference being one of shape. It is not always clear what is meant by the use of this elastic and indefinite word "function." But it is thought that the assertion of a new function or effect should only be sustained upon proof of novel or unexpected properties or uses capable of producing novel results. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952. We are not aware of any case where a claim for a new function has been sustained in the absence of such element of novelty or unexpectedness. We concur in the conclusion of the court below that such well-understood and obvious necessary effect of the elimination of joints as the prevention of electrical contact at the point where there was a joint is in no sense a new function or novel use, and cannot be invoked to sustain the broad claims of this patent, which merely covered the making in one piece from old material by means of an old process the old shape formerly made in two pieces, without thereby disclosing any new discovery or accomplishing any novel result.

The decree is affirmed, with costs.

KEASBEY & MATTISON CO. v. PHILIP CAREY MFG. CO. et al.

(Circuit Court, S. D. New York. July 6, 1905.)

1. PATENTS—EVIDENCE OF INVENTION—PUBLIC ACQUIESCENCE.

Acquiescence by the public in a patent for almost its entire life, while not conclusive, is persuasive evidence of its validity, and is entitled to great consideration, somewhat approximating that accorded to a prior adjudication.

2. SAME—ANTICIPATION.

Anticipation is not shown by broad and general language in prior patents, although, interpreted in the light of the later invention, it may be said to include the same.

3. SAME—AMENDMENT OF APPLICATION.

An applicant for a patent has the right to alter and amend his specification to conform to the state of the art as the facts are developed in the Patent Office, so long as he does not, by enlarging its scope, appropriate prior inventions, or any that have in the meantime gone into public use; and he may also amend his claims to conform more closely to the specification and drawings.

4. SAME—INFRINGEMENT—COVERING FOR STEAM PIPES.

The Hanmore patent, No. 545,843, for a nonconducting covering for steam pipes, etc., made of a composition which includes as its nonconducting element a major proportion of carbonate of or calcined magnesia and a sufficient quantity of fibrous material, such as asbestos fiber, to bind it together, discloses invention, and was not anticipated nor rendered void by prior public use. Also *held* infringed.

In Equity. Suit for infringement of patent. On final hearing.

See 113 Fed. 432.

For opinion denying motion for preliminary injunction, see 110 Fed. 747.

William A. Jenner and Edward K. Jones, for complainant.

William Houston Kenyon, William C. Witter, and Edmund L. Mooney, for defendants.

COXE, Circuit Judge. This is an equity action for the infringement of letters patent No. 545,843, granted July 20, 1886, to Hiram H. Hanmore, for an improvement in nonconducting coverings or jackets for steam pipes, steam boilers and other heated vessels or conduits. The invention was conceived in the autumn of 1885 and the application was filed January 19, 1886. Pending the litigation, July 20, 1903, the patent expired.

The complainant's title is not disputed. The specification asserts that prior to the invention steam pipes, etc., were commonly covered with nonconducting material in order to prevent the radiation of heat outwardly and to conduce to the economical operation of apparatus comprising such elements. The patentee found that carbonate of or calcined magnesia is one of the best nonconducting materials which can be made use of for such purposes and the invention relates to coverings which include carbonate of or calcined magnesia as an essential element. The specification continues as follows:

"The invention consists in a nonconducting covering or jacket composed of molded tiles or sections of a composition which includes as its nonconducting

element a major proportion of carbonate of or calcined magnesia, and which also includes a sufficient quantity of fibrous material—such as asbestos fiber—to bind the magnesia together, the magnesia in any case forming of itself the principal nonconducting element of the composition.

"The invention also consists in a nonconducting composition composed of a major proportion of carbonate of or calcined magnesia, which forms of itself the principal nonconducting element of the composition, and a minor proportion of asbestos fiber sufficient to form a binding material for the composition and prevent the same from cracking."

The specification states further that the invention may be embodied in tiles or sections of any shape suited to the exterior of any vessel or pipe which they are intended to cover. The drawings show these tiles in flat and semicircular form, their essential element being carbonate of or calcined magnesia. They may also comprise any suitable fibrous material, such as animal hair, wool and asbestos, which will bind the magnesia together and protect it against fracture. A small quantity of plaster of paris may also be employed in the composition, but the proportions of magnesia, fibrous material and plaster of paris may be widely varied for different purposes.

An example of a composition well adapted to the purpose is given as follows: Carbonate of or calcined magnesia, 75 parts; asbestos fibre, 20 parts; plaster of paris, 5 parts. This composition may be mixed into a paste by stirring and then molded into tiles or sections. The specification states further:

"I am aware that it is not new to employ magnesia in small quantities in a nonconducting composition, the magnesia being combined with other ingredients—such as steatite and silicate of soda—in order to produce a composition which, when applied to the surface to be covered, will harden into a stone-like casing or shell. In such use the magnesia does not form of itself the principal nonconducting element of the composition, and letters patent to Merrell, No. 170,099, dated November 16, 1875, describe the use of such a composition to form a hard impervious shell or stone-like casing around a nonconducting covering whose principal ingredient is sawdust, hair, rice hulls, or other fiber.

"My composition, whether applied by placing it over the surface of a pipe or boiler, or by moulding it into tiles or sections, includes as its principal element a major proportion of magnesia, and this magnesia forms of itself and is depended on to form the principal and important nonconducting material of the composition. Not only is a composition of about the proportions set forth by me very desirable, because of its great nonconducting character, but it is furthermore desirable because of its extreme lightness. It is, therefore, easily applied with little labor, and does not add materially to the weight of the pipe or other vessel covered by it."

There are three claims, all of which are involved. They are as follows:

"(1) A nonconducting covering or jacket composed of molded tiles or sections, of a composition which includes as its nonconducting element a major proportion of carbonate of or calcined magnesia, substantially as herein described.

"(2) A nonconducting covering or jacket composed of molded tiles or sections of a composition which includes a major proportion of carbonate of or calcined magnesia, and which also includes a sufficient quantity of fibrous material to bind the magnesia together, the magnesia forming of itself the principal nonconducting element of the composition, substantially as herein described.

"(3) The nonconducting composition herein described, consisting of a major

proportion of carbonate of or calcined magnesia, which forms of itself the principal nonconducting element of the composition, and a minor proportion of asbestos fiber sufficient to bind the magnesia together, as herein set forth."

The nonconducting covering of the patent has been manufactured and sold by the complainant and its predecessors, no licenses to others to manufacture having been granted by them.

The defenses are lack of novelty and invention, anticipation, non-infringement, ambiguity and insufficiency of specification.

Hanmore's invention for covering steam pipes and other vessels which radiate heat consists of a nonconducting composition, the major proportion being carbonate of or calcined magnesia, which forms the principal nonconducting element, and a minor proportion of asbestos fiber sufficient to bind the magnesia together. The nonconducting jacket is formed into molded tiles or sections calculated to fit the vessel to be protected. The utility, economy and efficiency of the invention were at once recognized by engineers, architects and the public, and it went into immediate and general use, the output increasing largely from year to year. For 14 years the recognition of the patent by the public and acquiescence in its claims was unbroken and complete. If this were due solely to the conviction that the patent could not be successfully infringed it furnishes persuasive proof of its validity. Though such acquiescence is not conclusive yet, when it exists during nearly the entire life of the patent, it should receive great consideration somewhat approximating that which is accorded a prior adjudication. *National Typo. Co. v. N. Y. Typo. Co.* (C. C.) 46 Fed. 114; *Sargent v. Seagrave*, 2 Curt. 553, Fed. Cas. No. 12,365.

No one molested the complainant in the enjoyment of the patent; the defendants were the first to infringe and their infringement did not begin until 1900. As to these facts there can be no question and they are not disputed, but it is urged in palliation of their legal effect that the patent would have been disregarded and infringed if rival manufacturers could have obtained carbonate of magnesia, but that it was impossible to do this as the complainant held a complete monopoly in its manufacture. The record on this subject is exceedingly voluminous and is largely made up of incompetent, irrelevant and hearsay testimony, opinions of the witnesses and assertion not supported by facts. It is, however, probably true that the complainant, by reason of its long established business, its exceptional facilities for the manufacture of magnesia and its large financial resources might have made it difficult for any attempted competition to succeed. The fact that complainant was undisturbed in its enjoyment of the Hanmore invention was due partly to the difficulty in obtaining magnesia, partly to the Keasbey patent and partly to the Hanmore patent. It is not possible to ascertain with precision to what extent the latter patent acted as a deterrent, but that it was the principal factor may fairly be presumed. The complainant denies emphatically that it possessed a monopoly in the production of magnesia and asserts that such a monopoly is and was impossible, for the reason that the processes of manufacture are well known to chemists and the raw material exists in

almost unlimited quantities. The record abounds in statements by the witnesses that they were morally certain, absolutely convinced, and had been repeatedly informed that the complainant would not furnish magnesia for steam pipe coverings and that this fact was "generally known in the trade." One of the witnesses says:

"I believe this monopoly is no more separable from the firm of Keasbey & Mattison, as referred to in years past, than, for instance, is the smell of fish from a fish market."

Another says, referring to the Hanmore patent:

"True, but they considered it of some consequence. Therefore, they would not sell to the trade carbonate of magnesia. They wanted the monopoly of 85 per cent. carbonate of magnesia steam pipe and boiler covering. They wouldn't let anybody else sell it. X-Q. How do you know that if you never made application? A. I am absolutely sure of it, just as sure as I am sitting here in this chair. I am absolutely sure of what I speak. It has been ingrafted into me for so many years that I know it. I am absolutely sure of it."

If the record contains an instance where a responsible buyer made application to complainant to sell him magnesia and was refused the court has overlooked the testimony. There was nothing to prevent other manufacturers from producing carbonate of magnesia by the kieserite process, or even by the dolomite process, except the expense of erecting the plants, and the fact that they did not do so, in view of the large profits which would have resulted, must be attributed largely to the fact that they knew of the existence of the Hanmore patent and respected the complainant's rights thereunder. The fact that the complainant was a large producer of magnesia might have made it unprofitable for small manufacturers, especially in the immediate vicinity, to compete, but the proposition that it was impossible to infringe is based upon imagination rather than upon proof. The defendants' own action is in itself a refutation of their theory. The court is convinced that others would have found means to practice the invention if no patent had existed, but not to the same extent as if magnesia had been cheaper and more easily obtainable. In other words, notwithstanding the large cost it would have been profitable to make the Hanmore covering had no patent been granted, but the existence of the patent rendered such an enterprise an exceedingly dangerous experiment. In short, the acquiescence shown, though somewhat impaired by the facts stated, is entitled to weight in determining the validity of the patent.

The invention is not for a process but for a composition by which magnesia was for the first time practically utilized as a pipe covering. This was done by a mechanical mixture of the magnesia with fibrous material, asbestos being preferred, which binds the magnesia into a durable mass making it available as a heat insulator. This mass is, in no sense, a chemical compound. Although the shape of the sections or tiles is no part of the invention they are shown molded in suitable shapes for application to boilers and pipes. In Hanmore's composition the magnesia constitutes the principal nonconducting element and is the major proportion.

In the example shown the magnesia predominates the other elements by a percentage of 75 to 25. The combination produces a heat insulator which has marked advantages over the others previously in use. It is light, compact and has great nonconducting power; it is simple in construction and easy of application. There is nothing difficult or ambiguous about the patent, its language perfectly plain and simple. If this fact be kept in view many of the difficulties suggested by the defendants will disappear.

It will shorten the discussion if it be conceded at the outset that pipe coverings were old in 1885, with fossil-meal, lime putty, clay, plaster of paris and paper pulp as the nonconducting material and the properties of magnesia as a nonconductor were well known. The principal anticipations relied on are the Nagel patents, the Brigham patent, the earlier Hanmore patent and the patent and publications of Ordway. The prior art does not show the ingredients in the proportion shown in the patent in suit unless the alleged prior use by Andrews is established.

The English and United States patents to Nagel, of January, 1884, are for "improvements in the manufacture of fireproof and waterproof plates" intended to be used as roof coverings to prevent the danger of fire in theaters and other analogous purposes. The patents undoubtedly show a fire proof mass in which asbestos may be mixed with magnesia, but in different proportions and for entirely different purposes. It is thought that nothing contained therein would suggest to the skilled mechanic the steam pipe covering of the Hanmore patent.

The Brigham patent of May, 1884, is for an improved asbestos compound and articles made therefrom. It is intended to take the place of wood and iron in the arts, it is quite hard and is fire and water proof. The drawing shows it applied to the roof of a railway freight car, the "boards" being rabbeted and battened so as to create a water proof joint. The patentee says that "a car or other roof composed of boards, a, a, will be fire and water proof and very durable." The compound is made by incorporating with asbestos, alone or with other fiber, oxide of magnesia in about equal parts with the asbestos and thereafter applying chloride of magnesium to temper and bring the same into a plastic state.

The Hanmore patent of April 15, 1884, is for a "nonheatconducting vessel." The drawings show the invention as embodied in an ice-water cooler. The specification says:

"The invention is applicable to ice-water pitchers, as well as ice-water coolers, and to ice-cream freezers and vessels for carrying and delivering ice-cream, to ice boxes and refrigerators, and, generally, to all vessels the contents of which are artificially cooled."

The nonconducting material is composed of a layer of raw-silk waste wrapped around the vessel, a coating of calcined or carbonate of magnesia plastered on the outside of the silk waste, a superimposed layer of paper, a layer of felt applied outside the paper, a second layer of paper outside the felt and an inclosing case. It is only necessary to read the claims to perceive that this complicated combination is not the simple covering of the patent in suit.

The Ordway patent, of January, 1885, is for a nonconducting composition for refrigerators and safes, but it may be introduced into the floors and walls of buildings to deaden sound and it may be used also as a covering for pipes. When used for the latter purpose the composition, which consists of a combination of granulated cork and water glass, is molded into a pipe having a greater interior diameter than the exterior of the steam pipe to be covered. When the halves of the composition pipe are dry and hard the inner surface is plastered with fossil meal or magnesia made into a thick paste with water. In other words, there is a layer of magnesia or fossil meal next the steam pipe and outside of that another layer made of granulated cork and water glass. The Ordway publications add little to the controversy except that he recognized in 1885 the efficiency of magnesia as an incombustible non-conductor, but about this there is no dispute. Every chemist knew that magnesia was a nonconductor but the difficulty was to utilize and apply it as a practical covering for steam pipes.

The foregoing are unquestionably the defendants' best references and it is evident that none of them anticipates. Neither the fire-proof and waterproof plates of Nagel, the roof boards of Brigham, the water-cooler lining of Hanmore, nor the magnesia plastered cork pipe of Ordway infringes the claims of the patent in suit. There is broad language in each which, interpreted in the light of subsequent events, may be said to include the Hanmore covering, but this is true in almost every patent litigation. Brigham, for instance, says:

"I do not desire to limit my invention to the exact proportion of asbestos and magnesium or of paper pulp as the same may be changed and produce articles of undoubted value as to durability and fire and water resisting qualities."

But a valuable patent cannot be invalidated and rights acquired under it destroyed by such general statements. As well might one attempt to anticipate the motor car of to-day by the statements found in the fourth verse of the second chapter of Nahum.

In *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33, the Supreme Court says, at page 555 of 11 Wall. [20 L. Ed. 33]:

"Mere vague and general representations will not support such a defense, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use."

Notwithstanding the specimens produced by the defendants it is thought that it is not possible to construct the pipe covering of the Hanmore patent by following the directions of the Brigham specification, or, indeed, of any of the patents in evidence. Hanmore appears to have been the first to construct a nonconducting jacket for steam pipes and boilers, the major proportion being carbonate of or calcined magnesia. His covering at once became popular and a great business was built up under the patent. It is true that, tested by all the after-acquired knowledge, the forward step taken by Hanmore seems a simple one, but that it involved invention to take this step is made clear by an application of the rules

so often enunciated in similar cases. *Cantrell v. Wallick*, 117 U. S. 689, 695, 6 Sup. Ct. 970, 29 L. Ed. 1017; *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; *Magowan v. Packing Co.*, 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781; *Smith v. Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952. But little need be said of the attempts to prove prior use. They are supported by testimony with which the courts having jurisdiction of patent causes, are exceedingly familiar. Of this testimony the Supreme Court says:

"In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the cotton gin of Whitney to the one under consideration, has been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny." *Barbed Wire Patent*, 143 U. S. 275, 284, 12 Sup. Ct. 443, 447, 36 L. Ed. 154.

The Andrews prior use, which depends largely upon the testimony of John Andrews, took place in Boston, in 1878, 25 years prior to the giving of his testimony. He was then engaged in the business of making boiler and steam pipe coverings, having begun the business the previous year. So, that, if his testimony is to be accepted as accurate, at the age of 32, and at the commencement of his business career as a manufacturer of steam pipe coverings, he had knowledge of the Hanmore combination. The question naturally arises, Is it likely that if he had this "potentiality of becoming rich" within reach he would have permitted it to slip from his grasp? No physical exhibit of the Andrews covering is shown except a so-called sample, which, it is asserted, was placed in a drawer of Andrews' desk in 1878 and remained there until 1903. It is unnecessary to attempt a minute analysis of this testimony. It presents the old situation which arises where human memory is relied upon to establish unimportant and trivial events and circumstances occurring a quarter of a century before. Andrews and the other witnesses, who agree with him in some more or less unimportant features, may be correct, but on the other hand they may be mistaken. The court is convinced that they are not willfully mistaken, but the inherent improbability of the testimony in its entirety, and the fact that Andrews' memory is shown to be exceedingly defective in other matters, compels the court to the conclusion that no impartial mind can be convinced of the truth of this testimony beyond reasonable doubt.

What has been said regarding the Andrews prior use applies with equal or greater force to the so-called Mills and Crabbs prior use.

It is said that the patent as issued is for a different invention from

that for which application was made. Unquestionably the description and claims were changed to meet the criticisms and suggestions of the officials of the Patent Office, but this is true of a great majority of patents.

Hanmore did not change his invention; he simply made his description more definite and narrowed the scope of his claims to meet the references cited by the examiner. He was clearly within his rights in making these changes. Few patents could survive if the courts should adopt the rule contended for by the defendants. The changes here made are of the same general character that appear in fully half the patents granted. An applicant has a right to alter and amend his specification to conform to the art as the facts are developed in the Patent Office so long as he does not by enlarging the scope of his claims appropriate prior inventions or that which has in the meantime gone into public use. In the present case there were no intervening rights. An amendment to the claims suggested by the specification and drawings is permissible. *Hobbs v. Beach*, 180 U. S. 383, 396, 21 Sup. Ct. 409, 45 L. Ed. 586.

Other criticisms and objections urged by the defendants have been examined, but in view of what has been already said it is thought that further discussion is unnecessary.

Infringement by the defendants, the Philip Carey Manufacturing Company and the American Magnesia Covering Company, is abundantly proved.

It was stated at the argument by the court that as to the other defendants the bill would be dismissed unless complainant's counsel referred the court to some evidence that they had personally infringed or had, in their individual capacity, promoted the infringement of the two corporations named. No such evidence has been furnished and as to all the other defendants the bill is dismissed with costs in each instance, consisting of the usual docket fee and such legal disbursements as were necessarily incurred by each defendant respectively in presenting his defense. *Hutter v. De Q. Bottle Stopper Co.*, 128 Fed. 283, 286, 62 C. C. A. 652.

The complainant is entitled to a decree for an accounting upon all the claims of the Hanmore patent against the two corporations above named, with costs.

COLUMBIA WIRE CO. v. KOKOMO STEEL & WIRE CO.

(Circuit Court, D. Indiana. March 22, 1904.)

No. 10,108.

1. PATENTS—INFRINGEMENT—IDENTITY OF COMBINATON.

A patent for a combination in a machine of three wheels, each of which is indispensable to the operativeness of the machine, is not infringed by a machine, also having three wheels, but one of which is an idler, and can be dispensed with at pleasure without affecting the working of the machine; such machine being in effect a two-wheel combination.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 370-373.]

2. SAME.

The Bates patent, No. 365,723, for a wire barbing machine, construed, and *held* not infringed.

In Equity. Suit for infringement of letters patent No. 365,723, for a wire-barbing machine, granted to Albert J. Bates June 28, 1887. On final hearing.

John R. Bennett and Bakewell & Byrnes, for complainant.
Thomas A. Banning (Ephraim Banning, Samuel W. Banning, Walker Banning, and C. C. Shirley, of counsel), for defendant.

ANDERSON, District Judge. Complainant alleges infringement of a combination patent. It consists of a combination of three butterfly wheels, each one of which is indispensable to the effective working of the combination. No one of the elements of the combination is new. Two of the wheels, in arrangement and function, are found in machines prior to the complainant's patent. The novelty in complainant's patent, if there be any patentable novelty in it, consists in adding to these two former wheels a third butterfly wheel, so arranged on a yielding arm as to serve the double function of turning the direction and indicating the tension of the wire. Defendant's contrivance also consists of a combination of three butterfly wheels, so arranged as to accomplish the same result as complainant's and also to work automatically. It is shown by the proofs, and it was demonstrated by an exhibition of one of the defendant's machines in operation on the hearing, that defendant's contrivance would work as rapidly and effectually when one of its butterfly wheels, the middle wheel, is omitted. This middle wheel is an idler, and, as shown upon the hearing, is not indispensable to the proper and effectual work of defendant's contrivance.

Complainant's counsel, on the hearing, freely and frankly admitted that defendant's contrivance, when operated without the middle wheel, is not an infringement of the complainant's patent. The question, then, is: Is a combination of three wheels, one of which is entirely dispensable, an infringement of a patent on a three-wheel combination, no one of which can be dispensed with? Or, in other words, is a three-wheel arrangement, one of the wheels of which may be omitted at will without affecting the working principle or effectiveness of the combination, in reality a two or three wheel combination? I am of the opinion that such a contrivance is really a two-wheel combination, and must be so considered, and that it does not infringe complainant's patent.

The bill should be dismissed for want of equity, and it is so ordered.

RYAN v. METROPOLITAN JOCKEY CLUB et al.

(Circuit Court, E. D. New York. June 11, 1904.)

PATENTS—INFRINGEMENT—STARTER'S GATE FOR RACE TRACKS.

The Ryan patent, No. 553,740, for a starter's gate for race tracks, claim 1, construed in the light of amendments made when before the patent office, and *held* not infringed.

In Equity. This cause comes here upon pleadings and proofs, complainant praying an injunction and accounting for alleged infringement of U. S. Letters Patent 553,740, issued January 28, 1896, to Patrick Ryan for starter's gate for race tracks.

W. P. Preble, for complainant.

Briesen & Knauth, for defendants.

LACOMBE, Circuit Judge. The object of the invention, as stated in the specifications, is "to provide a practical device for the use of the race starter which will afford a visible barrier across the race track until removed by the starter, which is done instantly when a fair start is had, so that the riders of horses on the track as they pass the starter's stand can see the barrier ahead of them, and if it is not moved will be warned to stop, which they can do before reaching the barrier, which is in the form of a gate, hung so as to rock across the track." For the proper support of the barrier two pairs of posts are vertically erected, one pair at each side of the race track, and at a correct distance in advance of the starter's box. The barrier is arranged, by mechanism which need not be here described, so as to rotate upwardly, and thus be thrown out of the way more quickly than if it were moved sideways, or rose in two arms from the middle, as railway gates usually do. The specification says:

"The gate or transverse barrier is preferably formed of strong canvas, but may be made of any other available material having pliability and necessary strength. The gate may be formed of imperforate material, or have series of spaced and marginally strengthened perforations produced in it; but it is deemed essential that the gate, if formed of textile material, be strengthened with a rope binding and also with intermediate ropes. The length of the gate is so proportioned that a space will be afforded at each end between said ends and the pair of front posts whereon the gate is hung."

The claim which complainant avers to be infringed is the first, reading as follows:

"(1) In a horse-starting apparatus for race tracks, the combination, with supports at opposite sides of the track, of a gate having its end bars pivoted at one end to the supports, so as to swing down between the said supports, springs for normally holding the gate swung up, latches for holding the gate depressed between the supports, and means for releasing the latches, substantially as described."

The defendants have two supports, one on each side of the track. At the top of each support is pivoted an arm, which swings in a plane parallel to the direction of the track. From one arm to the other are stretched two narrow strips of canvas, which are united to each other every five feet by connecting cross pieces of the same material. It may be said to be a two-bar gate of tape-like canvas reduced to its simplest form. By the use of appropriate mechanism it may be released, and is then swung up out of the way.

Two patents which have been put in evidence by the defendants concededly anticipate the patent in suit. One is No. 481,260, August 23, 1892 (application filed December 30, 1891), to Edwin Forbes for apparatus for starting races, which consists of a light fence or gate suspended from a swinging carrier, which hangs

across the track, and can be suddenly lifted clear out of the way. The other is No. 481,835, August 30, 1892 (application filed December 18, 1891), to James J. Sullivan for a device for starting horse races, which consists of a "panel or netting affording a perfect but harmless barrier" when down, and which can be instantly swung forward and upward out of the path of the horses. Complainant, however, by satisfactory evidence has carried the date of his invention back of both these applications.

It seems unnecessary to discuss any question except that of infringement. One noticeable difference between the two structures is that the patent calls for a gate essentially strong, which when down would operate as a barrier should a jockey neglect to check or turn his horse before reaching it, while the defendants' structure is flimsy, and adapted to part at the impact of a horse's body. Moreover the claim declared upon contains words of limitation, which cannot be ignored. When plaintiff's application was under consideration in the patent office, the patents to Forbes and to Sullivan were cited against it, and various amendments were suggested, in order so to qualify the claims as to avoid the references. It is no doubt true, as complainant's counsel contends, that Ryan is not to be cut off from showing that his invention antedated those references, because when they were cited against him he did not announce to the examiner that he was earlier, and did not ask to have an interference declared. Nevertheless whatever changes he elected to make in his claims in order to secure their issue without the delay and expense of an interference he must now stand to.

Claim 1 was rejected when it read:

"(1) In a horse-starting apparatus for race tracks, the combination, with supports at opposite sides of the track, of a pivoted and spring actuated gate carried by the supports, latches for holding the gate depressed, and means for releasing the latches to permit the gate to swing upward out of the way, substantially as described."

The applicant thereupon amended it so as to read as quoted above, in which form it was issued. When the two paragraphs are compared, it is found that the only distinctive changes are that the end bars are pivoted at one end to the supports, and that they are arranged "so as to swing down between said supports," and allow the gate to be held "between the supports" when depressed. Had the applicant insisted that he was the first to apply this device as an aid to the starter, he would no doubt have secured the allowance of his claim as first made, without any restriction as to manner of pivoting nor as to location of gate, whether between, ahead of, or behind the supports. But he elected to make the change, and must abide the consequences. In defendants' apparatus neither the canvas barrier nor the arms which carry it swing down between the supports. Their apparatus, therefore, lacks an element which the patentee has made an essential of the claim sued upon.

The bill is dismissed, with costs.

ATCHISON, T. & S. F. RY. CO. v. GEE et al.

(Circuit Court, S. D. Iowa, E. D. July 10, 1905.)

INJUNCTION—VIOLATION—PICKETING BY STRIKERS.

The maintenance of a system of picketing by men out of employment by reason either of a strike or lockout, the purpose and effect of which is to annoy and intimidate men working for their former employers by keeping a picket of men around or at the approaches to the places where such workmen are employed, who obstruct the approaches and use threatening or profane and vulgar language toward the workmen, is unlawful, and in violation of the rights of the workmen and their employer, and of an injunction against acts of intimidation toward such workmen, although no actual violence is used. Such picketing, when maintained for a year, cannot be justified on the ground that its purpose is to persuade the workmen to quit their employment or to ascertain who such workmen are.

In Equity. On motion to punish for contempt for violation of injunction.

Thomas R. Morrow, W. S. Hamilton, and Hughes & Sawyer, for plaintiff.

E. C. Webber and John E. Craig, for the accused.

McPHERSON, District Judge. Gus Hult, William Morley, Wm. Randall, and S. C. Neyer, four of the defendants, are before the court charged with being guilty of contempt, in that they have violated the restraining orders of this court. In the spring of 1904, differences arose between the company and some employes in its shops. A strike was threatened or probable, when the company discharged them, and from that time on there has been what by many is called a "lockout." Who is in the right and who is in the wrong as to this has not been the subject of inquiry.

Counsel on both sides agree, as do all informed men, that laboring men have the legal right to strike at will, with or without good reasons, singly, collectively, or as a union; and counsel also agree that the company had the legal right to discharge the men, one, many, or all, at any time, with or without good reasons, and without making the reason known. The rights of both the company and employes as to severing relations were and are reciprocal. The company can discharge employes at will, and employes can quit the company at will. Of course, if the contract of employment is for a fixed time, neither can breach the contract without being liable to a demand for damages; but no such claim has been made by either party, and, if it were, it could not be the subject of inquiry in this, a suit in equity, but would be only cognizable in an action at law for damages. That the employes have the legal right to quit or strike at pleasure, and the company the legal right to discharge at pleasure, simple as the proposition is, is too often forgotten. And that the employes have the legal right to organize and maintain a union is equally simple, but just as often forgotten by many. No court, federal nor state, nor, indeed, any informed man, longer denies the foregoing. And it is equally simple, obvious, and true that when one, many, or all the employes are out, either by

reason of a strike, discharge, or lockout, the positions thus made vacant no longer belong to those once filling them. But those positions belong to those, and those only, who may be thereafter voluntarily employed by the company. Those who are out singly, collectively, or by a union or organization, may seek to have the differences adjusted. This is not only so as a matter of sound reason, but Congress has recognized it as being so by the statutes of June 29, 1886 (Act June 29, 1886, c. 567, 24 Stat. 86 [U. S. Comp. St. 1901, p. 3204]), and June 1, 1898 (Act June 1, 1898, c. 370, 30 Stat. 424 [U. S. Comp. St. 1901, p. 3205]).

But, as broad as are the foregoing stated rights, neither can the company by any system, or irrevocable contracts, or force, or intimidation, require a man to continue his employment. It did not take a constitutional amendment nor an act of Congress to make either slavery or peonage indefensible in morals. And our laws, both state and national, upon the subject of peace, good order, good citizenship, a regard for the rights of others, the right of contract, as well as good morals, deny the right of all men to coerce by force, violence, or intimidation, or require a company or person to employ certain parties; and when one is employed, whether union or non-union, he has the right to work in peace and quiet. A man who does not belong to a union has the same rights, legal and moral, neither more nor less, as has a man who does belong to a union. His rights and his family are just as dear to him as are those of a union man. There are and can be no differences. And the company has precisely the same rights to employ nonunion men as union men, and the absolute legal and moral right to have its rights and property and its employes protected when it does elect for any reason to employ nonunion men; and when such rights are violated the company has the right to seek and obtain an injunction against the repetition of such violations. All the courts, English and American, federal and state, so hold. These questions are not debatable.

And yet, plain as are all the foregoing, if they had been recognized, this case would not have been brought. Not only so, but there would not have been the slightest occasion for bringing this case, had there been any sincerity and honesty of purpose by the local authorities to maintain peace and order. Intimidation, force, violence, and brutality were all winked at, because of the belief on the part of certain peace officers that they would be kindly remembered on future election days, instead of remembering that the great majority of the people of the city are law-abiding, and would reward those who would maintain peace and preserve order, to say nothing of the peace of mind arising from duty performed. The evidence shows that the parties in the employ of the company have been assaulted by the strikers for no offense, for no wrong, for no crime, but solely because they elected to work under terms mutually satisfactory. The accused stoutly deny any complicity. Employes have been denounced and called "scabs," and the most vulgar and profane names applied to them, for the sole reason that they elected to work, when work was offered to them of a satisfac-

tory character and at a price agreeable. The accused deny any complicity; but the proofs tend to show some of them guilty.

But as to one phase of the case there is no denial, but practically a confession, with the alleged and boasted right to practice it. A system of "pickets," for more than a year, around and near by places to the shops of the company, has been kept up by all the accused and others. The pretense of this picketing is the right to converse with the new employés and persuade them to quit, and the further pretense that they desire to see who are at work. This picketing is done by details of pickets, assigned by others; they taking turn. At all hours when men are going to and from work, morning, noon, and evening, the workmen must go through and by pickets, sometimes two, four, six, and more, at a place. At times the paths and walks are obstructed. At times the pickets are near by, making grimaces, and at times acting as if violence were intended, and at times uttering profanity and vulgarity. There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching. When men want to converse or persuade, they do not organize a picket line. When they only want to see who are at work, they go and see, and then leave, and disturb no one physically or mentally. But such picketing as is displayed in the case at bar by the evidence does, and is intended to, annoy and intimidate. The argument seems to be that anything short of physical violence is lawful. One man can be intimidated only when knocked down. But the peaceful, law-abiding man can be and is intimidated by gesticulations, by menaces, by being called harsh names, and by being followed, or compelled to pass by men known to be unfriendly. Perhaps such a man may not be a bully, but is frail in size and strength, or he may be a timid man; but such a man is just as much entitled to go and come in quiet, without even mental disturbance, as has the man afraid of no one and able with or without weapons to cope with all comers. The frail man, or the man who shuns disturbances, or the timid man, must be protected, and the company has the right to employ such.

The test of manhood, and the rights of man or property, is not to be measured by braggarts or bullies, or vulgarity, or profanity, and the saloons must not be the place where supposed rights are to be decreed, as the evidence in this case shows has been attempted many times by some of those on the strike. The evidence shows that many of the men out on the strike are peaceable and law-abiding men, who recognize all that I have said, and who have sought and obtained honorable employment, some in other lines of employment in the city, and some elsewhere; but several prefer the course of staying about engaged in the so-called picketing, by which they mean to harass, provoke, and intimidate those who prefer work to idleness, and those who prefer the shop to the doggeries. This is done by some who give their time to intimidating hotel and boarding house keepers for boarding the workingmen. Such law-breaking is to the great injury of the workingmen and to the company; and such law-breaking must be broken up, else our laws are

without force, and our courts and all in authority serve no useful purpose.

The accused were solemnly warned by the writ of this court June 1, 1904. Two of the defendants appeared in person, but without counsel. None of the other defendants appeared, although notified. Those two were admonished by the court, which they kindly received and thanked the presiding judge. They have gone to work for other parties. The four now accused did not appear, but claim that they were advised by the two who did appear that picketing was not only lawful, but would receive the approval of the court. I need only repeat what I said at the hearing, that no such sentiments were ever at any time or place uttered. Such defense is puerile. The one answer is that such statements are hearsay. Another answer is that no one could or should believe that laboring men should be "picketed," as have the employés of the company for more than a year. Another answer, and with which all lawyers and laymen will agree, that if the restraining order was too drastic, a motion to modify it would have been entertained, and if too radical would have been modified.

May 6, 1904, these accused defendants and many others were enjoined from conspiring against the company and its employés, and from doing many things, some of which were as follows, viz:

"From threatening by the means of force or violence, or threats thereof, or by the use of opprobrious epithets or means of intimidation, whether upon or near the premises of said complainant or elsewhere, the employés hired and employed by said complainant in its machine shops, roundhouses, repair shops, or in its mechanical department, for the purpose of or with the design of intimidating such employés, or forcing them, or any of them, by such means to quit the service of said complainant; from inducing any employé of said complainant who may have a definite or fixed contract of employment with said complainant for a definite period, and particularly those employed by said complainant to take the places of strikers in its shops, roundhouses, or in its mechanical department, to break his or their contracts of employment with said complainant by leaving the employment of said complainant before the termination thereof; from conspiring, confederating, or combining, among themselves or with other parties, to do or accomplish any of the foregoing acts, or to cause the same to be done or accomplished, or to obstruct or impede said complainant, its agents or employés, in the carrying on of interstate commerce by said complainant, or in the discharge of the duties which it owes to the public or to the government of the United States, or to induce or solicit any other party or parties to do or attempt to accomplish, singly or in connection with any of said defendants, any of the foregoing acts hereby or heretofore sought to be restrained or enjoined."

The defendants each claim by affidavits, and by his own testimony, that at no time was he lacking in respect to the court, or its orders, and that he thought from what he was doing, and the supposed views of the court orally expressed, as carried to him by hearsay, that he was doing nothing to subject him to punishment for contempt. All of which is no answer at all. All that can be claimed for it is a mitigation of punishment. This court has no desire to be severe in its punishments, and particularly to those badly advised. But this court has a concern that peace and quiet prevail, and that a state of serfdom shall not exist, by a so-called system of "picketing" of one crowd of men over another. No self-respecting man will submit to it. Nor is he compelled to submit

to it. Nor does he have to resort to force to get rid of it. He need only apply to the courts, state or federal, and he will be given an order to end it. And when such orders are given they must be and will be enforced, and aid will be given by all peace officers who take their oath of office with any purpose to observe it, and, if need be, the entire powers of both the state and federal government will enforce obedience to such orders of the courts.

Upon all these matters, all the courts, state and federal, are agreed, as can be seen from the cases collected in the opinion of *R. R. v. Ruef* (C. C.) 120 Fed. 102-105. And just cause of complaint cannot be made by the issuance of the writ of injunction, for the reasons eloquently stated by Justice Brewer in his lecture on "The Triumphs of Justice," that it is much better, much kinder, more humane, to enjoin the commission of acts which amount to crime, than for those in authority to remain quiet until the acts are done, and then punish for crime, often ensnaring the ignorant and those driven to crime by others who have no concern, except to show the authority of the nonresident boss.

A copy of this will be sent to each of the accused, and this memorandum filed in the case, to the end that the views of this court will not be peddled out by hearsay, but that all who have an interest in the matter can know what will be regarded as the law of the case, until the restraining order is modified, either by this court on motion or by an appellate court on appeal. When it is convenient for me to be at Keokuk, or when the necessities require, judgment will be pronounced. Possibly the accused by that time can make it appear to the court by their conduct that there are other extenuating circumstances, or it may then appear that they deserve a real and substantial punishment. In large part, the conduct of the accused and their associates will determine all this.

W. N. PROCTOR & CO. v. UNITED STATES.

(Circuit Court, D. Massachusetts. June 13, 1905.)

No. 1,327.

CUSTOMS DUTIES—CLASSIFICATION—NUTGALL EXTRACT.

Extract of nutgalls, an article which is made by grinding nutgalls, digesting the powder in water, and filtering to remove impurities, a chemical being added as a preservative without working any chemical change, is not dutiable as tannin or tannic acid, under paragraph 1, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], nor as a chemical compound under paragraph 3, Schedule A, § 1, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627], but either directly or by similitude as "drugs, such as * * * nutgalls, * * * advanced in value or condition," under paragraph 20, Schedule A, § 1, c. 11, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628].

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision in question, see G. A. 5,333, T. D. 24,395, which

affirmed the assessment of duty by the collector of customs at the port of Boston on merchandise imported by W. N. Proctor & Co.

Hatch, Keener & Clute (J. Stuart Tompkins, of counsel), for importers.

Melvin O. Adams, U. S. Atty., and Wm. H. Garland, Ass't U. S. Atty.

LOWELL, Circuit Judge. This case concerns the classification for duty of extract of nutgalls. The government contended that it should be classified under paragraph 1 of the act of July 24, 1897, c. 11, § 1, Schedule A, as tannic acid or tannin, dutiable at 50 cents per pound. 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]. For the history of this paragraph, see Rev. St. pp. 473, 481; Act March 3, 1883, c. 121, 22 Stat. 495; Act Oct. 1, 1890, c. 1244, § 1, Schedule A, par. 6, 26 Stat. 567; Act Aug. 27, 1894, c. 349, § 1, Schedule A, par. 5, 28 Stat. 509. The importer contended that the duty should be assessed under one of the three following provisions:

(1) Paragraph 20: "Drugs such as * * * nutgalls. * * * Any of the foregoing which are drugs and not edible, but which are advanced in value or condition by refining, grinding or other process, and not specially provided for in this Act, one-fourth of one cent per pound and in addition thereto ten per cent. ad valorem." Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628]. For the history of this paragraph, see Act March 3, 1883, c. 121, 22 Stat. 494; Act Oct. 1, 1890, c. 1244, § 1, Schedule A, par. 24, 26 Stat. 568. In Act Aug. 27, 1894, c. 349, § 1, Schedule A, par. 16½, 28 Stat. 509, nutgalls are not mentioned.

(2) Paragraph 22: "Extracts and decoctions of logwood and other dyewoods and extracts of barks, such as are commonly used for dyeing or tanning, not specially provided for in this act, seven-eighths of one cent per pound. * * * Extracts of sumac, and of woods other than dyewoods, not specially provided for in this act, five-eighths of one cent per pound." Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628]. For history, see Rev. St. p. 479; Act March 3, 1883, c. 121, 22 Stat. 493; Act Oct. 1, 1890, c. 1244, § 1, Schedule A, par. 26, 26 Stat. 568; Act Aug. 27, 1894, c. 349, § 1, Schedule A, par. 18, 28 Stat. 510.

(3) Paragraph 3: "Chemical compounds not specially provided for in this act." Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627]. It is to be observed that nutgalls were admitted free under all the above-mentioned tariff acts.

Under the Revised Statutes extract of nutgalls was classified by the Treasury Department as a manufactured article not otherwise provided for, the question being between this classification and a classification as an extract or decoction of dyewoods. There was no mention in the Revised Statutes of nutgalls "advanced in value or condition." No question was made of a classification as tannin or tannic acid, which two articles were separately classified in that tariff. T. D. 3,553. See T. D. 3,079; T. D. 2,095. In consequence of a decision of the Circuit Court, the ruling of the

department was soon revised, and thereafter duty was assessed upon extract of nutgalls as an extract or decoction of dyewoods. T. D. 3,842. See T. D. 3,898. The act of 1883 first provided a separate classification for drugs such as nutgalls advanced in value or condition. How the department classified extract of nutgalls under the acts of 1883 and 1890 was not shown. Under the act of 1894 the mention of nutgalls advanced in value or condition was omitted, and the department classified extract of nutgalls as tannin or tannic acid, rather than return to the former classification as an extract or decoction of dyewoods. T. D. 17,354. The act of 1897 reinserted the provision concerning nutgalls advanced in value or condition as quoted above. In T. D. 19,052, the department (for what reason does not appear) went back to its most ancient ruling, and classified extract of nutgalls as a manufactured article not otherwise provided for. But two years later the Board of General Appraisers in a careful opinion classified extract of nutgalls as nutgalls advanced in value. G. A. 4,716, T. D. 22,278. After this classification had stood for three years, the Board of General Appraisers overruled itself, and decided that extract of nutgalls should be classified as tannic acid or tannin. G. A. 5,333; T. D. 24,395.

It appears that extract of nutgalls is made by grinding nutgalls, digesting the powder in water, and filtering to remove impurities. To keep the filtrate from fermenting or molding, a chemical, probably sulphurous acid, is added as a preservative. The Board of General Appraisers has found that the chemical thus added works no chemical change in the article. Analysis shows that the filtrate contains about 25 per cent. of tanning matter (tannic acid chiefly, with gallic acid in much smaller, but varying, proportion), more than 50 per cent. of water and volatile matter, and a large organic and mineral residue. Otherwise stated, the article here in question contains "the active principle of tannic acid, plus certain gummy matters, plus certain salts which dissolve from the woody substance," plus water. This is "extract of ground nutgalls, which, of course, is far more valuable than the ground mass containing the woody fiber or the whole galls before grinding." Tannin is chemically known as digallic anhydrate, having a symbol of $C_{14}H_{10}O_8$. According to the testimony it may be prepared by treating the filtrate above described with acetate of lead, precipitating tannate of lead, which precipitate is decomposed by hydrogen sulphide, leaving tannic acid in solution. The solution may be evaporated to produce the anhydrate. Tannin may also be produced by extracting with alcohol and ether, and washing the extract with water. See Wurtz, *Dict. de Chimie*, art. "Tannin." It may also be prepared from substances other than nutgalls. As stated by the Board of General Appraisers, the preparation of tannin from extract of nutgalls involves chemical reactions, while it seems that the preparation of extract of nutgalls (the imported article here in question) from whole nutgalls involves only mechanical changes. The Board of General Appraisers has found that extract of nutgalls, chemically considered, is not tannic acid. The decision of the board in favor of the government was based

(1) upon a finding that the term "tannic acid," as used in trade, includes extract of nutgalls; and (2) on the ground that extract of nutgalls is more closely similar in material, character, and uses to tannic acid than to any other article mentioned in the tariff act.

1. As to the first consideration stated above, there is now before this court considerably more testimony than that upon which the finding of the board was based. Four witnesses testified for the importers (only one heard by the board); all of them to the effect that extract of nutgalls was not known as tannin, tannic acid, or liquid tannic acid, and that extract of nutgalls and tannic acid were commercially two different things. Three witnesses testified for the United States. Of these Drobegg apparently knew nothing of commercial nomenclature. Rau testified that he sold the same article as liquid tannin and extract of nutgalls, marking the barrels in the one case "liquid tannic acid" and in the other "extract of nutgalls," to suit the vagaries of the trade. He further testified, however, that, when tannic acid or tannin is inquired for, the dry material is understood. Buhl testified that there was no difference between extract of nutgalls and liquid tannic acid, except in name. Upon the whole, the testimony regarding commercial nomenclature as now presented to the court makes for the importer, rather than for the United States.

2. If we pass from nomenclature to a consideration of the real nature of the substance imported, we find that by the tariff act nutgalls are admitted free. That they are a drug within the provisions of paragraph 20 is pretty plain. Tannin is a drug, used in medicine and in the arts; and nutgalls, from which it is prepared, are therefore a drug, like peruvian bark, from which quinine is made. The Board of General Appraisers did not question that nutgalls were a drug. That nutgalls are more directly used as a drug is stated in Enc. Brit. 9th Ed. X, 45. Ground nutgalls, nutgalls "advanced in value by grinding," are therefore specially classified for duty. The powder is a mixture of tannin, gummy material, mineral salts, woody material, and, I suppose, a certain amount of water. For this mixture a particular rate of duty is provided. Powdered nutgalls in this state are an article of commerce. On the other hand, tannin, one of the components of the powder above described, is also specially classified for duty. Which of the two specially classified articles, ground nutgalls and tannin, does the imported article, extract of nutgalls, most nearly resemble? In composition the extract is differentiated from the powdered nutgalls by the addition of water and the exclusion of most of the woody material. In composition it is differentiated from tannin by the absence in the latter of the components which make up three-fourths of the substance of the former. In appearance the extract is differentiated from the powder as a filtrate is differentiated from a powder. In appearance it is differentiated from tannin as a filtrate is differentiated from crystals or powder. In preparation the extract is differentiated from the powder by digesting the latter in water and by filtering the decoction. In preparation it is differentiated from tannin, inasmuch as, accord-

ing to the General Appraisers, tannin is produced from the powder by two or more chemical reactions. As above stated, however, it may be possible to make tannin from the powder without chemical reaction involving the tannin. In commercial use the extract is differentiated from the powder in that the latter is commercially useless as a mordant, though possessing mordant qualities. In use the extract is differentiated from tannin by its cheapness, which makes it available where tannin would be too costly. The commercially important principle of nutgalls is tannin or tannic acid. This is also the commercially important principle of powdered nutgalls. Upon the whole, it seems to me that extract of nutgalls is more closely similar to nutgalls advanced in value by grinding, etc., than to tannin or tannic acid.

If extract of nutgalls should not be classified under paragraph 20, a strong argument could be made for classification under paragraph 22. That paragraph imposes a duty upon decoctions and extractions of dyewoods and barks used for dyeing, and upon extracts of woods other than dyewoods. Extract of nutgalls is an extract of a diseased growth of wood or bark, and unless more specifically described elsewhere, can hardly escape altogether the terms of paragraph 22. As more specific description is found in paragraph 20, I am of opinion that it is taxable thereunder.

Judgment for the importers.

In re R. F. DOWNING & CO.

(Circuit Court, D. Massachusetts. June 14, 1905.)

No. 1,468.

CUSTOMS DUTIES—CLASSIFICATION—PAPER STOCK—WASTE CONTAINING WOOL.

Certain waste of an inferior quality, fit only for paper stock, consisting of mill sweepings, which contain not more than 1 per cent. of wool, that is not of sufficient fiber for commercial purposes, and is not separable from the material with which it is mixed, is not dutiable as waste in part of wool, under Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 362, 30 Stat. 183 [U. S. Comp. St. 1901, p. 1666], but is within the provision for "paper stock * * * fit only to be converted into paper," in paragraph 632, § 2, Free List, 30 Stat. 200 [U. S. Comp. St. 1901, p. 1686.]

On Application for Review of a Decision of the Board of United States General Appraisers.

Currie, Smith & Maxwell and Searle & Pillsbury, for petitioners.
Melvin O. Adams, U. S. Atty., and Wm. H. Garland, Asst. U. S. Atty.

DODGE, District Judge. In compliance with the order of court entered in this case July 22, 1904, the Board of General Appraisers made a return August 3, 1904, whereby it appears that after their protest had been transmitted to the board by the collector at Boston the petitioners wrote to the board that they did not wish to take any further action in the matter, and that the board thereupon, on June 23, 1904, overruled the protest, and sustained the collector's

decision. It has since been agreed between the United States and the petitioners that the above abandonment of their protest shall, for the purposes of this case, be considered null and void, and that the protest shall be treated as though no abandonment of it had been made. Evidence has been taken under the order of court entered August 10, 1904, upon the question raised by the protest before a member of the board acting as an officer of the court, and the case has now been heard upon the evidence so taken, which was all of it evidence introduced by the petitioner. None of the objections to this evidence are insisted on, and no evidence has been offered to contradict it. There is therefore no dispute regarding the facts, which I find to be as follows:

The petitioners imported and entered at Boston on March 3, 1904, 22 bales of mixed cotton waste for paper stock, brought to Boston by steamship Pomeranian, for the Toronto Mill Stock & Metal Company, of Toronto, Canada. This merchandise was bought by the company for 2.4 cents per pound, and was sold by it to the Springfield Waste Company of Springfield, Mass., for 3.8 cents per pound. It was entered free, and one of the bales ordered for examination. The collector at Boston classified and assessed the entire shipment as "waste composed in part of wool," dutiable at 20 cents per pound, under paragraph 362, Schedule K, § 1, Act July 24, 1897, c. 11, 30 Stat. 183 [U. S. Comp. St. 1901, p. 1666]. The petitioners' protest above referred to claimed that the goods were free of duty under paragraph 537 or paragraph 632, and, if not free of duty under those paragraphs, then dutiable at 10 per cent., under paragraph 463 of the act referred to. From the decision of the Board of General Appraisers overruling the protest, on June 23, 1904, as stated above, an appeal was taken in due time and form to this court.

The importation consisted of sweepings from various mills, both cotton and woolen mills. It contained no percentage whatever of commercial or marketable wool, and no percentage whatever of wool capable or being either spun or carded. It did contain a small proportion—not exceeding 1 per cent.—of wool sweepings, variously described as "carpet shearings," "carpet sweepings," "fluff," and "wool fly." The wool whereof this was composed was not what is known as "wool waste." It had not sufficient fiber to be of value for commercial or manufacturing purposes, even if separated; and as separation from the other waste with which it was mixed was impossible, it impaired the value of the whole for the purpose for which it was intended, viz., the manufacture of paper. The merchandise as a whole was what is known to the trade as cotton waste of inferior quality, fit only for paper stock. As paper stock it was of little value, because capable of use in the manufacture of a low grade of paper only. The prices at which it was bought and sold, as above stated, were considerably in excess of its real value as disclosed by the evidence.

In view of the above facts, this merchandise cannot properly be included among the "other wastes composed wholly or in part of wool," referred to in paragraph 362. It must be regarded as coming under the language of paragraph 632, § 2, Free List, 30 Stat. 200

[U. S. Comp. St. 1901, p. 1686], "paper stock, crude, of every description, * * * including all waste * * * fit only to be converted into paper," and therefore free of duty.

The decision of the Board of General Appraisers is reversed.

In re OSTRANDER.

(District Court, E. D. New York. June 24, 1905.)

BANKRUPTCY—DEBTS RELEASED BY DISCHARGE—MEDICAL SERVICES FURNISHED TO WIFE OR CHILD.

The provision of Bankr. Act July 1, 1898, c. 541, § 17a, cl. 2, 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1903, p. 411], excepting from the debts released by a discharge of a bankrupt "liabilities * * * for maintenance or support of wife or child," does not apply to a debt for medical attendance furnished to the wife or child of the bankrupt at his request, and while the normal family relations subsist between him and the recipient of the services.

In Bankruptcy.

J. Tilden Crusier, for bankrupt.

Backus & Lewis, for creditor.

THOMAS, District Judge. It is considered that the words in section 17a, cl. 2, Bankr. Act July 1, 1898, c. 541, 30 Stat. 550, as amended Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1903, p. 411], "for maintenance or support of wife or child," do not refer to a debt incurred for the services of a physician called by the husband to attend the wife while she is in normal relation to her husband. If so, a person supplying goods for a wife or child or rendering a service necessary for support or maintenance, at the request of the husband, without delinquency on his part, would be beyond the scope of the act. The grocer, the marketman, clothiers of all descriptions, physicians, dentists, in fact all who, by service or sale, contribute to the support of the family, and thereby to the support of a wife or child, would have claims not dischargeable under the act. The provision has probable application to cases where the person applying for discharge from his debts had so betrayed his moral and legal duty as a husband or parent that another was justified in providing the maintenance and support denied by the one upon whom the law places the primary duty. Without attempting to define the limits of the section, it is held that it does not apply to medical attendance furnished upon the express or implied contract of the husband or parent to pay therefor while the recipient is a member of the family, and while there is no breach of duty on the part of the person contracting the debt toward the one receiving the service.

GOODSITE, Treasurer of Erie County, Ohio, v. LANE et al.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1905.)

No. 1,392.**TAXATION—TRUSTS—PLACE.**

Under St. Ohio 1890, § 2731, providing that all property within the state, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in the state, shall be subject to taxation, where a trust estate and the beneficiaries were both outside the state, and the trustee did not act as trustee in Ohio, the estate was not taxable there by reason of the mere fact that the trustee was a resident of that state.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Malcolm Kelley, for appellant.

E. B. King, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The question involved is whether personal property, consisting of stocks, bonds, etc., held in New York, on deposit with a bank and trust company, by a trustee appointed by a court of Connecticut, under the will of a resident of Connecticut, for the benefit of an heir and legatee residing in Connecticut, and which had never been brought into or invested in Ohio, was taxable in the latter state for the sole reason that such trustee was a resident of Ohio. The court below held it was not.

The suit was one brought by the beneficiary and trustee to restrain the treasurer of Erie county, Ohio, from collecting \$45,773.35, assessed by the auditor, for the years 1898 to 1903, inclusive, and certified to the treasurer for collection. A demurrer to the bill was overruled, and a decree entered, from which an appeal has been taken to this court.

Charles G. Griswold, a resident and citizen of Connecticut, died in 1869, leaving a will, which created certain trusts in favor of his wife and his two married daughters, Elizabeth D. G. Lane, one of the plaintiffs below, and Sarah J. G. Spencer. The will named as trustees the widow and the husbands of the two married daughters. The widow and the husband living in Ohio (William G. Lane) qualified. The two acted as trustees for the entire estate from 1869 until 1877, when Judge Lane died. The widow then acted as trustee until her death in 1888. The will provided substantially that the trustees were to manage the estate, and during the life of the widow pay her one half the income, but in no case less than \$2,500 annually, and divide the other half equally between the two daughters, Mrs. Lane and Mrs. Spencer. After the death of the widow the property was to be held for the use and benefit of the daughters during their lives, and upon their death conveyed to their heirs when the latter should attain majority. Upon the death of Mrs. Griswold in 1888 the probate court in Connecticut appointed as trustees William Spencer, a citizen of New York, son of Sarah J. G. Spencer, and the defendant Charles H. Moss, a son-in-law of Eliza-

beth D. G. Lane, and at that time a resident and citizen of Erie county, Ohio.

It appears from the bill that Mrs. Lane has always been a citizen of Connecticut. Moss resided in Erie county, Ohio, up to October 1, 1903, when he removed to Connecticut, and became a citizen of that state. In 1889, the year after the appointment of Moss and Spencer as joint trustees for the entire estate, an arrangement was made by which they resigned their trust, the trust estate was divided, and each was appointed trustee for one-half the estate—Spencer for the share belonging to his mother, and Moss for the share belonging to his mother-in-law, Mrs. Lane. The property, consisting principally of stocks and bonds in Connecticut and New York corporations, has been and is deposited in a bank and trust company in the city of New York. This bank collects the dividends and interest, and credits the same on its books to Moss, as trustee; and Moss as often as twice a year pays over the same to the beneficiary, Mrs. Lane, receiving for his services \$300 a year. No part of the estate or its income has ever been brought within the state of Ohio. No change of investment is made, except after personal consultation by the trustee with the beneficiary or her agent, in the city of New York, or at her home in Connecticut.

As stated in the leading case of *State Tax on Foreign Held Bonds*, 15 Wall. 300, 319, 21 L. Ed. 179, "the power of taxation * * * is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business." The question here is, was either this Connecticut estate, or its trustee, as such, within the jurisdiction of Ohio? The statute of Ohio provides that "all property, whether real or personal, in this state, * * * and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state, shall be subject to taxation." Section 2731, Rev. St. 1890. As construed by the Supreme Court of Ohio, "the first clause evidently embraces the tangible property, real or personal, situated in this state, irrespective of the residence of the owner, and the second clause embraces all intangible property of persons residing in this state, irrespective of where the subject of the property may be situated." *Myers v. Seaberger*, 45 Ohio St. 232, 235, 12 N. E. 796. Applying the rule mentioned supra, the state of Ohio taxes tangible property located in the state, because of its jurisdiction of the property; and it taxes intangible property located without the state, because of its jurisdiction of the person residing in the state who holds it. The property involved in this case had never been brought within the state of Ohio, and therefore could not be taxed upon the ground that it was tangible property within the state. The tax must be sustained, if at all, upon the ground that the estate was the property of a person residing in Ohio, who, being within the jurisdiction of the state, and owing it an obligation, might be compelled to contribute to its support out of his property, wherever located. *Kirtland v. Hotchkiss*, 100 U. S. 491, 498, 25 L. Ed. 558. The exaction must find its justification in the privileges and protection enjoyed in the state, under its laws, by the person taxed, in the capacity in which taxed. The person taxed

must therefore be in the jurisdiction of the state not only personally, but officially, in the capacity in which he is taxed, and in that capacity must be enjoying the benefits referred to. In the case of a trustee, he must be exercising his office of trustee within the state, and be enjoying, as trustee, privileges of value to the estate, for which it is just the estate should pay. An examination of the cases will show that, where this tax has been sustained, either the trust estate or the beneficiary, or the trustee, as trustee, was receiving benefits from the state, for which it was only fair the trustee should pay. *Price v. Hunter* (C. C.) 34 Fed. 355, 356; *Borough of Carlisle v. Marshall*, 36 Pa. 397, 402; *Lewis v. County of Chester*, 60 Pa. 325, 330; *Guthrie v. Ry. Co.*, 158 Pa. 433, 439, 27 Atl. 1052; *Mayor of Baltimore v. Stirling*, 29 Md. 48; *Appeal Tax Court v. Gill*, 50 Md. 377, 396; *Mackay v. San Francisco*, 128 Cal. 678, 61 Pac. 382; *Trustees v. City Council*, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151. But where the estate and beneficiaries were outside the state, and the trustee only resided, and did not act as trustee, within the state, the tax was not sustained. *Hawk v. Bonn, Auditor*, 6 Ohio Cir. Ct. R. 452; *People ex rel. Darrow v. Coleman*, 119 N. Y. 137, 23 N. E. 488, 7 L. R. A. 407. In the case of *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443, an estate was held taxable in Indiana, where the trustee was appointed, although he was a resident of New Hampshire: the court holding that, having been appointed in Indiana, he was to be regarded, in his capacity of trustee, as a resident of that state. Page 200 of 154 Ind., page 443 of 56 N. E. In the present case neither the trust estate nor the beneficiary nor the trustee, in any proper sense, was within the jurisdiction of the state of Ohio. The trust estate was in New York. The trustee was appointed in Connecticut, and acted wholly outside of Ohio. The fact that as an individual he resided in Ohio could not authorize the taxation of this foreign estate, which had received no benefit whatever from the laws of Ohio.

The judgment is affirmed.

CAMDEN INTERSTATE RY. CO. V. BROOM.

(Circuit Court of Appeals, Sixth Circuit. July 21, 1905.)

No. 1,409.

STREET RAILROADS—INJURY OF CHILD AT CROSSING—NEGLIGENCE OF MOTOR-MAN.

A motorman operating a street car on approaching a crossing where a number of children are congregated or passing across the tracks is bound to know that they may not exercise the care of older persons, and to take special precautions accordingly to avoid their injury; and where in such case a child was run over and injured, and there was evidence of a substantial character tending to show that the car approached the crossing at a speed of 10 or 15 miles an hour, without giving any warning of its approach, although such evidence was contradicted, a verdict finding that the company was chargeable with negligence will not be disturbed.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 202.]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

A. R. Johnson, for plaintiff in error.

R. B. Miller and W. D. James, for defendant in error.

Before MURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. On December 5, 1902, the plaintiff below, Edward Broom, a boy six years old, was run over by one of the defendant company's cars, and lost a leg. The accident occurred in the morning, at or near a street crossing in Ironton, Ohio, while the boy, in company with other children, was on his way to school. He brought this suit by his next friend, claiming the company was liable, because the brakes on the car were out of order (one set being off and the other not working properly), so it could not be stopped quick enough to avoid striking him, and because, in view of the presence of the children at and near the crossing, the motorman did not use the necessary precautions in approaching it, running at too high a rate of speed, without keeping a proper lookout and giving warning by bell or gong of his approach. The company defended on the ground that the car was properly equipped with brakes, and that the accident was inevitable, not being attributable either to the condition of the car or the action of the motorman in operating it, but solely to the conduct of the boy in suddenly and unexpectedly running from the sidewalk in front of or against the car. A motion for peremptory instructions in favor of the defendant having been denied, there was a verdict and judgment for \$10,000, which the court declined to disturb.

It is very earnestly argued that no case for recovery was shown in the testimony, and that, if there was, the court erred in its rulings during the trial. The accident took place on Elm street, at or near the east side of its intersection with Third street, at about half past 8 o'clock in the morning, when the children of the neighborhood were on their way to the public school, located on the east side of Third street, about half a block north of Elm. The street railway of the defendant company runs south on Second street to Elm, then east on Elm to a point between Fourth and Fifth, where it crosses a bridge over Storms creek. The car which caused the injury was an interurban one, 38 feet long, and weighing 20 tons. It was in charge of Motorman Willis, who had been operating cars over the route for about four months, knew the location of the schoolhouse, that the school was in session, and was familiar with the habits of the children in going to and coming from school. On this day the car stopped after it had rounded the curve from Second into Elm, to take on a passenger, and then started out Elm towards the crossing on the east side of Third, about 300 feet distant, and in plain view. At this time a number of school children were collected at the intersection of Third and Elm on or near the southeast corner. There was a fire hydrant on this corner, and near it a pool of muddy water. The sidewalk was not paved,

nor was the crossing over Elm. The situation at that corner was thus described by one of the defendant's witnesses:

"I was standing at the water plug that is right at the corner there, and the children were all gathered around there, getting ready to go to school. The first bell was ringing for school. The boys were splashing water on the girls—the little girls—as they came along, and I saw the car coming."

The little Broom boy was at or near this corner as the car came east on Elm. He was on his way to school. To get there he had to cross Elm, which was about 30 feet wide; so it was only about 12 feet from the outer edge of the sidewalk (there was no curb there) to the nearest rail.

All of the above facts are practically undisputed. As to what occurred at the precise time of the accident there is a conflict in the testimony. The testimony of the defendant tended to show that the car was coming out Elm street at its usual rate of speed (the motorman said five or six miles an hour); that the brakes were in perfect condition; that the motorman was keeping a proper lookout; that no one was on or near the track as the car neared the crossing on the east side of Third street, when suddenly and unexpectedly the little Broom boy started from the sidewalk on the south side of Elm near the corner, and, running rapidly and in a diagonal direction across Elm street, with his face away from the approaching car, ran either directly in front or against the side of the car so quickly that it was impossible for the motorman to stop the car in time to prevent the accident. As soon as the motorman saw the boy, he applied the brakes and stopped the car, but meanwhile it had run over the boy, who was picked up under the rear platform. If this were all the testimony in the case, it might well be said that no ground of recovery was shown (*Chilton v. Central Traction Co.*, 152 Pa. 425, 25 Atl. 606; *Fleishman v. Neversink Mt. Ry. Co.*, 174 Pa. 510, 34 Atl. 119; *Booth on Street Railways*, § 310); but the testimony of the plaintiff (and it was of a substantial character) tended to prove that although, from the number of children on or near the Third street crossing in plain view of the motorman as he started out Elm, he should have anticipated some one of them might attempt to cross the track in front of his car, and therefore was bound to take precautions to avoid injuring him, holding the car under control, keeping a keen lookout, not only ahead, but on both sides, and sounding a warning of his approach, nevertheless the car was run out Elm at a speed of from 10 to 15 miles an hour, and took the crossing without slackening its speed or giving any warning whatever of its approach; that as the car approached Third, the witness, Calvin Frowine, a school boy about 14 years old, was crossing Elm on a diagonal course, starting from the southwest corner of Third and Elm. He was on the crossing and close to the track when, happening to see the car coming, he stepped back from the track, and it went on. Meantime the little Broom boy, who was on the south-east corner, started to cross Elm street, passing to the left of the mudhole, and then running diagonally toward the track. He passed the Frowine boy about two feet to his right, with his face turned

away from the approaching car, and, stepping upon the track in front of it, was struck and run over. If the jury believed this testimony; if it reached the conclusion that, had the motorman taken proper precautions, he would have had the car under control, and warned the child, and avoided the accident—it was justified in finding for the plaintiff. The duty of a motorman approaching a crossing is well established. He may not rely upon an exclusive right to use the street. Those on foot have rights too. He is bound to keep a vigilant lookout, give warning of his approach, and so regulate the speed of his car as to avoid injuring those using the crossing. *Cinti. St. Ry. Co. v. Snell*, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276. As at crossings, so in the case of children, special precautions are demanded. "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others, who are chargeable with the duty of care and caution towards them, must calculate upon this, and take precautions accordingly." *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 277, 14 Sup. Ct. 619, 625, 38 L. Ed. 434, quoting Judge Cooley in *Powers v. Harlow*, 53 Mich. 507, 514, 19 N. W. 257, 51 Am. Rep. 154. To a certain extent the care which is not required of children incapable of contributory negligence must be exercised towards them by those operating dangerous machines.

In thus stating the tendency of plaintiff's testimony, we have taken the view favorable to his side. We are bound to do this. The jury had a right to take this view, and we have no power to set the verdict aside because we may entertain a different one. This was not the case of an absence, but of a conflict, of testimony. Upon nearly every point of importance there were witnesses on one side and the other. The case was therefore clearly one for the jury. Although we may disagree with its conclusions, and regard its assessment as excessive, we cannot, on that account, reverse the judgment based upon its verdict. As we said recently in the case of *Minahan v. Grand Trunk Ry.* (C. C. A., decided June 6, 1905) 138 Fed. 37, in which we attempted to mark out the respective provinces of the court and jury in these cases:

"The court cannot balance the evidence when it is conflicting, and then compel the jury to find a verdict according to the court's estimate of the relative weight of the evidence for the respective parties. Such a doctrine would efface the line of demarcation between the provinces of the court and jury."

2. We have not discussed the question of the condition of the brakes, as shown by the testimony, because upon the trial this point apparently dropped out of sight; but it is now submitted there was error in the charge upon the subject; that the court told the jury that, if there was "any evidence tending to show that the failure to stop the car was due to the inefficient brakes, or the absence of brakes, then that would be ground for recovery." It is insisted this was going too far; that it is not sufficient if there be evidence merely "tending to show"; there must be evidence showing the thing to the satisfaction of the jury. This is quite true, but the court, both before and after using the language ob-

jected to, said as much to the jury. The jury was not, in our opinion, misled.

3. It is further submitted that the court erred in its charge in assuming that the accident took place at a street crossing. The petition alleged that the injury took place at a street crossing. The answer denied generally. The testimony was conflicting. The court gave the jury the law with respect to street crossings. Undoubtedly the accident took place at or near a street crossing. In presenting the claim of the plaintiff, the court apparently assumed that the accident took place at a crossing, but the court qualified this assumption by saying:

"I am not undertaking to say what the evidence is. I am stating to you the plaintiff's claim, and it is for you to determine from the evidence what the situation presented to the motorman was."

But, if the charge contained an assumption that the accident took place at a crossing, so as to mislead the jury and prejudice the defendant, the attention of the court should have been called to the matter at the time, so that it might have been corrected.

4. The defendant presented 19 special charges, which were refused on the ground that most of them were covered by the charge given, and the rest inapplicable. We have gone over them carefully, and are unable to see how the defendant was prejudiced by their rejection. The charge as given covered the case, and presented the issues, with the law, fairly to the jury. The claim of the defendant is thus described:

"If he was exercising due prudence and care—ordinary prudence and care, all that the situation required of him—and the boy unexpectedly ran in front of the car, then the company would not be liable, for that would not be the fault of the motorman. That might happen. A car might be moving at a slow rate of speed absolutely within the control of the motorman, due warning might be given, all reasonable precautions might be taken to avoid injuring people who might be using the crossing, and a thoughtless boy suddenly get upon the track in front of the car, when it would be impossible to stop it in time to save him, and be injured; but in such a case the motorman would not be negligent, and the company would not be responsible for the injury."

A number of these requests are based upon the theory that if the boy suddenly and unexpectedly ran from the sidewalk into Elm street against the car or in front of it, and so was injured, then the verdict must be for the defendant. This is to disregard wholly the duty of the motorman. In the case of small children at or near a crossing, a motorman may anticipate that a boy six years old is liable to run out into the street against or in front of the car. He is bound to be on the lookout for that sort of thing, and take proper precautions to guard against an accident resulting from it.

These, we think, are the only points that require discussion. There was no prejudicial error in the rulings respecting the admission or rejection of testimony.

The judgment is affirmed.

CITY OF CHATTANOOGA et al. v. HILL.

(Circuit Court of Appeals, Sixth Circuit. July 21, 1905.)

No. 1,436.

BANKRUPTCY—DUTY OF TRUSTEE TO PAY TAXES.

Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], which provides that the court shall order the trustee to pay "all taxes legally due and owing by the bankrupt" in advance of the payment of dividends, is not ambiguous, and requires the payment of all such taxes, irrespective of the question of lien, and although they may have been levied on property which did not pass into the hands of the trustee.

Appeal from the District Court of the United States for the Eastern District of Tennessee.

Chambliss & Chambliss, for appellants.

Wm. L. Frierson (Lewis Shepherd of counsel), for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. By intervening petition the state of Tennessee, the county of Hamilton, and the city of Chattanooga sought an order requiring the trustee to pay certain taxes due from the bankrupt corporation, the New Chattanooga Furnace Company, out of the funds in his hands before the payment of dividends. The aggregate of the claims is \$690. Of this about two-thirds is the tax assessed upon personal property and the remainder upon the real property of the bankrupt. The greater part of the property upon which this tax was assessed consisted of real and personal property covered by a mortgage. The mortgage debt being in excess of the value of the mortgaged property, the trustee, by consent of the court, relinquished it to the mortgage creditors. The unmortgaged property which came to the hands of the trustee represented about 15 per cent. of the total of the entire property upon which the tax was assessed. Upon this state of facts the court ordered the trustee to pay 15 per cent. of the tax claim, and declined to order the payment of the remainder.

The decree is erroneous, and the trustee should be required to pay all the taxes legally due by the bankrupt. Section 64a of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]) reads as follows:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

There seems to be no room for construction. The taxes claimed are confessedly due and owing. Of the aggregate tax claimed \$450 was assessed against the aggregate value of the personal property owned by the bankrupt and the remainder upon the aggregate value of the realty. Under the Tennessee statute this assessment con-

stituted a first charge or lien upon the fee in said property, regardless of liens or divisions of interest. Acts Tenn. 1903, pp. 663, 667, c. 258. This lien upon the personalty for the tax assessed against the personalty was a lien for the entire tax upon every part of the personalty, and the whole personal tax might have been enforced against that part of the personalty which did not come to the trustee or against that which did. We can find no provision in the Tennessee assessment statutes which apportions the burden among different parcels when the assessment has been made upon the gross value of the personal estate of the taxpayer. But, irrespective of the question of a lien, the taxes constituted a personal debt against the taxpayer which can be enforced by proceedings in personam. The bankrupt act says that "all taxes legally due and owing by the bankrupt" shall be paid by the trustee "in advance of the payment of dividends to creditors." This does not say or mean that such payment shall be dependent upon the question as to whether they are a secured debt. Section 64b deals with the order of payment, and does not mention taxes. Clause 5 of section 64b (30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), which is supposed to cover taxes, refers only to "debts owing to any person who by the laws of the states or United States is entitled to priority." A tax due to the United States or a state is not a debt owing to "any person," within the meaning of this clause. The priority of taxes is provided for by section 64a. If paid only as a secured debt of the kind referred to in 64b, taxes would be postponed not only to costs of administration but to workmen, clerks, and servants' wages. Congress evidently meant that the sovereign should neither be postponed nor delayed in the collection of taxes, and therefore provided that the trustee should pay all taxes due and owing by the bankrupt in advance of dividends. The bankrupt might have paid all taxes immediately prior to the filing of a petition by or against him. This would not have been a preference. The law means that the trustee shall do what the bankrupt might have done and what good citizenship required him to do. The opinions of the courts are not agreed about this matter, and there are holdings which limit this direction to pay "all taxes due and owing by the bankrupt" to such taxes as constitute a lien upon the bankrupt's estate in the hands of the trustee and remit the sovereign to the enforcement of any lien which it may have against property which the trustee relinquished to the lien creditors. In *re Veitch* (D. C.) 101 Fed. 251; In *re Stalker* (D. C.) 123 Fed. 961; In *re Brinker* (D. C.) 128 Fed. 634. The two last are opinions by Hazel, District Judge. In the case of *In re Tilden* (D. C.) 91 Fed. 501, it was held that taxes due upon and assessed against the exempt homestead of the bankrupt should be paid by the trustee. That the bankrupt's creditors were not benefited by the bankrupt's homestead was held not enough to raise a doubt upon the plain meaning of so unambiguous a law. In the case of *In re Prince & Walter* (D. C.) 131 Fed. 546, state taxes assessed upon mortgaged lands of the bankrupt were directed to be paid out of proceeds of the bankrupt's personalty, there being no proceeds of the land out of which to pay after satis-

lying the mortgage thereon. Looking to the terms of 64a, Judge Archbald said: "Taxes, as a class, are thus put at the head of everything, even above the expense of preserving the estate or the cost of administration." In the case of the *City of Waco v. Bryan*, 127 Fed. 79, 62 C. C. A. 79, the Court of Appeals for the Fifth Circuit in a clear and forceful opinion by Judge Pardee held that the claim of the city of Waco for taxes assessed against the bankrupt was entitled to priority of payment by the trustee for taxes assessed against property which did not come to the hands of the trustee. For the purposes of this case it is enough to say that we concur with that court, but find no necessity for the expression of any opinion as to whether taxes would be entitled to priority over costs and expenses of administration.

The order of the bankrupt court is reversed, with direction to pay the entire claim for taxes.

NEW AMSTERDAM CASUALTY CO. v. EAST TENNESSEE TELEPHONE CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 21, 1905.)

No. 1,364.

INSURANCE AGAINST LIABILITY FOR NEGLIGENCE—ACTION ON POLICY—DEFENSES.

Under a policy insuring a company against loss from liability for damages on account of personal injuries due to its negligence, which provided that, in case of a suit to enforce a claim for injuries within the policy, the insurer should be notified, and should defend the suit "or settle the same," where the attorneys and agents representing the insurer made a settlement of such a case for more than the amount of the policy, with the assent of the assured, which paid the money, further provisions of the policy prohibiting settlements by the assured without consent in writing of the insurer, that it should be liable only after final judgment against the assured, etc., have no application, and constitute no defense to an action to recover on the policy on account of the claim so settled; nor can it deny, as against the assured, the authority of the agents and attorneys employed by it and acting in its behalf to make the settlement.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

This is an action to recover under a policy of indemnity insurance. The New Amsterdam Casualty Company (hereafter styled the "Insurance Company") undertook to indemnify the Cumberland Telephone Company against loss from liability for damages on account of bodily injuries caused by its negligence, liability in any one instance not to exceed \$5,000. During the currency of this contract an action was brought at Frankfort, Ky., against the telephone company by Miss Hedger, a citizen of Kentucky, resident at Frankfort, to recover \$25,000 damages on account of injuries sustained through the alleged negligent conduct of the telephone company's business in that city. The casualty company was notified both of the happening of the accident and of the bringing of the suit, and at once employed attorneys, and undertook to defend the case, as it was bound to do. Investigation convinced both the telephone and insurance companies that the injury sustained by the plaintiff in the case was very serious, and the case indefensible, and that a judgment in excess of the liability of the insurance company to the telephone company was

very probable. In this condition of affairs, and just as the case was about to be brought to trial, a settlement was reached, by which her expenses of litigation, including her counsel fees and court costs, and the sum of \$8,000, was to be received in full satisfaction, and her suit dismissed. A check or draft for \$10,085.25 was thereupon given to Judge Ira Julian, the attorney of the insurance company at Frankfort, engaged in defending the suit, and paid over by him to Miss Hedger or her attorneys in full settlement for the amount agreed upon. Upon receipt of this sum she dismissed her suit. Thereupon the telephone company demanded that the insurance company should pay to it the amount of \$5,000 and \$17.10, one-half the costs of suit, in accordance with the terms of the contract of indemnity. This the insurance company refused to do, denying its liability to pay anything whatever. Thereupon this suit was brought, and the plaintiff recovered a judgment for the sums sued for, with interest. This writ of error has been sued out to reverse this judgment.

C. T. Boyd, for plaintiff in error.

J. J. Vertrees, for defendants in error.

Before LURTON and SEVERENS, Circuit Judges, and THOMPSON, District Judge.

LURTON, Circuit Judge (after stating the facts). The insurance company at the close of all the evidence requested the court to instruct the jury to return a verdict for it. This the court refused, and an exception has been saved. The insurance company then requested a number of special charges, based upon certain provisions of the policy. Most of these were denied, and error is assigned. The case was then submitted to the jury upon a charge not excepted to in any matter now relied upon. This charge, in effect, instructed the jury that the plaintiff would be entitled to recover the amount sued for if they should find that the insurance company and Miss Hedger had agreed upon a sum to be paid in settlement of her claim against the telephone company, and that the telephone company had assented to the terms of settlement, and had paid the money, at the instance of those acting for the insurance company, necessary to carry out the settlement. The question as to whether the persons assuming to represent the insurance company in the settlement made with Miss Hedger had authority to act for it in settling, or whether the plaintiffs were authorized to assume that they had the authority they assumed to have, were questions of fact, in respect to which there was conflicting evidence; and these questions were submitted to the jury upon a charge which, in this aspect of the case, was not excepted to. Upon this issue the jury have found, as we must assume for the purpose of the present hearing, in favor of the contention of the plaintiff. The insurance company, upon the other hand, contended that the case must turn upon certain provisions of the policy. Upon this insistence they bottomed a motion for a peremptory instruction. This being denied, the same matter was again presented in certain requests for special charges, which the court also denied. Exceptions were duly taken to the action of the court, and upon these exceptions the assignments of error have been predicated. The character of the requests denied is sufficiently indicated by the motion for a peremptory instruction, the grounds of that motion having been reduced to writing. If that motion was

properly denied, the special requests were also properly denied, as they cover the same ground. The grounds of the motion were as follows:

"Comes the defendant, the New Amsterdam Casualty Company, all proof having been introduced by both sides, and moves the court to direct a verdict for it upon the following grounds, to wit:

"First. Because the policy of insurance or contract on which plaintiff bases and predicates this suit provides 'that the assured shall not settle any claim arising thereunder, except at its own cost, without the consent to the company previously given in writing,' and no waiver of this provision by the defendant is shown to have been made in writing.

"Second. Because the contract of insurance on which plaintiff bases and predicates its suit provides 'that the assured shall not incur any expense nor interfere in any legal proceeding brought against it for which the company might be liable to it, without the consent of the company previously obtained in writing,' and no waiver of this provision by the defendant is shown to have been made in writing.

"Third. Because the contract or policy of insurance on which plaintiff bases and predicates its suit provides 'that no action shall lie against the company as respects any loss thereunder, unless the action be brought to reimburse the assured for a loss actually sustained by it, after a trial of the issue, and in satisfaction of a final judgment against it,' and no waiver of this provision by the defendant is shown to have been made in writing.

"Fourth. Because the contract or policy of insurance on which plaintiff bases and predicates its suit provides 'that no action shall lie against the company as respects any loss thereunder, unless brought within the period within which a claimant might sue the assured for damages, unless at the expiration of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above,' and no waiver of this provision is shown to have been made by the defendant in writing.

"Fifth. Because the contract or policy of insurance on which plaintiff bases and predicates its suit provides 'that an agent has no authority to change this policy or to waive any of its provisions, nor shall notice to any agent or knowledge of his, or of any person, be held to effect a waiver or change in this contract or in any part of it. No change whatever in this policy, nor waiver of any of its provisions or conditions shall be valid, unless an endorsement is added hereto signed by an officer of the company at its home office expressing such waiver or change,' and no waiver or change of this provision has been agreed to or signed by any officer of the defendant, and indorsed or added to said contract."

The trial judge rightly concluded that the special provisions of the policy upon which the defendant's motion was based, although constituting a part of the contract, were not applicable to the circumstances of this case. After providing by the first clause of the special provisions of the policy, called "General Agreements," that the assured should, upon the occurrence of an accident, give immediate notice, etc., the second clause then provides as follows:

"If thereafter any suit is brought against the assured, to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company and the company shall defend such suit in the name and on behalf of the assured, or settle the same."

Thus the obligation of the insurance company was to defend the suit in the name of the assured, or "settle same." The contract does not contain any provision in respect to how or through what agency the insurance company should either defend or settle.

Those were matters for its own determination. It might settle the suit through its attorneys, or through some local or general agent, or by some agent specially appointed. It was a corporation, and could act only through some agency. The assured was not at all concerned, provided the settlement did not exceed the indemnity for which the insurer was liable, as to how or by whom it should settle any suit it was contractually bound to defend or settle. This defense it was to make in the name of the assured, and implied an obligation to defend in good faith. Inasmuch as its own liability was limited, it was bound to take care that no unnecessary liability was cast upon the assured by a negligent defense. So with its obligation to settle. So long as it should settle within the limit of its contractual obligation, the assured was not concerned. But a settlement in excess of that would require the consent of the assured, who would have to pay the excess. To enable the insurance company to defend or settle, the assured was required, upon request, "to aid in securing information and evidence and in effecting settlements." But this was the extent of the right of the assured in the matter of settlements, unless it should make a settlement of its own volition. In this case it could not call upon the insurer for reimbursement unless its action in settling a claim was done with the consent of the insurer "previously given in writing." But if the fact was that Miss Hedger's suit was settled upon an agreement between the insurance company and herself, and the money paid by the plaintiff, at the instance of those who had represented the insurance company in the defense and in settlement of the Hedger suit, none of the provisions of the policy referred to in the requests of the defendant would have any application in a suit for the recovery of money so paid by the insured, to the extent of the indemnity due under the other terms of the contract of insurance. The distinction between a settlement made by the insurance company, and assented to by the assured, and one made by the assured and assented to by the insurance company, may not be a very wide one. But when the insurance company endeavors to defeat a claim otherwise indefensible by appealing to a term of the contract providing that it shall be bound by no settlement made by the assured to which it has not consented in writing before the settlement, the distinction is vital. There was no restriction contained in the policy bearing upon the manner or agencies by which the insurance company should fulfill its obligation to defend or settle suits against the assured on account of accidents within the terms of the policy, and no express provision in respect to the liability or its mode of enforcement when the assured should assent to a settlement so made, and, at the request of the insurer, furnish the money to meet a settlement made by the insurer. There was evidence from which the jury might reasonably find that the settlement made was one made by agents of the insurer authorized to defend or settle or by agents whom the assured were justified in assuming had authority to settle or defend. Any limitation which in fact may have been imposed upon Messrs. Watkins & Thompson,

as general agents and attorneys, or upon Judge Julian, the local attorney employed to defend the suit, were not known to the assured; and the evidence tended to show that the assured had in good faith accepted their assumption of authority to settle, and had paid the amount agreed upon, believing that they had acted within their authority. In this view, the court did not err in refusing to submit the case to the jury, and did not err in denying charges upon provisions of the policy which had no bearing upon the real issue of the case, and would have only tended to mislead the jury.

The errors assigned are therefore overruled, and the judgment affirmed.

KLOTS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 24, 1905.)

No. 220.

1. CUSTOMS DUTIES—CLASSIFICATION—SILK ON TUBES—"ADVANCE IN MANUFACTURE."

In construing the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 660, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], for "silk, raw, or as reeled from the cocoon, but not * * * advanced in manufacture in any way," held: (1) That the provision does not cover any form of raw silk advanced beyond the condition of skeins; (2) that silk known as "singles" or "silk on tubes," which has been wound from the skeins onto tubes, the effect of this process being to advance the silk a stage in preparation for its ultimate use, has been "advanced in manufacture"; and (3) that silk in this form is not free of duty under this provision, but dutiable under paragraph 384 (section 1, Schedule L, of said act, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668]), as "silk * * * not further advanced or manufactured than carded or combed silk."

2. SAME—TARIFF PROVISIONS—PROSPECTIVE EFFECT.

The provisions in a tariff act are designed for the future as well as for the present, and cover all importations which the definitions fit.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decisions below, see 133 Fed. 808, and G. A. 5,432, T. D. 25,790, where the Circuit Court reversed the decision of the Board of United States General Appraisers, which had reversed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Henry D. Klots. The merchandise consisted of raw silk in the same physical condition as reeled into skeins from the cocoon, but re-reeled or wound from the skeins onto cops or tubes. It was classified as dutiable under the provision in paragraph 384, Schedule L, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668], reading as follows: "Silk partially manufactured from cocoons * * * and not further advanced than carded or combed silk." The importer (appellant) contends that it should have been classified free of duty under paragraph 660, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], the pertinent portion of which is as follows: "Silk, raw, or as reeled from the cocoon, but not doubled, twisted, or advanced in manufacture in any way."

Gould & Wilkie and Albert Comstock, for appellant.

D. Frank Lloyd, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Any opinion which we could write in this case would be merely a repetition of the opinion of Mr. Appraiser De Fries and that of Judge Hazel to the same effect in the court below. We think the importations in controversy are not, as claimed by the importer, exempt from duty as "silk, raw, or as reeled from the cocoon, but not doubled, twisted, or advanced in manufacture in any way," within the definition of paragraph 660 of the free list of the tariff act of July 24, 1897, c. 11, § 2, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688]. A brief statement of our reasons will suffice. The free list of the tariff act of 1857 contained an identical provision. At that time, and at the date of the present act, the raw silk of commerce was imported in skeins, and in no other form. It was silk (1) as drawn from the cocoon, consisting of a single thread, composed of several of the gummy filaments spun by the worm and formed by the aglutination of the several filaments in passing through the reel, and (2) wound off the reel into the skein. The raw silk from Japan was re-reeled from a smaller to a larger reel, and transferred from that to the skein, and in that operation underwent to some extent a cleansing process. The thread of the re-reeled, like that of the once-reeled, silk, was neither twisted nor doubled, but consisted merely of the filaments from the cocoon, aggregated and compacted together by the gum. When imported, and before it could be used by the manufacturer, the silk in the skeins required to be subjected to the process known as "throwing," conducted by an artisan known as a "throwster," which consists of winding, twisting, doubling, and retwisting raw silk. In this process the skeins are sorted, and the single thread is wound onto bobbins or some receptacle which can be put on the spindle of the spinning mill. It is dealt in to some extent in this country in that form, and bought and sold as "singles" or "silk on tubes." The mechanism which effects the winding is technically known as the "swift." The doubling is effected by a different machine, which twists the threads together, and is called the "spinning mill." The process in each of these different steps improves the thread as it existed in the skein for manufacturing uses, and adds to its cost. We regard the winding as an advance in the manufacture of raw silk. The raw silk of the importations has been advanced to the same extent. It is true that the thread resulting does not differ in conformation, physical characteristics, or genus from the raw silk of skeins; but nevertheless it has been advanced a stage in preparation for its ultimate use, and, although it is still raw silk, it is not the raw silk of the paragraph "not advanced." Congress undoubtedly had in mind, when the provision was inserted in the tariff act, the raw silk in skeins, which was the filament as reeled from the cocoon or re-reeled as the case might be. Of course, the provision was not necessarily intended to apply only to the raw silk in skeins, as the provisions of a tariff act are designed for the future as well as for the present, and cover all importations which the definitions fit; and the words "not advanced in manufacture in any way" are appropriate to describe any form of raw silk not advanced beyond the condi-

tion of skeins. The provision does not fit the present importations, not only because they have been advanced beyond the condition of raw silk as known to commerce, but also because they have been advanced by a process which would have had to be bestowed upon them by the manufacturer in this country if it had not been done abroad. If it be conceded that they have not been manufactured into a new and different article having a distinctive name, they have nevertheless been advanced into an article having a new and different use, and consequently they are raw silk in an advanced state.

The decision is affirmed.

In re STURGEON.

(Circuit Court of Appeals, Second Circuit. May 5, 1905.)

No. 212.

1. BANKRUPTCY—EVIDENCE—EXAMINATION OF WITNESSES BEFORE REFEREE IN ANOTHER DISTRICT.

Where an order is made pursuant to Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], which authorizes a court of bankruptcy to require any person to appear for examination "in court or before a referee or the judge of any state court," requiring a person to appear for examination before a designated referee in another district, such referee conducts the examination in the capacity and with the powers of a referee, and not merely as an examiner with the powers of such under the general equity rules.

2. SAME—POWERS OF REFEREES—RULING UPON EVIDENCE.

Under general orders in bankruptcy No. 22 (18 Sup. Ct. vii) it is the duty of a referee to receive all evidence which is offered, to note objections, and to record the evidence, following the equity practice. If immaterial or irrelevant matter is introduced, the remedy of the other party is by applying to the court, which has power, under the rule, to deal with the same in the matter of costs.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

In Bankruptcy. On petition for review.

The estate of William A. Sturgeon, bankrupt, was in process of administration before a referee in bankruptcy in Detroit, Mich. Charles F. Hammond, a creditor of the bankrupt, had caused an examination of the bankrupt to be made looking to the discovery of sequestered assets. E. H. was a material and competent witness, under the laws of the state of Michigan, on behalf of the creditor, for the purposes of examination above referred to. Said E. H. resided in the city of New York, more than 100 miles from the city of Detroit. A petition was filed by the creditor with the referee in Detroit, Mich., asking that an order be made by said referee for the examination of E. H. before Stanley W. Dexter, Esq., a referee in bankruptcy, for the Southern District of New York. An order was thereafter made by the referee in Detroit directing said witness E. H. to appear on a day certain before Mr. Dexter for examination. A subpoena signed by Referee Dexter was served upon the witness E. H., who appeared in conformity with the subpoena, and submitted to the examination. At the outset of the examination there were asked the witness certain questions, to whose competency the counsel for the bankrupt objected, and requested Mr. Dexter to exclude the questions. Mr. Dexter refused so to do, and rendered the following decision September 19, 1904:

"Stanley W. Dexter, Special Commissioner. The commissioner states that under the practice, as he understands it, it is his duty to receive the answer of the witness, and to take all the questions and answers, and note the objections thereto and his rulings thereon, and report the matter to the court. The commissioner understands that this is referred to him in the nature of a special examiner only, and that he is not called upon to review the evidence, or make any report or decision thereon, and that he is bound by the practice prevailing in the taking of testimony in equity in United States courts. The Matter of Samuel Wilde's Sons, decided by Judge Holt in the Eleventh Bankruptcy, at page 714, 131 Fed. at page 142, is not inconsistent with this decision. Therefore I direct the witness to answer."

The witness thereafter refused to answer the questions, and a motion was made before the District Court for the Southern District of New York to compel the witness to answer the questions, and for instructions concerning the powers of Mr. Dexter in the proceeding.

On the argument of the motion the bankrupt's counsel contended: (1) That the witness had not been properly served, in that the subpoena was issued by Mr. Dexter, and not by the clerk of the court. (2) That the referee in Detroit had no jurisdiction to make an order directing the witness E. H. to appear before Stanley W. Dexter, a referee in the Southern District of New York. (3) That Mr. Dexter, in the present matter, was sitting as referee. (4) That, as referee, Mr. Dexter had the power to rule on evidence; that is, exclude any evidence deemed incompetent by him.

By an order filed November 19, 1904, Judge Holt overruled the objection of the bankrupt's counsel that the referee in Detroit had no jurisdiction to issue the order directing the witness to appear before Mr. Dexter, but held that Mr. Dexter was sitting as referee, and as referee had the right to rule out evidence. A petition for the review of the order and decision of Judge Holt was filed by the creditor Charles F. Hammond on November 29, 1904.

Fletcher, Sillcocks & Leahy (Henry Fletcher and Anderson & Rackham, of counsel), for creditor.

George Carlton Comstock, for bankrupt.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Under General Order No. 22 (18 Sup. Ct. vii) the duty of the referee is to receive the evidence which is offered, to note objections, and to record the evidence; and, if either party persists in offering incompetent or irrelevant matter in evidence, the other party has a remedy, because the rule provides that "the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just." The equity practice is to be followed by referees. The order directs him to proceed as referee. The referee must take all the evidence and note objections.

The order is affirmed under General Order No. 22, but without costs.

WALKER v. PIKE COUNTY LAND CO.

(Circuit Court of Appeals, Eighth Circuit. June 15, 1905.)

No. 2,036.

FRAUDULENT REPRESENTATIONS—PERSONS IN FIDUCIARY RELATION—JOINT PURCHASERS OF LAND.

An agent for the sale of a tract of land, who joined with others in purchasing the same for speculative purposes, under an agreement that a corporation should be formed for convenience in holding the title and

making conveyances, stood in a fiduciary relationship to his associates in the purchase, and was bound to the utmost good faith toward them; and where he misrepresented to them the price paid, and thereby obtained a secret profit on the sale, the corporation, of which he and such associates are the sole stockholders, may maintain a suit to require him to account to it for such profit.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

In the month of February, 1902, and for several months previous, the defendant, Walker, a real estate agent residing at Louisiana, Mo., held an option from the Block Land & Farming Company for the sale of a large tract of land owned by it, situated in Pike county, Mo., for the net price to the company of \$67,500. Early in February, through a subagent by the name of Sawyer, he was brought into communication with C. C. Weber, E. L. Carpenter, F. H. Carpenter, and E. P. Welles, of Minneapolis, Minn., as possible purchasers of the property. Soon thereafter defendant visited Minneapolis and carried on the negotiations in person. He represented to these parties that the lowest price for which the owner would sell the property was \$80,000, that he had an option on the property at that price which would expire March 1st, and for that reason he was very anxious to close the deal. In response to specific inquiries he repeatedly asserted that the \$80,000 did not include any commission or compensation to himself in any form. As evidence of his entire good faith, he also offered to join with the parties named, in the purchase of the property and contribute \$10,000, or one-eighth of the purchase price. It was mutually understood that the land, if purchased, would be bought for speculation, and defendant agreed to look after the same until it was resold without any charge, but he was to be given the agency for the resale of the property on a commission of 5 per cent. As a part of these negotiations it was contemplated by all the parties that a corporation should be organized for the convenient holding and transfer of the title to the property. As a result of defendant's representations the Minneapolis parties sent an expert to examine the land, and a short time thereafter Messrs. Weber and Carpenter personally inspected it. On the 15th of February one memorandum was signed on behalf of the purchasers by Messrs. Weber and Carpenter, and on behalf of the Block Land & Farming Company by the defendant, Walker, for the purchase of the property at the price of \$80,000. Another memorandum was signed by Walker, whereby he agreed to invest \$10,000 in the stock of the corporation that should be formed, and also providing for his agency as above mentioned. Up to this time the defendant's agreement with the Block Land & Farming Company had rested in parol. He now obtained from it by correspondence a written option at the net price to him of \$67,500. On receipt of this he wrote to the president of the company as follows, under date of February 21st:

"I have your agreement this a. m., and I believe I can put deal through. but what I want is consideration of sale \$80,000, so that I can show it to the purchasers. Then we can have our private arrangement as to what you are to pay me, which is none of their concern. I cannot show them your letter as it is, because they would think I was getting too much out of it and would make a big kick. So please send me an exact copy of the letter I received this a. m., with the exception of the consideration, and make that consideration \$80,000, and accompany it with another letter saying, if I sell it at \$80,000 net, you will pay me \$12,500 commission. In that shape I can handle it; otherwise, I am handicapped to such an extent that I can do nothing."

The completion of the sale was now delayed by an attempt on the part of Walker to get the company to reduce its price to him to \$60,000. As a result of this delay the Minneapolis parties called upon Walker to submit to their attorneys his authority as agent and all his correspondence with the company. To meet this emergency he again wrote the company, urgently asking for the documents in accordance with his letter above copied, stating: "Unless I can get such an agreement as I wrote you about, I cannot see how I can make a sale. I have just received a letter saying an attorney will be here Monday to go into titles and are dead sure to ask for contract of sale

from you, and I cannot show him the one I have. You know just what I want and just what I will have to have in order to do business." In reply to this the company furnished Walker the desired documents which enabled him to carry out his deception. The sale was made for \$80,000. The property was temporarily deeded to Mr. Carpenter pending the organization of the holding company. Out of the \$80,000, the Block Land & Farming Company paid to defendant \$12,500. Immediately thereafter the defendant joined with the Minneapolis parties in the organization of the plaintiff company under the laws of Minnesota. They and he were its only stockholders, and were all members of its board of directors. As soon as the plaintiff was organized it took over the title to the property. As a result of litigation between the defendant and his subagent, Sawyer, the plaintiff first learned in July, 1902, of defendant's deception, and promptly instituted this suit to compel him to account to it for the \$12,500. The trial court, after allowing credit for the payments made by defendant to his subagent, gave judgment in favor of the plaintiff for \$9,000. The present appeal seeks a review of that decree.

Eugene Pearson and F. L. Schofield (Ras Pearson, on the brief), for appellant.

W. A. Lancaster (Lancaster & McGee, Ball & Sparrow, and F. H. Carpenter, on the brief), for appellee.

Before VAN DEVANTER and HOOK, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge, after stating the case as above, delivered the opinion of the court.

It would be a reproach to the law if the rule determinative of the rights of the parties upon the foregoing facts were uncertain. Fortunately the situations are few in which one party to a business transaction can deliberately lie to the other with legal impunity. Appellant rests his defense upon the ground that statements as to the price paid or offered for property are not material, and, though false, are not fraudulent; but this doctrine, even in those courts which sustain it, is confined to transactions between vendor and purchaser when standing at arm's length. The defendant saw fit to put off that character in his dealings with the Minneapolis parties and unite himself with them as purchaser. As a joint purchaser he stood in a fiduciary relationship to his associates, and was bound to the utmost good faith in his dealings with them. The law demanded of him, not only that he should not be guilty of positive fraud, but that he should not conceal from them any fact material to the transaction. Any profit which he secured by violating this legal duty he was bound to account for to them. *Hinton v. Ring*, 111 Ill. App. 369; *Pendergast v. Reed*, 29 Md. 398, 96 Am. Dec. 539; *Banta v. Palmer*, 47 Ill. 99; *Hauk v. Brownell*, 120 Ill. 161, 11 N. E. 416; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Yeoman v. Lasley*, 40 Ohio St. 190; *Willink v. Vanderveer*, 1 Barb. 599; *King v. Wise*, 43 Cal. 628; *Barry v. Bennett*, 45 Cal. 80; *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47; *Beare v. Wright*, 13 N. D. —, 103 N. W. 632.

We do not find it necessary to pass upon the question to which counsel for defendant has devoted much attention in his brief, whether the defendant was technically a promoter of the corporation or not. The corporation was in contemplation at the time the ne-

gotiations were had, and it was understood by all parties that the property was being acquired to be held in that manner. It was not a trading corporation organized for permanent purposes. It was never contemplated that its stock should be placed on the market. In fact, the corporation is simply a convenient business form in which the purchasers of the property combined. Under these circumstances the plaintiff has the same right to call the defendant to account which his associates would have possessed if the corporation had not been organized.

The decree is affirmed.

NOTE.—The following is the opinion of Adams, District Judge, in the court below:

ADAMS, District Judge. This action was instituted to require the defendant to account to the complainant for the sum of \$12,500, alleged to be due to the complainant, by reason of the facts to which attention will now briefly be called. In the early part of the year 1902, the evidence shows that the defendant represented to one Weber and E. L. Carpenter, that he had the right to sell a certain large tract of land, situate near Louisiana, Mo., belonging to the Block Land & Farming Company, for the sum of \$80,000, and that he was willing to go in with them (Weber, Carpenter, and their associates), and become the joint purchaser with them of such land to the extent of one-eighth interest therein; that he was so confident of the ultimate outcome of the venture that he was willing to put his own money into it to that extent, without taking any commission or personal compensation for his services in bringing about the sale. He represented, and gave Weber and Carpenter to understand, that \$80,000 was the lowest price for which the property could be purchased, and affirmatively assured them that at that price he would get no commission whatsoever. Defendant and Weber and Carpenter, during the negotiations for the purchase of the land, all understood and intended that a corporation should be organized to ultimately take title to the land, and to dispose of it for the benefit of the parties interested. Subsequently the land was purchased for \$80,000, net, and by agreement title was taken temporarily in the name of E. L. Carpenter. Very soon thereafter a corporation was organized under the laws of the state of Minnesota; Weber and Carpenter and their friends in Minneapolis taking all the stock except 62 shares, which were subscribed and paid for by defendant Walker. After the purchase of the land had been accomplished, Walker requested the others to permit him to subscribe for one-sixteenth of the stock, instead of one-eighth, or to take \$5,000 interest, instead of \$10,000, which he had agreed to take before the land was purchased. This fact explains why he subscribed for only 62 shares.

It is quite immaterial, in my opinion, to critically distinguish between an option and an agency in the determination of defendant's relation to the Block Land & Farming Company. The big fact is that defendant represented to Weber and Carpenter that he had the control of the situation, and could get the land for \$80,000 and no less. Weber and Carpenter believed him and acted upon what he said. There is no doubt, however, that in the inception of the trade defendant represented to them that he had an option which would expire March 1, 1902, and I think they acted upon this representation throughout the negotiations. This fact was strenuously urged by the defendant to induce the others to close the contract of purchase prior to March 1, 1902. There is no doubt in my mind that defendant represented to Weber and Carpenter that he was getting no commission for making the sale; that \$80,000 was the net actual cost of the land; that he was so confident of the wisdom of making the purchase at that price that he was willing to go in with them and take one-eighth interest in the venture, with the right to act as selling agent for the concern to be organized to take title to the land. These representations are obviously very persuasive, and were made to induce Weber and Carpenter to join with the defendant in the purchase of the property, and in my opinion were made by the defendant, knowing that it was the intention to form

a corporation to ultimately take title to the property. I have no hesitancy in finding from the evidence that the defendant, together with Weber and Carpenter, became and were promoters of the enterprise of organizing a corporation for the purpose of taking title to the land in question; Weber and Carpenter and their friends to take seven-eighths of the capital stock, and Walker to take one-eighth thereof. The subsequent formation of such corporation by them, each becoming a stockholder and director therein, and the vestiture of such corporation with title to the land in question, throw light, if any were needed, on all their prior conduct. But the whole matter is conclusively settled by the two instruments of writing, each bearing date February 13, 1902: one signed by Weber, Carpenter, and Walker, and the other signed by Walker only. The first purports to be a written memorandum of the sale by Walker, as agent for the Block Land & Farming Company, of the land in question to Weber and Carpenter. The second modifies the first and establishes Walker's true relation to the other parties. It reads thus:

"Messrs. E. L. Carpenter & C. C. Weber, Minneapolis, Minn.—Dear Sirs: In consideration of your agreeing to purchase the property known as the lands of the Block Land & Farming Co., in accordance with the memorandum of agreement entered into between us to-day, I agree as follows, in case the sale of the said property is completed, and you acquire title to the same: First. To invest in cash in a corporation that you will form for the purpose of handling said property ten thousand dollars (\$10,000) in cash upon demand, said corporation to acquire the property from you at cost to you. The said corporation to be formed within a reasonable time after you acquire title. Second. To enter into a contract with the said corporation to offer for sale, and to use my best efforts to sell portions of the said lands for farming purposes," etc.

Can there be any doubt, taking these two papers together, that they fully corroborate the testimony of complainant in regard to defendant joining them in the organization of a corporation to handle the property in question? Some comment was made in argument upon particular words employed in the paper signed by Walker, but the general purpose of the paper is entirely consistent with the contention of the complainants as to what occurred during all prior negotiations, namely, that it was at all the times contemplated that the purchase was made for a corporation to be organized, in which all the parties would be interested according to the several amounts which they might agree upon as between themselves. The foregoing seems to me to show conclusively that the defendant occupied the position of trust and confidence toward the corporation contemplated to be formed. He was, together with the other persons interested in the negotiations with him, a promoter, in the truest sense of the term, of the corporation to be formed. Such being the case, the rule "*uberrima fides*" became his rule of conduct. Does his conduct square with this rule? Clearly not. During all the negotiations, while he was pretending to act without any commission, claiming that the project in hand was so meritorious that he desired to become interested in it to the extent of one-eighth interest on an equal footing with the others, he had a secret agreement with the owner of the land for a commission of \$12,500. In other words, occupying the trust relation already disclosed, he was continually representing by speech and by letter that the owner of the land would take nothing less than \$80,000 for the same, when he knew and had a private agreement with the owner to the effect that it would take \$67,500, and when he knew and intended to secure a personal advantage in the transaction to the amount of \$12,500. Defendant's bad faith in this matter is clearly shown by his correspondence with the Block Land & Farming Company, wherein, after that company had given him a writing to the effect that he had an option to sell the land for \$67,500, he returned the same to the owner, saying that that would not do, that he could not show such a letter to his contemplated purchaser, and afterwards securing a letter giving him the option to sell at \$80,000, and making use of that letter by way of assurance to Weber and Carpenter that the land would cost them the full amount of \$80,000. This was clear deception on his part, and does not square at all with the rule of conduct which the law required him to observe in such case. In my opinion defendant must be made to account to

the complainant corporation for all that he surreptitiously acquired. He holds that money in trust for complainant.

Complainant's counsel consented in argument to allow defendant the sum of \$3,500, which he claimed to have paid out to one Sawyer, and for other expenses in bringing about the sale. The decree will therefore be in favor of the complainant, requiring defendant to pay complainant within a time to be fixed the sum of \$9,000, and in default of such payment that execution shall issue therefor. The decree may also fix a lien upon the stock held by defendant in complainant corporation for the amount just mentioned. Counsel may prepare a form of decree and submit it to the court.

The following is the decree of the Circuit Court:

"This cause coming on to be further heard at this term of the court, was argued by counsel; and thereupon, upon consideration thereof, and by reason of the law and the findings of the court, it is hereby ordered, adjudged, and decreed that the complainant have and recover of and from the defendant the sum of nine thousand dollars (\$9,000.00), with interest thereon at the rate of six per cent. per annum from the date hereof, until paid, together with all costs and disbursements incurred in this action, and that this judgment shall be and constitute a first lien for the amount hereof on thirty (30) shares of the capital stock of the complainant corporation owned by defendant, now in the possession of complainant. It is further ordered, adjudged, and decreed that unless the said defendant pay to said complainant said sum of nine thousand dollars (\$9,000.00), so adjudged and decreed to be due complainant as aforesaid, with interest thereon at the rate and from the date aforesaid, together with all costs and disbursements by it laid out and expended, on or before the 22d day of December, 1903, execution shall forthwith issue against him, the said defendant, for said sum."

NORTHERN LUMBER CO. v. O'BRIEN et al.

(Circuit Court of Appeals, Eighth Circuit. July 26, 1905.)

No. 2,219.

1. PUBLIC LAND—SETTLED MEANING OF TERM IN LEGISLATION OF CONGRESS.

The words "public land" have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made.

2. SAME—WITHDRAWAL FOR BENEFIT OF RAILROAD LAND GRANT.

Where a withdrawal of public lands along the route of a railroad, in aid of which a grant of lands has been made by Congress, is made by the chief officers of the Land Department in advance of the definite location of the route of such road, in order that the lands may be preserved for the ultimate satisfaction of the grant, such withdrawal, if not made in opposition to the terms of the grant or other congressional enactment, is a reservation made by competent authority. The reservation, during its continuance, removes the lands embraced therein from the category of public land, and excludes them from subsequent railroad land grants containing no clear declaration of an intention to include them, even though it subsequently transpires that the withdrawal was ill-advised, or that the lands are not required for the satisfaction of the prior grant.

3. SAME—GRANT TO NORTHERN PACIFIC RAILROAD COMPANY.

The grant to the Northern Pacific Railroad Company made by the act of July 2, 1864, c. 217, 13 Stat. 365, was one in presenti, and was in terms confined to public land. Land not public at the date of the grant

was not granted, even though it subsequently became of that character. *Bardon v. Northern Pacific Railroad Co.*, 12 Sup. Ct. 856, 145 U. S. 535, 36 L. Ed. 806, followed; *United States v. Oregon & California Railroad Co.*, 20 Sup. Ct. 261, 176 U. S. 28, 44 L. Ed. 358, distinguished. (Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Minnesota.

For opinion below, see 134 Fed. 303.

This is a suit in equity, brought by the appellant to obtain a decree perpetually enjoining the appellees from cutting or removing the timber standing on part of an odd-numbered section of land in Northern Minnesota. The land is vacant and unoccupied, and the timber thereon gives it its principal value. The appellant claims full title, under the grant of public lands made to the Northern Pacific Railroad Company by Act Cong. July 2, 1864, c. 217, 13 Stat. 365. When the suit was brought the appellees were asserting a right to cut and remove the timber, under a claim to the land initiated under the forest reserve lieu land provision in Act Cong. June 4, 1897, c. 2, 30 Stat. 11, 36 [U. S. Comp. St. 1901, p. 1541]. The claim under the grant to the railroad company had been presented to and rejected by the Land Department of the government prior to the initiation of the claim under the act of June 4, 1897. 31 Land Decisions, 32. The latter claim was initiated prior to the bringing of the suit, and, as shown by the supplemental bill and the answer thereto, was perfected into full title by the issuance of a patent thereon during the pendency of the suit. At the date of the grant to the Northern Pacific Railroad Company the land was withdrawn from pre-emption, settlement, and sale in order that it might be ultimately available for the satisfaction of a prior grant of lands made by Congress May 5, 1864 (13 Stat. 64, c. 79), in aid of the construction of a railroad from St. Paul, Minn., to the head of Lake Superior, which came to be known as the Lake Superior & Mississippi Railroad. This withdrawal was made by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, May 26, 1864, after the filing and acceptance of a map of the general route of the Lake Superior & Mississippi Railroad, which indicated that the land would fall within the place limits of the grant made in aid of that road. The land was public in the full sense of the term at the date of the grant of May 5, 1864, and at the date of the withdrawal. The route of the Lake Superior & Mississippi road as definitely located September 25, 1866, by the filing and acceptance of the required plat, departed so far from the line provisionally indicated upon the map of the general route that this land fell entirely without the limits of the grant. The prior withdrawal was then impliedly, if not expressly, revoked as to all lands falling without the limits of the grant as adjusted to the line of definite location. It was during the existence of the withdrawal for the benefit of the Lake Superior & Mississippi Railroad that the grant of public land was made to the Northern Pacific Railroad Company by the act of July 2, 1864, supra. This land is within the place limits of that grant, and the portion of that company's railroad opposite thereto was definitely located July 6, 1882. At that time this land was public land, not mineral, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. The Circuit Court held that land which at the date of the grant to the Northern Pacific Railroad Company was included within a withdrawal like that made for the benefit of the Lake Superior & Mississippi Railroad did not come within the description of "public land" granted to the Northern Pacific Railroad Company, and entered a decree dismissing the bill and supplemental bill. 134 Fed. 303.

The grant to the Northern Pacific Railroad Company is expressed in the third section of the act of July 2, 1864, supra, and reads as follows:

"Sec. 3. And be it further enacted, that there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said

line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office: and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections: provided, that, if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: provided, further, that the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: provided, further, that all mineral lands shall be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: and provided, further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: and provided, further, that no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Northern Pacific Railroad.'" 13 Stat. 367.

James B. Kerr, for appellant.

J. N. Searles, for appellees.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The grant to the Northern Pacific Railroad Company was one in presenti and was in terms confined to "public land." *St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co.*, 139 U. S. 1, 5, 11 Sup. Ct. 389, 35 L. Ed. 77. Land not public at the date of the grant was not granted, even though it subsequently became of that character. *Bardon v. Northern Pacific R. R. Co.*, 145 U. S. 535, 539, 12 Sup. Ct. 856, 36 L. Ed. 806; *Northern Pacific Ry. Co. v. De Lacey*, 174 U. S. 622, 626, 19 Sup. Ct. 791, 43 L. Ed. 1111; *United States v. Southern Pacific R. R. Co.*, 146 U. S. 570, 594, 606, 13 Sup. Ct. 152, 36 L. Ed. 1091. The words "public land" have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made. *Bardon v. Northern Pacific R. R. Co.*, supra; *Wilcox v. McConnell*, 13 Pet. 498, 513, 10 L. Ed. 264; *Leavenworth, etc., R. R. v. United States*, 92 U. S. 733, 741, 745, 23 L. Ed. 634; *Newhall v. Sanger*, 92

U. S. 761, 23 L. Ed. 769; *Doolan v. Carr*, 125 U. S. 618, 630, 8 Sup. Ct. 1228, 31 L. Ed. 844; *Cameron v. United States*, 148 U. S. 301, 309, 13 Sup. Ct. 595, 37 L. Ed. 459; *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284, 14 Sup. Ct. 820, 38 L. Ed. 714; *Barker v. Harvey*, 181 U. S. 481, 490, 21 Sup. Ct. 690, 45 L. Ed. 963; *Scott v. Carew*, 196 U. S. 100, 109, 25 Sup. Ct. 193, 49 L. Ed. 403. From the time of the earliest railroad land grants it was the practice of the chief officers of the Land Department, to whom was committed the administration of such grants, to withdraw from settlement, entry, and sale the public lands along the line or route of the road so aided, in advance of its definite location, in order that the lands might be preserved for the ultimate satisfaction of the grant. Such withdrawals, where not made in opposition to the terms of the grant or other congressional enactment, have been uniformly declared to be reservations made by competent authority and to be efficient to remove the lands therein from the category of public land and to exclude them from subsequent railroad land grants containing no clear declaration of an intention to include them; and this, even though it subsequently transpired that the withdrawal was ill-advised, or that the lands therein were not required for the satisfaction of the grant. *Wolcott v. Des Moines Company*, 5 Wall. 681, 688, 18 L. Ed. 689; *Riley v. Welles*, 154 U. S. 578, 14 Sup. Ct. 1166, 19 L. Ed. 648; *Wolsey v. Chapman*, 101 U. S. 755, 768, 25 L. Ed. 915; *Wisconsin Central R. R. Co. v. Forsythe*, 159 U. S. 46, 54, 55, 15 Sup. Ct. 1020, 40 L. Ed. 71; *Spencer v. McDougal*, 159 U. S. 62, 15 Sup. Ct. 1026, 40 L. Ed. 76; *Northern Pacific R. R. Co. v. Musser-Sauntry Co.*, 168 U. S. 604, 607, 18 Sup. Ct. 205, 42 L. Ed. 596.

The application of these fixed rules of decision to the facts of the present case sustains the holding of the Circuit Court and requires that its decree be affirmed. At the date of the grant to the Northern Pacific Railroad Company the land now in controversy was embraced in a subsisting withdrawal made by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, for the purpose of preserving the land for the satisfaction of a prior grant in aid of the construction of another railroad, the provisional location of which, as shown upon the accepted map of its general route, indicated that the land would probably fall within the place limits of that grant, and would be required for its satisfaction. The withdrawal was not made in opposition to the terms of the prior grant or of any other congressional enactment, and there is nothing in the subsequent grant to the Northern Pacific Railroad Company indicative of an intent on the part of Congress to use the words "public land" therein in a sense which would embrace lands at that time withdrawn or reserved for the protection of a prior grant. In short, the subsequent grant, being in presenti and confined to public land, did not embrace the land now in controversy, because it was then excluded from the category of public land by reason of the subsisting withdrawal or reservation. It is true that, after the date of the grant to the Northern Pacific Railroad Company and before the definite location of the line of that company's road, the land was released from the withdrawal, and

thereupon became public in the fullest sense of the term; but this did not place it within the operation of a preceding grant in præ-senti confined to land then public. The release simply restored it to the public domain and subjected it to future disposal under any law then applicable to it. The decision of the Supreme Court in *Bardon v. Northern Pacific Railroad Co.*, supra, is conclusive on this point. The land there in controversy was part of an odd-numbered section, not mineral, within the place limits of the grant to the Northern Pacific Railroad Company made by the act of July 2, 1864 (13 Stat. 365, c. 217), and to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of that company's road was definitely fixed; but it was not "public land," within the usual and settled meaning of that term at the date of the grant. It was then covered by a subsisting pre-emption entry theretofore wrongfully allowed without proof of the pre-emptor's compliance with the law. Shortly thereafter, and before the line of road was definitely fixed, the entry was canceled by the Commissioner of the General Land Office because of the absence of such proof, and the money theretofore paid on the entry was refunded by the government. There, as in the present case, it was contended that the status of the land at the date when the line of road was definitely fixed was the only criterion in determining whether or not it passed to the railroad company under the grant. In holding otherwise the court said (page 538 of 145 U. S., page 857 of 12 Sup. Ct. [36 L. Ed. 806]):

"It is thus seen that when the grant to the Northern Pacific Railroad Company was made, on the 2d of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncanceled; that by such pre-emption entry the land was not at the time a part of the public lands, and that no interest therein passed to that company. The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land, to which any claims or rights of others have attached, does not fall within the designation of 'public land.' The statute also says that whenever, prior to the definite location of the route of the road, and of course prior to the grant made, any of the lands which would otherwise fall within it have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands are to be selected in lieu thereof under the direction of the Secretary of the Interior. There would therefore be no question that the pre-emption entry by the heirs of Robinson, the payment of the sums due to the government having been made, as the law allowed, by them after his death, took the land from the operation of the subsequent grant to the Northern Pacific Railroad Company, if the pre-emption entry had not been subsequently canceled. But such cancellation had not been made when the act of Congress granting land to the Northern Pacific Railroad Company was passed. It was made more than a year afterwards. As the land pre-empted then stood on the records of the Land Department, it was severed from the mass of public lands, and the subsequent cancellation of the pre-emption entry did not restore it to the public domain, so as to bring it under the operation of previous legislation, which applied at the time to land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this court."

And referring to the case of *Leavenworth, etc., R. R. Co. v. United States*, supra, in which a claim to lands under a railroad land grant was rejected where the lands were within an Indian reservation at the date of the grant, but at the date of the definite location of the line of the road had become public land in the proper sense of the term by reason of the termination of the reservation, it was also said (page 543 of 145 U. S., page 859 of 12 Sup. Ct. [36 L. Ed. 806]):

"Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in the *Leavenworth Case*; but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that in the absence of any express provision indicating otherwise a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the government and to private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties."

Upon the filing and acceptance of the map showing the general route of its railroad the Lake Superior & Mississippi Railroad Company acquired an inchoate right to the odd-numbered sections public at the date of the grant of May 5, 1864, within the prescribed limits on each side of that route, and thereupon the land officers, anticipating that the line of definite location would substantially conform to the general route, withdrew these sections from pre-emption, settlement, and sale, thus placing them in a state of reservation for the benefit of that company and removing them from the category of public land. Such was the status of the land now in controversy when the grant was made to the Northern Pacific Railroad Company. Had the line of definite location of the Lake Superior & Mississippi Railroad as subsequently established conformed to the line of its general route sufficiently to have brought the land within the place limits of the grant in aid of that road, there would be no question that the Lake Superior & Mississippi Railroad Company would thereupon have acquired a vested right to the land, as of the date of that grant, and that the same would not be within the operation of the grant to the Northern Pacific Railroad Company. *Northern Pacific R. R. Co. v. Musser-Sauntry Co.*, 168 U. S. 604, 611, 18 Sup. Ct. 205, 42 L. Ed. 596; *St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co.*, 139 U. S. 1, 17, 11 Sup. Ct. 389, 35 L. Ed. 77; *United States v. Southern Pacific R. R. Co.*, 146 U. S. 570, 595, 13 Sup. Ct. 152, 36 L. Ed. 1091. As, however, the line of definite location of the Lake Superior & Mississippi Railroad departed materially from the general route, no title to the land vested in the Lake Superior & Mississippi Railroad Company, and the withdrawal or reservation was modified accordingly; but these matters, occurring subsequently to the grant to the Northern Pacific Railroad Company, and therefore after the time in respect of which that grant must operate as one in presenti, if at all, are without any bearing upon the decision of the present case, unless, as before indicated, there is something in the granting act clearly indicative of

an intent on the part of Congress to depart from the settled meaning of the words "public land" and to use them in a sense which would embrace lands then withdrawn and reserved for the satisfaction of a prior grant in aid of another railroad. Not only is there nothing in the act of July 2, 1864, indicative of such intent, but the clear import of the first proviso to section 3, *supra*, is that there was none. *United States v. Southern Pacific R. R. Co.*, 146 U. S. 570, 605, 13 Sup. Ct. 152, 36 L. Ed. 1091.

The reliance of counsel for the appellant seems to be on the cases of *Northern Pacific R. R. Co. v. Sanders*, 166 U. S. 620, 17 Sup. Ct. 671, 41 L. Ed. 1139; *Menotti v. Dillon*, 167 U. S. 703, 17 Sup. Ct. 945, 42 L. Ed. 333; *Nelson v. Northern Pacific Ry. Co.*, 188 U. S. 108, 23 Sup. Ct. 302, 47 L. Ed. 406; and *United States v. Oregon & California R. R. Co.*, 176 U. S. 28, 20 Sup. Ct. 261, 44 L. Ed. 358. None of these cases has particular reference to or makes the decision turn upon the clause, "there be, and hereby is, granted * * * every alternate section of public land," which makes the grant one in *presenti* of land then public, but instead each has particular reference to and makes the decision turn upon the limitation on the granting clause, which makes it also requisite that "the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed." They all recognize the well-established rule, that the grantee under a railroad land grant acquires, by designating the general route of its road, only an inchoate right to the odd-numbered sections granted by Congress, and that until the definite location of the road these sections remain within the disposing power of Congress, and this, even though they be withdrawn for the protection of the grant, as in the present case; but there is nothing in this which is inconsistent with the rule, equally well established, that an intent to supersede such a withdrawal and to make other disposition of the lands covered thereby is not deducible from subsequent legislation relating to "public land," unless it contains something to indicate that that term is used otherwise than according to its settled meaning. This is made clear in *Menotti v. Dillon*, where it was said (page 719 of 167 U. S., page 950 of 17 Sup. Ct. [42 L. Ed. 333]):

"It is said that the railroad company filed its map of general route on the 8th day of December, 1864, and that, these lands having been withdrawn from pre-emption, private entry, and sale by the executive order of January 30, 1865, they were not embraced by the act of 1866. In our opinion this is not a proper interpretation of that act. The proviso of the first section distinctly indicates certain cases to which the act should not apply; and, distinctly excluding those cases, but no others, from its operation, the act, in express words, confirmed to the state, 'in all cases,' lands which the state had theretofore selected in satisfaction of any grant by Congress and sold to purchasers in good faith under its laws."

In this connection it may be properly observed that the same rule which defeats the appellant in the present case was applied in favor of its grantor, the Northern Pacific Railroad Company, as much as 14 years ago, in *St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co.*, 139 U. S. 1, 17, 11 Sup. Ct. 389, 394, 35 L. Ed. 77, where it was said:

"Besides, the withdrawal made by the Secretary of the Interior of lands within the 40-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises."

The very earnest contention of learned counsel for the appellant that the question presented in this case is identical with that determined by the Supreme Court in *United States v. Oregon & California R. R. Co.*, supra, justifies a somewhat extended statement respecting that case. Primarily the controversy arose out of a claimed conflict between the grant made to the Northern Pacific Railroad Company by the act of July 2, 1864, and the grant to the Oregon & California Railroad Company made by the act of July 25, 1866 (14 Stat. 239, c. 242). March 6, 1865, Josiah Perham, president of the Northern Pacific Railroad Company, addressed to the Secretary of the Interior a communication transmitting to that officer a map said to designate the general route of the Northern Pacific Railroad, and requested that it be filed in the office of the Commissioner of the General Land Office, and that an order of withdrawal be made of the lands along the route designated. The map was not accepted, because not sufficient as a map of general route, and no order of withdrawal was made thereon; nor was there ever any definite location or construction of the Northern Pacific Railroad opposite to the lands in suit. The road of the Oregon & California Railroad Company was definitely located and constructed, and the lands within the area of the claimed conflict were patented to it. Subsequently Act Sept. 29, 1890, c. 1040, 26 Stat. 496 [U. S. Comp. St. 1901, p. 1598], forfeited to the United States all lands theretofore granted to any corporation to aid in the construction of a railroad which were opposite to and coterminous with the portion of such railroad not then completed and in operation. The purpose of the suit was to cancel the patents issued to the Oregon & California Railroad Company for the lands within the area claimed to be in conflict; the contention of the government being that the patents were issued without authority of law. It was stated in the opinion:

"This contention rests upon the assumption that the lands so patented, although within the limits of the grant contained in the act of July 25, 1866, and within the line of the Oregon Company as definitely located, were excluded from that grant because included in the grant previously made to the Northern Pacific Railroad Company by the act of July 2, 1864, * * * in which case it is insisted that they were forfeited to the United States by the act of September 29, 1890, * * * and should be so adjudged."

The opinion does not disclose any contention on the part of the government that the grant of July 25, 1866, being one in presenti and confined to public land, did not include the lands in controversy, because then withdrawn or reserved for the benefit of the prior grant. To the contrary it is said:

"The contention of the government renders it necessary to ascertain what interest, if any, was acquired by the Northern Pacific Railroad Company in these lands by virtue of the act of July 2, 1864."

Then, after stating that the grant made by that act was in the nature of a "float," no right or title to any particular section becom-

ing "certain" until a definite location of the line of road, it was further said:

"If, therefore, the Perham map of 1865 were conceded, for the purpose of the present discussion, to have been sufficient as a map of 'general route'—and nothing more can possibly be claimed for it—these lands could not be regarded as having been brought by that map (even if it had been accepted) within the grant to the Northern Pacific Railroad Company, and thereby have become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under statutes enacted by Congress after the filing of that map and before any definite location by the company of its line."

An extended reference to decided cases, particularly to *Northern Pacific R. R. Co. v. Sanders* and *Menotti v. Dillon*, *supra*, was then made, in the course of which it was declared that a general statement in *Buttz v. Northern Pacific R. R. Co.*, 119 U. S. 55, 72, 7 Sup. Ct. 100, 30 L. Ed. 330, to the effect that, upon the designation of the general route of the Northern Pacific Railroad, "the law withdraws" the odd-numbered sections within the prescribed limits for the protection of the grant, was too broad, if intended to convey the thought that the designation of such route would prevent these sections from being granted by Congress to, and from being earned by, another railroad corporation prior to the definite location of the line of road. It was then said:

"As the grant contained in the act of July 2, 1864, did not include any lands that had been reserved, sold, granted, or otherwise appropriated at the time the line of the Northern Pacific Railroad was 'definitely fixed'; as the route of the Northern Pacific Railroad had not been definitely fixed at the time the act of July 25, 1866, was passed, or when the line of the Oregon Company was definitely located; as the lands in dispute are within the limits of the grant contained in the act of 1866; as the route of the Oregon Railroad was definitely fixed, at least when the map showing that route was accepted by the Secretary of the Interior on the 29th day of January, 1870, the Northern Pacific Railroad Company having done nothing prior to the latter date except to file the Perham map of 1865; and as prior to the forfeiture act of September 29, 1890, there had not been any definite location of the Northern Pacific Railroad opposite the lands in dispute—there is no escape from the conclusion that these lands were lawfully earned by the Oregon Company and were rightly patented to it."

In a later case, *United States v. Northern Pacific R. R. Co.*, 193 U. S. 1, 7, 24 Sup. Ct. 330, 48 L. Ed. 593, the question was presented as to what effect had been and should be given to the Perham map, and therefore as to what was decided in the former case, and it was said:

"In *United States v. Oregon & California R. R. Co.*, *supra*, it was held that, if the Perham map were valid as a map of general route, it did not operate as a reservation."

As no withdrawal was made by the officers of the Land Department along the route attempted to be designated by that map, and as the map did not of itself operate as a reservation, it follows that at the date of the grant of July 25, 1866, the lands in suit were not withdrawn or reserved for the benefit of the prior grant, but remained within the category of public land. The case chiefly relied upon is therefore clearly distinguishable from the present one. The ultimate question decided in that case, as is indicated by the ex-

tracts before quoted from the opinion, was whether the grant of July 2, 1864, of itself excluded the lands in suit from the grant of July 25, 1866. Of course it did not. It did not identify them as within the limits of the grant, and, there being no definite location of the line of road opposite to them, they were never so identified. The decree is affirmed.

In re HABEGGER.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1905.)

No. 55.

1. BANKRUPTCY—PREFERENCES—SECURING ATTORNEY'S FEE.

A transfer of property by an insolvent debtor, immediately prior to and in contemplation of bankruptcy proceedings, to an attorney, in consideration of the attorney agreeing to perform legal services in negotiating with the creditors of such debtor for a settlement of his financial difficulties without resort to the bankruptcy court, is not validated by section 60d of the national bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]), and the property so transferred may be recovered by the trustee of the bankrupt estate.

2. SAME.

Such transfer of property, made under like circumstances, to an attorney, in consideration of his agreeing to defend the bankrupt debtor against anticipated criminal prosecutions, which are not brought until after the filing of a petition in bankruptcy, is not made valid by section 60d of the act, but may be avoided, and the property recovered by the trustee in bankruptcy.

3. SAME—CHARACTER OF SERVICES.

The kind of legal services to be performed for which an insolvent debtor contemplating bankruptcy proceedings may contract and make payment for in money or by a transfer of property, under the provisions of section 60d of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]), are such services as are rendered in aid of the purpose sought to be accomplished by the act, conserve and benefit the estate of the bankrupt, and thus inure to the benefit of creditors, or are such legal services as are contemplated by the act in bringing the bankrupt estate before the court, its subsequent administration and distribution to the creditors, and the like.

(Syllabus by the Court.)

Petition for Revision of Proceedings of the District Court of the United States for the District of Minnesota, in Bankruptcy.

The controversy here presented for decision arises from the following state of facts: On October 31, 1903, one H. Burton Strait, being in financial difficulties, employed Charles R. Fowler, a regular practicing lawyer, to negotiate, and, if possible, arrange, with his creditors for an extension of time of payment of his indebtedness and settlement of his affairs out of the bankruptcy court. On that day Fowler entered upon this employment, saw and negotiated with the creditors of Strait, attempted to obtain an extension of time of payment of his indebtedness, and a settlement of his financial difficulties out of court, without success. On November 2d, thereafter, Strait received information that his creditors were contemplating the institution of criminal proceedings against him on the charge of receiving deposits in his bank, known as the "Scott County Bank," at a time when it was insolvent, and known to be so by Strait. On that day Strait further employed Fowler to defend him in case any such criminal proceedings should be instituted against him. At this time Strait assigned to Fowler promissory notes agree-

gating \$1,500, and a mortgage given to secure the same, as a retainer, and by way of compensation to Fowler for services so to be rendered. At this time Fowler did not know Strait was insolvent or that bankruptcy proceedings were contemplated. On the 4th day of November, thereafter, it became apparent the financial difficulties of Strait could not be adjusted, and that bankruptcy proceedings would be commenced, and on that day he employed Fowler to represent him in the bankruptcy proceedings, and agreed to pay him, as compensation for his services, the sum of \$500 as attorney's fees and \$30 necessary expenses in the bankruptcy proceeding, which sums were to be received from the securities theretofore transferred to Fowler, and further agreed he should have and retain the remainder of the proceeds of the notes and mortgage as compensation for his services in attempting to arrange an extension of time with his creditors and in negotiating for settlement of his financial difficulties out of court, and for his services in such criminal proceedings as might thereafter be commenced against him. Thereafter, on the 6th day of November, bankruptcy proceedings were instituted, and Strait was on that day adjudged a bankrupt. Petitioner herein was duly chosen and qualified as trustee in bankruptcy of his estate. After the commencement of the bankruptcy proceedings criminal prosecutions were instituted against Strait in the state court of Minnesota, which criminal prosecutions, under his contract of employment, were defended by Fowler. Thereafter the trustee filed his application in the bankruptcy court against Fowler, tendering to him the sum of \$530, his necessary costs and compensation as an attorney for Strait in the bankruptcy proceedings, and praying an order requiring the surrender of the notes and mortgage transferred to him by Strait on such payment being made. This application Fowler answered, claiming the remainder of the proceeds of the securities transferred to him by Strait to have been received in payment of his compensation as an attorney in negotiating with the creditors of Strait for an extension of time and settlement of his financial difficulties out of court, and also for defending Strait in criminal proceedings brought against him after the commencement of the bankruptcy proceedings, as theretofore agreed by Strait with him. The matter was submitted to the referee in bankruptcy on the application made by the trustee and the answer of Fowler thereto, without other evidence or proofs. The facts as herein stated are taken from the application and answer. The referee at the hearing dismissed the application of the trustee. This order was affirmed by the District Court, and the trustee has filed in this court his petition for a review of that order.

F. J. Leonard and F. C. Irwin, for petitioner.

Edward H. Crooker, for respondent.

Before HOOK, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, District Judge, after stating the case as above, delivered the opinion of the court.

The right of Fowler, as attorney for the bankrupt, to receive payment of \$530 in compensation for his services and expenses in the bankruptcy proceedings, before being compelled to surrender the securities transferred to him by the bankrupt, is conceded by the trustee in his application, and is thus removed from consideration in this case. The controversy arises over the right of Fowler to retain the securities absolutely, under his agreement with the bankrupt, made before the adjudication in bankruptcy, in payment of professional services rendered and to be rendered under the terms of such agreement. The claim thus made by Fowler to the securities is based on two grounds: First, his right to withhold the same in payment of his services in negotiating with the creditors of Strait for an adjustment and settlement of his financial difficulties out

of the bankruptcy court; second, for legal services to be performed by Fowler in defending Strait in criminal prosecutions thereafter to be brought against him, which contract was executory in its nature at the time the petition in bankruptcy was filed, as no criminal prosecutions were brought against the bankrupt prior to the filing of the petition in bankruptcy and adjudication thereon. Can either of such claims be relied upon by the attorney by way of defense to the application made by the trustee?

There are two provisions of the national bankruptcy act relating to the compensation of attorneys. Clause 3 of section 64b provides what attorney's fees shall have priority and be paid in full out of the assets of the bankrupt estate, as follows:

"The cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow." Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448].

Clause "d" of section 60 provides the extent to which money paid or property transferred by a debtor contemplating insolvency to an attorney or other legal counsel, in compensation for services thereafter to be rendered, shall be declared valid as a preference, as follows:

"If a debtor shall, directly, or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate." Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446].

The comprehensive, general, and unrestricted language employed in this section, in failing to define the character of the legal services to be performed which shall entitle the doer to retain the money paid or property transferred to him, under the provisions of the act, as a preferred creditor, has given rise to much doubt as to its intent and meaning, which doubt is only aggravated by the use of the terms "solicitor in equity" and "proctor in admiralty." Thus it is the contention of the claimant, Fowler, this section applies to and validates any contract made by a debtor contemplating bankruptcy with his attorney for future legal services to be performed, where there is a present payment of money or transfer of property, to the extent that such payment or transfer may be found reasonable compensation for the services to be performed, and that to such extent the attorney is a preferred creditor of the estate, regardless of the character of the legal services to be performed, whether such services are beneficial to the estate of the bankrupt or otherwise. Therefore, he contends in this case, his contract for services to be rendered the bankrupt in attempting to secure an extension of time and settlement of his financial difficulties with his creditors out of

court, and to defend him against criminal proceedings thereafter to be instituted, in consideration of the present transfer of the securities, is valid, and he is a preferred creditor to the extent the value of the securities reasonably bears to the legal services agreed to be performed under the contract. On the other hand, it is the contention of the petitioning trustee, the legal services provided for in the act, and by section 64b of the act awarded priority of payment over the demands of other creditors against the estate, or which are permitted to stand as a valid preference under the provisions of section 60d of the act, when paid by the debtor before contemplated bankruptcy, are such services only as tend to conserve the estate to the creditors, bring it before the court for adjudication and distribution, and other like legal services rendered to the creditors or bankrupt, required or necessary to be done under the terms of the act in carrying out and rendering effective its purpose.

From a consideration of the entire act, having in mind the dominant object and purpose is to protect the estate of failing debtors and to distribute it among creditors pro rata in proportion to their provable demands, to guard it from preferred creditors and fraudulent grantees, and in the end to provide for the discharge of the honest debtor, we are inclined to agree with the contention made by the trustee, notwithstanding the broad, general language of section 60d, and for this reason: From an examination of the entire act it will be seen no other or different provision is made respecting the allowance or payment of the general obligations of bankrupts to their attorneys than is made for the payment of other debts of the bankrupt. The method provided by the act for the preservation of the bankrupt estate, the ascertainment of the amount of valid claims against the bankrupt, the value of the assets, the extent and priority of liens thereon, the conversion of the estate into money and its disbursement amongst creditors, preferred and general, the granting of a discharge to the bankrupt, and all other proceedings thereunder, are, in accordance with the provisions of the act, transacted in the bankruptcy court. Of necessity, such proceedings are conducted in most cases by attorneys employed by the bankrupt in voluntary cases, or by the creditors in involuntary cases. It is just and equitable such attorneys should be compensated for their services rendered in this behalf out of the assets of the estate, because of the fact that by the filing of a petition in bankruptcy the nonexempt property passes into the control of the court, leaving the bankrupt without means of payment. Hence, the clause of section 64b, above quoted, in making provision for the payment of debts which have priority, and which must be paid in full before distribution of the estate to the general creditors, makes provision for the compensation of attorneys as therein specified in cases where no contract has been theretofore made with the bankrupt and payment made in advance of the bankruptcy proceedings.

Again, the act is framed in recognition of the well-known fact that a debtor in contemplation of insolvency and consequent bankruptcy proceedings may be importuned, harassed, and annoyed by

his creditors seeking to gain an advantage over other creditors by way of preference, fraudulent conveyances, and the like; and in such extremity the bankrupt needs the advice and assistance of counsel to conserve the estate for the benefit of all creditors against spoliation and dissipation, and in the preparation of the petition, schedules, and the like papers to confer jurisdiction on the court to take charge of the estate, and, in order to obtain such legal services in contemplation of bankruptcy proceedings, may make contracts, and will make present payments of money or transfers of property to obtain such services and make payment thereof, which executory contracts, being made by one insolvent and in contemplation of bankruptcy proceedings, would under other provisions of the act be voidable as a preference, unless protected by section 60d. Therefore such payments of money or transfers of property to an attorney by one contemplating bankruptcy as tend to conserve the estate and bring it before the bankruptcy court for settlement, or other services required by the terms of the bankruptcy act to be performed by the bankrupt, are made valid as a preference under that section, to the extent they are found upon examination to be reasonable and equitable; such claims being in principle entitled to equitable priority, as are claims for services performed or property furnished in the preservation and betterment of an estate controlled and administered by a court of equity. All other claims for legal services are allowable only as a general claim against the estate of the bankrupt in the hands of the trustee. In view of the oft-repeated declarations of courts as to the object and purpose of the national bankruptcy act, as to the advantages accruing to creditors and the debtor, as well by an honest, conservative, and expeditious preservation and administration of the estate according to its letter and spirit, and as to the many mischiefs sought to be guarded against by its enactment and enforcement, the construction here given section 60d seems to us to be most in consonance with the purpose sought to be accomplished by the act, as declared by the courts, and as gathered from the several sections of the act construed as a whole, and also to be in harmony with the better reasoned cases bearing upon the subject, as will be seen by reference thereto.

In *Re Kross* (D. C.) 96 Fed. 816, the question for decision was the right of an attorney for the bankrupt to demand and receive payment of his fees as a prior claim against the estate of the bankrupt in the hands of the trustee, under section 64b. Brown, District Judge, delivering the opinion of the court, after defining the nature of the legal services performed for a bankrupt which are entitled to priority and payment in full under the provisions of section 64b, in discussing the relation and interdependence of sections 64b and 60d in this respect, says:

"This construction is further sustained by subdivision 'd' of section 60, which provides that the 'payment of money or transfer of property to an attorney or counselor for services to be rendered in contemplation of the filing of a petition by or against a person * * * shall be re-examined by the court * * * and held valid only for a reasonable amount to be determined

by the court, the excess to go to the trustee.' While by the general terms of the act the debtor is required to turn over all his unexempt property to the trustee, an exception is here created in favor of an attorney, to a reasonable amount, for services to be rendered to the debtor in bankruptcy, although this is valid so far only as subsequently approved by the court. The charges to be 'approved' are, I cannot doubt, for the same services which the 'fee' is designed to be allowed for, under section 64, subd. 'b,' par. 3. Both paragraphs are to be construed together, so that it becomes immaterial in the result whether the attorney obtains his compensation in the first instance from the bankrupt under section 60 refunding what, if anything, is disallowed by the court, or whether he waits for an allowance by the court under section 64. The latter is evidently the more convenient and desirable practice; and, considering that prior payment for an attorney's services to the bankrupt is expressly allowed by section 60, I cannot agree to any such construction of the act as would deprive the attorney of a proper compensation for a necessary service merely because he did not take it out of the estate at his own estimate in advance."

In *Randolph v. Scruggs*, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, the following questions were certified to that court from the Circuit Court of Appeals for the Sixth Circuit for instruction:

"(1) Is a claim for professional services, rendered to a bankrupt corporation in the preparation of a general assignment, valid under the law of Tennessee, entitled to be paid as a preferential claim out of the estate of the corporation in the hands of a trustee in bankruptcy, when the corporation was adjudicated an involuntary bankrupt within four months after the making of the assignment, and the assignment set aside as in contravention of the bankrupt law? (2) Is a claim for professional advice and legal services rendered such an assignee, prior to an adjudication of bankruptcy, against the assignor, the assignment providing that the costs and expenses of administering the trust should be first paid, entitled to be proven as a preferential claim against the bankrupt estate? (3) Is a claim against such an assignee for legal services, rendered at his employment in resisting an adjudication of involuntary bankruptcy against the assignor, allowable as a preferential claim, when the necessary effect of the adjudication would be to set aside the assignment under which the assignee was acting? (4) If not entitled to be allowed as preferential claims, may either of the items described in the foregoing questions be proven as unsecured debts of the bankrupt corporations?"

These questions were answered by that court as follows:

"(1) No. (2) Not under the deed; but, so far as the assignee would be allowed for payment of the claim, the claim may be preferred in the right of the assignee. (3) Not on the facts appearing in the certificate. (4) The charge for the preparation of the deed may be proved as an unsecured claim."

Mr. Justice Holmes, in delivering the opinion of the court, said:

"We are not prepared to go further than to allow compensation for services which were beneficial to the estate. Beyond that point we must throw the risk of his conduct on the assignee, as he was chargeable with knowledge of what might happen. It does not appear how far the services to the assignee were beneficial. Therefore the questions of the Circuit Court of Appeals cannot be answered in full. But the principles as to which it desired instruction may be stated sufficiently for the disposition of the case upon a subsequent finding of facts. None of the claims is entitled to preference under the deed. The charge for the preparation of the assignment properly may be proved as an unpreferred debt of the bankrupt. The services to the voluntary assignee may be allowed so far as they benefited the estate, and inasmuch as he would be allowed a lien on the property if he had paid the sum allowed, the appellants may stand in his shoes and may be preferred to that extent. No ground appears for allowing the item for services in resisting an adjudication of bankruptcy. See *Platt v. Archer*, 3 Blatchf. 351, 354, Fed. Cas. No. 11,214; *Perry-*

Mason Shoe Co. v. Sykes, 72 Miss. 390, 398, 17 South. 171, 23 L. R. A. 277; T. T. Haydock Carriage Co. v. Pier, 78 Wis. 579, 582, 47 N. W. 945; Clark v. Sawyer, 151 Mass. 64, 23 N. E. 726."

While the Supreme Court in this case did not place its construction on the provisions of the act now under consideration, or determine the analogy of the legal services provided for in the one section of the act to that of the other, yet it is an authority on the class of legal services performed for an assignee, who stands in the place of the bankrupt, entitled to priority of payment under the terms of the entire act, out of the assets of the estate in the hands of the trustee, and is, to our minds, a conclusive holding that such general legal services only as are beneficial to the estate are to be so preferred. This is the construction given to the clause of the act under consideration by Mr. Collier in his work on Bankruptcy (5th Ed., p. 464). See, also, *In re Smith* (D. C.) 108 Fed. 39, *In re Rosenthal & Lehman* (D. C.) 120 Fed. 848, and *In re Lewin* (D. C.) 4 Am. Bankr. Rep. 632, 103 Fed. 852.

On the other hand, *Furth v. Stahl*, 10 Am. Bankr. Rep. 442, 55 Atl. 29, and *Pratt v. Bothe*, 130 Fed. 670, 65 C. C. A. 48, would seem to be authority in favor of the contention here made by the claimant, Fowler. The latter was a controversy over a claim for legal services, part of which were performed before and a part after the filing of the petition in bankruptcy, under a contract secured by mortgage made with the bankrupt before the filing of the petition. The nature of the legal services performed before the institution of the bankruptcy proceedings does not appear. It would seem, however, from the reasoning of the opinion, this was not thought material; for it is there said:

"Upon the construction which we think should be given to section 60d, there having been no petition of the trustee or any creditor that the court should inquire into the reasonableness of the amount of the compensation agreed to be paid by the debtor, we think the claim of the petitioner for charges incurred before the commencement of the bankruptcy proceedings should have been allowed at the sum of \$241.75, less the sum of \$150 admitted to have been paid, which would leave a balance of \$91.75. This, of course, does not include the \$37.50 allowed by the judge under section 64b. As the rights of the parties are governed by the special provisions of the statute relating to the subject, no question of preference by reason of the payments arises."

From this and other language of the opinion it would seem to be thought by that court the construction and effect to be given section 60d must depend alone upon the time of performance of the legal services, and not upon the character or class of such services; that all claims for services performed before the filing of the petition, contracted and paid for by a debtor contemplating bankruptcy in money or by a transfer of property, must stand, if reasonable, as a preferred claim, and all claims for legal services performed thereafter must be disallowed. If the decision there made is as the opinion would seem to indicate, we are not prepared to agree with the reasoning employed or the conclusion reached; for, in the very reason of things, why should an insolvent debtor, contemplating bankruptcy, be permitted to mortgage his property to secure the

payment of legal services to be performed in the future, not beneficial to his estate, any more than he should be permitted to mortgage his property to secure payment of money to be paid in future? The act was passed for the protection of existing creditors of insolvent debtors, and to work a discharge of the honest bankrupt who subjects his available property to the payment of his just debts, and not for the purpose of validating his contracts. If an insolvent, contemplating bankruptcy, transfers his property in payment of future legal services to be performed, not beneficial to his estate and which do not inure to the benefit of his creditors, why is such a transfer not a voidable preference or a fraudulent transfer under other provisions of the act, to the same extent as are other transfers of his property without present fair consideration.

In *Furth v. Stahl*, *supra*, the Supreme Court of Pennsylvania held there is no relation existing between the kind of legal services provided for in section 60d and clause 3 of section 64b of the act. This distinction is based on the single fact that in the one case the services are contracted for by the bankrupt and are services to be performed in future, and in the other they are allowed by the law without express agreement. The thought that in the one case Congress was dealing with preferential payments, and in the other with claims entitled to priority of payment out of the assets of the estate, is lost sight of or not considered. We are not impressed with the reason given for the distinction made. Why the bankrupt may not in advance contract for and make payment of the identical legal services required to be performed under the terms of the act, or in aid of its purpose, is not apparent. Such constructions, to our minds, lay too much stress upon the language of a single clause, are not in harmony with the beneficial purpose sought to be accomplished by the act, and would lend inducement too strong to fraudulent payments and transfers to one occupying a fiduciary relation, which would be difficult of investigation because of the confidential relations of the contracting parties. We prefer rather to confine the general language of the section, by construction, to such legal services as are clearly shown to have been beneficial to the estate, or to such services as are required or may be performed by the bankrupt under the terms of the act, and to that extent, only when reasonable, hold payments made or property transferred valid as preferential payments, and beyond that voidable at the suit of the trustee or creditors of the estate. If it be thought the terms employed in the section, "solicitors in equity" or "proctors in admiralty," require a different construction of the section, as was thought in *Pratt v. Bothe*, *supra*, we find no inherent reason in the character of the legal services performed by such professional talent in this country as would preclude their giving advice or rendering services to insolvent debtors which would inure to the benefit of the estate, or in the nature of things would preclude their preparing schedules of assets and liabilities and other like papers, for the purpose of bringing the estate before the bankrupt court for settlement.

It follows, from the construction here placed on the section of the act relied upon by the claimant, Fowler, in justification of his withholding the securities from the estate, the services by him performed were not such as are in their nature beneficial to the estate of the bankrupt, or as are required to be performed by the bankrupt under the provisions of the act. The claim for services in attempting to settle the financial difficulties of the bankrupt out of the bankruptcy court were rendered in opposition to bringing the estate before the court, and therefore should be clearly disallowed, under the ruling in *Randolph v. Scruggs*, supra. In so far as the claim is made for legal services performed on behalf of the bankrupt in defending him from criminal prosecutions, such services were neither beneficial to the estate, nor are they in their nature such legal services as are contemplated by the terms of the bankruptcy act, or as may be compensated from the assets of the estate in the hands of the trustee as a preferred claim; and this, even though such services had been performed before the filing of petition of bankruptcy and the consequent transfer of the estate into the grasp of the court.

The order of the District Court dismissing the petition of the trustee must be reversed, with directions to grant the relief therein prayed. It is so ordered.

CITY OF PLATTSMOUTH v. NEW HAMPSHIRE SAV. BANK et al.

(Circuit Court of Appeals, Eighth Circuit. July 24, 1905.)

No. 2,220.

LANDLORD AND TENANT—LEASE—HOLDING OVER.

The rule applied in a case where a tenant for years holds over his term with the consent of his landlord, express or implied, has no application to a case wherein the lease itself grants the tenant the power to continue the tenancy from year to year, for a specified number of years, on terms more favorable to the tenant, as to the payment of rent, than those imposed on the original term, and the tenant exercises the power conferred by remaining in possession beyond the original term, and makes payment of rent in accordance with the rent reserved for the continuing term.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Nebraska.

Rehearing denied September 8, 1905.

This controversy arose over the construction of a contract of lease entered into between appellant, the city of Plattsburgh (hereinafter called "the city"), and defendant, the Plattsburgh Gas & Electric Light Company (hereinafter called the "light company"), on the 23d day of October, 1896. The facts material to a decision of the question involved are these:

In the year 1885 the city granted to the light company a franchise to construct and maintain in the city a plant for the manufacture and sale of gas and electric light, and at various times thereafter entered into contracts with the light company to furnish lights to the city at the monthly rental of \$233.33, or, in the aggregate, \$2,800 per year. The last of these contracts ex-

pired November 15, 1900. On May 8, 1890, the light company executed and issued its negotiable bonds, in amount \$30,000, bearing interest at the rate of 6 per cent. per annum, payable semiannually, on the 1st days of June and December in each year thereafter, until the maturity of the bonds. To secure payment of these bonds and interest, the light company on the same day made and executed a mortgage covering all the property rights, privileges, franchises, choses in action, rents, and profits then held by it, or of which it might thereafter become possessed. In this mortgage the Illinois Trust & Savings Bank, of Chicago, Ill., was nominated as trustee for the benefit of the holders of the bonds. The entire issue of bonds was sold and delivered to appellees herein, the New Hampshire Savings Bank and the New Hampshire Banking Company (hereinafter called the "banking company"). Thereafter, and on October 23, 1896, while the city was still obligated to the light company to receive and pay for lights furnished by it at the rate of \$233.33 per month, or \$2,800 per year, in pursuance of the provisions of an ordinance of the city duly enacted for that purpose, the contract of lease forming the subject-matter of this controversy was entered into between the city and the light company. This lease comprises 12 articles. In so far as material to this inquiry, they are as follows:

"Article 1. The Plattsmouth Gas & Electric Light Company, aforesaid, hereby and by these presents doth lease, set over, convey, and transfer unto the city of Plattsmouth, Nebraska, its successors and assigns, all of its right, title, interest, and estate in and to the following real, personal, and mixed property, to wit: [Description omitted]—for a period of four years and fifteen days from and after the first day of November, A. D. 1896, until the fifteenth day of November, A. D. 1900, at an annual rental of twenty-eight hundred (\$2,800) dollars, payable in monthly warrants of two hundred and thirty-three and $\frac{33}{100}$ (\$233.33) dollars each; the same to be paid in city warrants of said city drawn on the gas and lighting fund of said city.

"Art. 2. That in addition to the payment of the sum of money for the rental of said gas and electric light [plants], the said city of Plattsmouth hereby agrees and undertakes to pay the annual interest upon \$30,000 of bonds at six per cent. per annum, being \$1,800 payable in equal installments of \$900 each upon the first days of December and June of each year until said fifteenth day of November, 1900, said sum payable to the Illinois Trust & Savings Bank, of Chicago, Illinois, trustee, its successors and assigns, as provided and required by the deed of trust made and executed by the said gas and electric light company, said gas and electric light company agrees to pay all interest due upon said bonds up to the first of November, 1896.

"Art. 3. That in consideration of the above lease and contract the said city of Plattsmouth, Nebraska, hereby agrees and undertakes to pay all taxes hereafter assessed and levied upon the property hereby conveyed and leased; said gas and electric light company hereby agrees to pay all taxes now due, assessed, and levied upon said property including the taxes for the year 1896.

"Art. 4. That on and after the 15th day of November, A. D. 1900, the said city of Plattsmouth, Nebraska, is hereby granted the right and shall have the power to continue this lease from year to year upon the terms and conditions herein set forth for a period ending on the first day of June, 1910, upon the payment of the sum of \$1,800 per annum to the Illinois Trust & Savings Bank, of Chicago, Illinois, trustee, or its successors or assigns, as provided in article 2 of this agreement; and that said sum of \$1,800 shall be in full payment for such lease for each year after said 15th day of November, 1900.

"Art. 5. That on and after the 15th day of November, 1900, the said city of Plattsmouth may at any time declare said lease terminated by giving to said Plattsmouth Gas & Electric Light Company written notice thereof at least sixty days before, of such intention to terminate said lease, and thereupon the termination of said lease as herein provided said city shall not be liable for the payment of said sum of \$1,800."

"Art. 10. That on and after the 15th day of November, 1900, the said gas and electric light company hereby agrees to transfer in fee and forever by good and sufficient deed of conveyance and bill of sale to said city of Platts-

mouth all of the property hereinbefore set forth upon the payment by said city to said company of the sum of one dollar, and an agreement to pay or assume the bonds of said gas and electric light company now outstanding in the sum of \$30,000, that said city shall have the option to take said property including franchise as herein set forth, or to continue this contract and lease upon the terms set forth in articles 4 and 5 hereof at any time after November 15, 1900, and prior to June 1, 1910.

"Art. 11. It is further stipulated and agreed by and between said parties that at the expiration of said lease the said city of Plattsmouth, Nebraska, unless it shall elect to take a conveyance of the same as provided, peaceable possession of said property shall be given to said Plattsmouth Gas & Electric Light Company in as good condition as it now is, the usual wear, inevitable accidents, and loss by fire excepted. That during the existence of this lease under the terms herein expressed, said Plattsmouth Gas & Electric Light [Company] hereby guaranties the title to said property and agrees to defend the same against all persons whomsoever."

The city entered into possession under this lease, and made the monthly payments to the light company and the semiannual payments of interest on the bonds to the Illinois Trust & Savings Bank, trustee, and paid the taxes and charges on the property, all as provided in the lease, until November 15, 1900. Thereafter, although the city remained in possession and operated the plant until March 1, 1902, without notice to the light company of which, if either, of the options mentioned in the lease it would avail itself, it neither paid, nor was it called upon by the light company to pay, any monthly installment of \$233.33, but it did pay to the Illinois Trust & Savings Bank, trustee, the semiannual installment of interest falling due on the bonds December 1, 1900. On December 9, 1901, the city passed an ordinance directing its clerk to notify the light company it would terminate the lease on February 18, 1902, which notice was by the clerk given as directed. The interest on the bonds being in default October 23, 1901, the owners thereof, the banking companies, brought this suit in the Circuit Court to foreclose the mortgage made to secure the bonds, prayed an accounting of the amount due thereon, and also a personal decree against the light company, the city, and others. Thereafter a receiver was appointed in the suit, and on March 1, 1902, the city delivered possession of the premises to him, and also turned over to him personal property belonging to the city of the stipulated value of \$805.30. On February 15, 1904, a decree was entered in the foreclosure suit directing a sale of the premises, but expressly reserving all questions of the personal liability of the city to complainants for future determination. Thereafter a sale of the plant was made in conformity with the decree, leaving a deficiency of more than \$20,000. Thereafter complainants (the banking companies), on July 15, 1904, made application to the court for the extension of a deficiency judgment against the light company, which was entered without opposition; also, complainants made application for a judgment against the city in the sum of \$13,783.30, a portion of this amount claimed, \$5,941.65, being for rentals and moneys to be paid by the city at the rate stipulated in the lease from November 15, 1900, to March 1, 1902. During the pendency of this application the city paid to the receiver, under the terms of a written stipulation, the sum of \$1,800, the amount of the semiannual installments of interest falling due on the bonds on the 1st days of June and December, 1901, during which time the city continued in possession of the plant; the city making the claim at the time of this payment the same was in full of all liability to complainants or the light company. However, as shown by the stipulation, the same was paid by the city and accepted by the receiver without prejudice to the rights of the parties. The city joined issue with complainants on the application made, but neither filed a cross-application against complainants, nor prayed any affirmative relief. Proofs were taken, and on final hearing a judgment was entered in favor of complainant, the New Hampshire Savings Bank, alone, and against the city, for the sum of \$3,336.30, together with interest thereon at the legal rate of 7 per cent. from March 1, 1902, the date the receiver took possession of the property, and for costs accruing upon the application.

The judgment so entered against the city is not in any respect in the nature of a deficiency judgment, but is in the nature of a judgment in an independent action. All objection, however, to the method of procedure was expressly waived by the parties. The amount of the judgment so awarded against the city was arrived at in this manner:

The city was charged with rentals as stipulated in the lease from	
November 15, 1900, to March 1, 1902.....	\$5,941 65
And was credited with amount of interest paid on bonds..	\$1,800 00
Stipulated value of property belonging to the city turned	
over to receiver.....	805 30
	<hr/>
	\$2,605 30
	<hr/>
	\$2,605 30

Leaving a balance against the city of..... \$3,336 35

From the allowance of this judgment, the city appeals to this court.

Matthew Gering (Harvey D. Travis and Jesse L. Root, on the brief), for appellant.

William Baird (E. A. Baird, C. J. Baird, and Byron Clark, on the brief), for appellees.

Before VAN DEVANTER and HOOK, Circuit Judges, and POLLOCK, District Judge.

POLLOCK, District Judge, after stating the case as above, delivered the opinion of the court.

From an inspection of the record it is quite clear the judgment entered was intended to be and is based upon the claim made against the city for rentals at the rate of \$233.33 per month, or \$2,800 per year, during the time the city remained in possession of the plant from November 15, 1900, to March 1, 1902, at which time the property was turned over to the receiver. This appears from a reading of the application made against the city, and the fact, as shown by the decree, the credit of \$1,800, claimed by the city and awarded by the trial court, was made by the city and allowed by the court as a payment of the only semiannual installment of interest falling due and unpaid prior to the date the receiver took possession of the property. For, if it be the city was liable to complainant for that portion of the semiannual installment of interest on the bonds falling due on June 1, 1902, earned while the city retained possession of the plant, in such case the personal property of the city turned over to the receiver, and credited to the city in the computation made in the decree at its stipulated value of \$805.30, is more than sufficient in amount to meet such obligation. It follows, therefore, the sole question for decision here is, was complainant entitled to a judgment against the city based on this claim for rentals at the rate of \$233.33 per month, or \$2,800 per year, under the terms of the lease, from November 15, 1900, to March 1, 1902, construed in the light of the conduct of the city with reference to the property after November 15, 1900?

It is conceded whatever rights the light company had, under the provisions of the lease, against the city, by virtue of the mortgage, passed to, became the property of, and are enforceable by, complainant. It is perfectly obvious, however, the rights of complainant

thus transmitted cannot exceed those acquired by the light company. The precise question involved, therefore, is, what rights did the light company acquire against the city by reason of its continued occupancy of the leased premises after the expiration of the absolute term of 4 years and 15 days specified in the lease?

It is the insistence of solicitors for appellee in this regard that, as the tenant (the city) continued in possession of the leased premises after the expiration of the term for which they were originally let without notice to the landlord of its election to exercise either the option to renew the lease as provided for in article 4, or to terminate it as provided in article 5, or to purchase the leased premises as provided in article 10, it must be held as a matter of law to have assumed the position of a tenant holding over its term with the assent of its landlord; hence the law will imply an agreement on the part of the city to pay rent thereafter from year to year upon the same terms and conditions imposed by the lease on the original term. This is the view entertained by the trial court respecting the rights of the parties, as shown by the following excerpt from the opinion:

"The retaining of the possession of the leased property being with the apparent consent of the gas [light] company, it, and consequently the complainant, can claim rent for the period which the city actually occupied the leased property in accordance with the terms of the original lease."

The contention of the city is, it at no time assumed the position or incurred the liability imposed by law upon a tenant holding over the term, but that its continuance in possession of the premises after November 15, 1900, was in pursuance of the express provisions of the lease as to the amount of rent reserved thereafter, and that by payment of the semiannual installment of interest due December 1, 1900, to the trustee, which payment included interest falling due on the bonds for the period of 15 days after the original term of the lease, and which payment was accepted and retained by the trustee of the light company, and the bondholders as well, for their benefit, the city evidenced its intent to continue the tenancy under article 4 of the lease, with the knowledge of the light company and complainant of its intention. These, in substance, are the claims of the respective parties to the controversy.

It must be conceded to be the general rule, in the absence of statute, when a tenant for years, with the consent of his landlord, either expressed or implied, holds over his term, in the absence of stipulation to the contrary, the law will imply a tenancy from year to year, with the same rent reserved and time of payment stipulated for in the original lease. *Singer Manufacturing Company v. Sayre*, 75 Ala. 274; *Wolffe v. Wolffe*, 69 Ala. 549, 44 Am. Rep. 526; *Clinton Wire Cloth Co. v. Gardner et al.*, 99 Ill. 151; *Tolle v. Orth*, 75 Ind. 298, 39 Am. Rep. 147; *Schuyler v. Smith et al.*, 51 N. Y. 309, 10 Am. Rep. 609; *Witt v. Mayor, etc., of New York*, 6 Rob. (N. Y.) 443; *Quinette v. Carpenter*, 35 Mo. 502; *Diller v. Roberts*, 13 Serg. & R. (Pa.) 60, 15 Am. Dec. 578; *Ives v. Williams*, 50 Mich. 106, 15 N. W. 36; *Martin v. Hammersky*, 63 Kan. 360, 65 Pac. 637. Such

appears to be the rule in the jurisdiction where this controversy arose. *Bradley v. Slater*, 50 Neb. 682, 70 N. W. 258.

If, therefore, the city, in the light of the facts stated, is to be deemed a tenant holding over its term with the implied assent of the light company, an affirmance of the decree entered must follow, of course. The rule applied by the courts to cases where a tenant for years holds over his term with the implied consent of his landlord sprung from the necessity which arose in such case that, where the parties had continued the original status in the absence of any agreement between them, having neglected to make the same, the law should step in and imply a reasonable, fixed, and definite agreement for the parties, based on their former agreement. However, this rule has no application to cases where it may be gathered, from the contract of lease theretofore existing between the parties or otherwise, that the parties have made a valid agreement of their own touching the nature of the tenancy and rent reserved after the expiration of the time fixed in the original lease.

Recurring, now, to the lease in question, may it be said, in view of its express provisions, the parties thereto neglected to provide therein for the exact contingency which arose in this case at the expiration of the original term of 4 years and 15 days, namely, the continued possession of the city after November 15, 1900, to March 1, 1902? There is no contention made that the city elected to exercise the option to purchase the property, provided for in article 10; hence, that provision may be left out of the consideration. Article 4 of the lease in express terms states the nature of the tenancy to be created, the amount of rent to be paid and the time and place of its payment, in case the city should elect to continue the tenancy after the expiration of the original 4 years and 15 days' term, and further provides:

"That on and after the 15th day of November, A. D. 1900, the said city of Plattsmouth, Nebraska, is hereby granted the right and shall have the power to continue this lease from year to year upon the terms and conditions herein set forth for a period ending on the first day of June, 1910," etc.

The light company, in our opinion, thus not only by necessary implication waived notice of the election of the city to continue the lease beyond the original term, but expressly conferred upon the city irrevocably the power to thus continue the lease of its own volition, and without any subsequent arrangement with or notice to the light company, upon payment of rent as therein specified. The force of this article becomes more apparent when we refer to the provisions of article 5, which provides, not that notice of the election of the city to continue the tenancy after November 15, 1900, shall be given, but that it shall give 60 days' notice in writing of its intention to terminate the tenancy created by the lease, on or after the 15th day of November, 1900, if the city desired to end the term. As has been seen, such notice was given December 9, 1901, and the tenancy created thus terminated.

Again, by reference to the stipulation for surrender of possession by the city, found in article 11, it will be seen to relate, not specific-

ally to the date November 15, 1900, as the end of the term, but in general language to any expiration that might occur at any time under the former provisions of the lease. The language employed by the parties to this lease is clear, exact, definite, positive, and certain, free from all semblance of ambiguity, and hardly susceptible of doubtful construction. The continued possession of the premises by the city was not the holding over by it after the expiration of a fixed and definite term with the implied consent or assent of the light company, but was a continuance of the tenancy by the city in strict accordance with the express agreement of the parties, as evidenced, not alone by the language of the lease itself, but also by the subsequent conduct of the parties. This view of the case, we are persuaded, is in harmony with the current of authorities. *Andrews v. Marshall Creamery Co.* (Iowa) 92 N. W. 706, 60 L. R. A. 399, 96 Am. St. Rep. 412; *Kramer v. Cook*, 73 Mass. 551; *Delashman v. Berry*, 4 Am. Rep. 393; *Montgomery v. Board of Commissioners of Hamilton County*, 76 Ind. 365, 40 Am. Rep. 250. We are further persuaded the construction placed upon the different articles of the lease gives effect to the whole instrument, and makes plain and renders effective the intent of the parties thereto.

It follows the judgment must be reversed, and case remanded, with directions to dismiss the application.

WESTERN WOOLEN MILL CO. v. NORTHERN ASSUR. CO. OF LONDON.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1905.)

No. 2,216.

1. INSURANCE—CONSTRUCTION OF POLICY—"FIRE" DEFINED.

The word "fire," as used in an insurance policy, in the absence of language showing a contrary intention, is to be given its ordinary meaning, which includes the idea of visible heat or light.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1126.]

2. SAME—SPONTANEOUS COMBUSTION.

A large quantity of wool in fleeces covered by fire insurance policies was submerged for several days during a flood, which caused spontaneous combustion, with smoke and great heat, by which the wool was damaged and its fiber destroyed, but there was no visible flame or glow. *Held*, that the loss was not the result of fire, within the meaning of the policies.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1126.]

In Error to the Circuit Court of the United States for the District of Kansas.

The woolen mill company sued the assurance company to recover the amount of two policies of insurance issued by the latter to the former on the 6th day of August, 1902, and on May 5, 1903, for the sums of \$4,000 and \$1,500, respectively. The property insured was wool, and it was insured against all direct loss or damage by fire. At the trial the evidence on the part of the woolen mill company established the following, among other, facts:

On the 29th day of May, 1903, the woolen mill company owned about 80,000 pounds of wool, stored in certain buildings at Topeka, Kan., which was covered by the policies in question. The wool was in the same condition as when taken

from the sheep. Wool in this condition contains about 5 per cent. of foreign matter in the way of manure, strings, and straw. On or about the 29th day of May, 1903, this wool was entirely submerged by water, caused by an unusual flood in the Kaw river, and remained so submerged for eight days. After the subsidence of the water, the woolen mill company endeavored to save the wool by spreading it around upon floors for the purpose of drying the same. The wool was found to be wet and covered with mud, very much heated, and, when handled, the fleeces came apart as if the fiber of the wool had been destroyed by the action of the heat and the water, or, as plaintiff in error claims, by burning. It became necessary in handling the wool to use pitchforks, as the wool was too hot for the hands. The strings around the fleeces had apparently burned. There was smoke in the rooms where the wool was, and an odor of burned wool. There was no flame to be seen, no firelight, and no visible fire. Whatever process was acting upon the wool to its damage was as visible at the time the wool was first seen and separated as at any time. The wool was not hot enough to blister one's hands in handling it. The building in which the wool was stored did not burn, nor any part of it. Whatever damage was done to the wool was caused by the action of water thereon. There was evidence of ashes. There was steam and smoke, and the wool was said by one witness to be charred; but at all the times the wool was wet. Wool in the condition of the wool in question is subject to spontaneous combustion when submerged in water. Spontaneous combustion is a rapid oxidation. Fire is oxidation which is so rapid as to either produce flame or a glow. Burning and rotting are, in the main, processes of oxidation, a combining with oxygen; but in the rotting that operation of combining with oxygen is indirect, and helped by what is called fermentation or bacterial action usually. In the case of burning, the substance combines directly at the high temperature with the oxygen of the air, and produces the ordinary effect of burning in the stove.

At the close of the evidence for the mill company, counsel for the assurance company demurred to the evidence, upon the ground that the same did not show that the wool was damaged by fire, within the meaning of that term as used in the policies of insurance. The trial court sustained the demurrer and discharged the jury. Judgment was thereupon entered for the assurance company. Exceptions having been taken to the court's ruling, the case is now here on writ of error. As the rulings of the trial court on the admission of evidence and other matters appearing in the record could not affect the result arrived at, they will not be noticed.

Clifford Histed (W. H. Rossington, Charles Blood Smith, and J. S. West, on the brief), for plaintiff in error.

Charles J. Greene and Ralph W. Breckenridge (Quinton & Quinton, on the brief), for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge, after stating the case as above, delivered the opinion of the court.

However interesting it might be to follow counsel in their scientific investigations, we think the case may be decided by the application of well-known principles to the facts appearing in the evidence. The policies of insurance were contracts between the parties to this litigation, and must be construed as such. In their interpretation we must give to the words employed therein their ordinary popular signification, unless it appears the parties intended to use them in a different sense. No such intention appears in this case as to the use of the word "fire." That the wool, submerged

for the time mentioned, became smoking hot, may be conceded; that spontaneous combustion, caused by the wool being submerged in water, existed may also be conceded; and still the plaintiff has not shown any direct loss by fire as that word is used and known to the public generally. Fire is always caused by combustion, but combustion does not always cause fire. The word "spontaneous" refers to the origin of the combustion. It means the internal development of heat without the action of an external agent. Combustion, or spontaneous combustion, may become so rapid as to produce fire; but, until it does so, combustion cannot be said to be fire. "Fire" is defined in the Century Dictionary as "the visible heat or light evolved by the action of a high temperature on certain bodies, which are in consequence styled 'inflammable or combustible.'" In Webster's Dictionary "fire" is defined as "the evolution of light and heat in the combustion of bodies." No definition of fire can be found that does not include the idea of visible heat or light, and this is also the popular meaning given to the word. The slow decomposition of animal and vegetable matter in the air is caused by combustion. Combustion keeps up the animal heat of the body. It causes the wheat to heat in the bin and in the stack. It causes hay in the stack and in the mow of the barn to heat and decompose. It causes the sound tree of the forest, when thrown to the ground, in the course of years to decay and molder away, until it becomes again a part of mother earth. Still we never speak of these processes as "fire." And why? Because the process of oxidation is so slow that it does not, in the language of the witness at the trial, produce a "flame or glow."

It appears, without contradiction, from the evidence, that there was not at any time any visible heat or light in or about this wool. Wool is an animal fiber, and the necessary result of its submergence in water and mud for the time mentioned would be that it would become heated, and disintegration of the fiber would occur. But, according to the evidence, the internal development of heat never at any time became so rapid as to produce a flame or a glow, and hence, within the meaning of the word "fire," as used in the policies of insurance, there was no fire.

We think the ruling of the court below was right, and the judgment must be affirmed.

ROLLINS v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1905.)

No. 2,182.

1. RAILROADS—KILLING OF PERSON AT CROSSING—PRESUMPTION OF CARE.

The presumption that a person who was struck and killed by a train while driving over a railroad crossing exercised due care to avoid injury is destroyed, where it appears from the undisputed evidence that, if he had looked and listened before driving upon the crossing, he must have seen and heard the train approaching.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1043, 1142.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate, who was a young man, was struck and killed by a train on defendant's railroad, while driving over a crossing at night with a team and top buggy, the curtains to which were down. The evidence showed that the train, which was lighted and with the headlight burning, could have been seen for a long distance before it reached the crossing from any point on the highway within 100 feet or more from the crossing in the direction from which the deceased approached. It was a moonlight night, and the fence, extending from the cattle guard along the side of the highway for 90 feet, had been recently whitewashed. It also fairly appeared that deceased was, to some extent, at least, acquainted with the locality, from which he lived a few miles distant along the highway, and that he knew that such highway crossed the railroad. *Held*, that the physical facts rebutted any presumption that he exercised due care, and that he was chargeable with contributory negligence as matter of law, which precluded any recovery for his death.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1169-1174.]

In Error to the Circuit Court of the United States for the Northern District of Iowa.

While W. M. Rollins, a single man 26 years of age, was going from Charles City, Iowa, on the 26th day of November, 1903, to his home, himself and a team of horses that he was driving were killed, and the buggy in which he was riding was destroyed, in a collision with one of the defendant in error's passenger trains, at a public highway crossing known in the evidence as "Warner's Crossing." His administrator brings this suit to recover damages therefor. The highway upon which Rollins was traveling runs east and west. Defendant in error's railroad at the point where the collision occurred runs from northwest to southeast, and crosses the highway at an acute angle. Three hundred and sixty-one feet west of the crossing lives a Mr. Warner, whose house is between the highway and the railroad. Northwest along the railroad from the crossing in question 1,311 feet is another crossing called "Short's Crossing." Northwest along the railroad a mile and a half is the Cedar River Bridge. At a point 108 feet west from the center of the Warner Crossing the Short's Crossing can be plainly seen. The right of way of the railroad is 100 feet, 50 feet each side of the center of the track. There is nothing in the right of way, after you reach the right of way line, to obstruct the view along the right of way to the northwest. A person standing on the highway and looking directly north can see a train coming on the railroad. At a point 50 feet west from the crossing one can see pretty near to the Cedar River Bridge. At a point 100 feet west from the crossing one can see Short's Crossing. The accident occurred between 9 and 10 o'clock at night. The moon was shining and clouds were flying. The depth of the cut in which the railroad track is located, as you leave the Warner Crossing and go west, is 2 or 3 feet. There are some cherry, apple, and plum trees between Warner's house and the Warner Crossing, which partially obstruct the view of the railroad track when one passes along the highway for about two-thirds of the way to the crossing. At a point 200 feet west of the Warner Crossing, on the highway, the surface of the ground is $1\frac{3}{10}$ feet higher than the rail of the railway at a point opposite. The height of the bottom of an ordinary passenger car window from the rail is 7 feet and 2 inches. The headlight of the train that collided with the team and buggy was lighted, and the train and cars were lighted. Two witnesses for the plaintiff in error, Charles F. Warner and Anna Wood, who were in the Warner house, with closed windows and doors, heard the noise of the coming train when it crossed Cedar River Bridge. C. P. Warner, in the same house, heard the train for two minutes before it passed the house. Charles Ash and Mrs. Charles Ash, who live 140 rods south of Short's Crossing, heard the train when at said crossing. Maude Johnson, who lives a quarter of a mile east of the crossing in question, saw the headlight of the train beyond Short's Crossing. The train was about four minutes late. It was running from 45 to 50 miles an hour. The

engineer on the train, who was the only person who saw the team immediately prior to the accident, testified that it was only an instant after he saw them that the collision occurred. The buggy had a top, and this top was up. Two hundred feet west from the crossing in question on the highway the distance between the railroad and highway is 90 feet. Rollins, the deceased, made his home with his father, M. W. Rollins, who lived about 30 miles from Charles City, Iowa. The highway on which Rollins was traveling is called the "Charles City Road," and is a main traveled road. Rollins ate supper, on the evening of the day that he was killed, at the house of a Mr. Adams, and, when he left Adams' house on the journey which cost him his life, he was told by Adams to be careful of the cars, to which Rollins replied: "I will be careful. I am pretty careful of that. As far as that is concerned, I could tie up my lines and the team would take me home." The wing fences extending from the cattle guards at the Warner Crossing to the right of way line on either side of the track were newly whitewashed five or six days before the accident. The wing fence, which extended from the north cattle guard along the north line of the highway to the right of way line, by reason of the angle at which the railroad crossed the highway, is from 80 to 100 feet in length. The foregoing facts are those upon which the correctness of the ruling of the court below in directing a verdict must be determined. These facts, with one or two exceptions, appear from the evidence of the plaintiff. Photographs of the physical facts surrounding the place of the accident were introduced in evidence, and were considered by the trial court, and were also furnished to this court for inspection. At the close of all the evidence counsel for defendant in error moved the court to direct the jury to return a verdict in its favor, for the reason that the negligence of the plaintiff in error directly contributed to his death. This motion was granted by the court. The plaintiff in error excepted to the ruling, and now brings the case here for review.

W. A. Smith (Smith & O'Connor, on the brief), for plaintiff in error.

W. J. Knight (H. H. Field, on the brief), for defendant in error.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

CARLAND, District Judge, after stating the case as above, delivered the opinion of the court.

We have had some trouble in settling the bill of exceptions in this case. The record shows that to the proposed bill of exceptions of the plaintiff in error the defendant in error submitted what amounts to 16 pages of the printed record as amendments thereto. Then the plaintiff in error submitted some. At the end of these documents appears the usual allowance thereof by the trial judge as a bill of exceptions. At no place in the bill can a statement be taken as true, without searching the whole record for the purpose of ascertaining whether or not said statement has not been changed or added to by amendment. This labor ought not to be imposed upon this court. We are of the opinion that, when a trial judge has decided what shall appear in the bill of exceptions, counsel should be required to prepare for signature a new draft of the bill as amended, and trust that this may be done in the future. In the absence of evidence as to the acts of the deceased immediately prior to the collision, plaintiff in error is entitled to the presumption that deceased used due care to avoid injury. Texas, etc., *Railway v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186;

Northern Pacific Railway v. Spike, 121 Fed. 44, 57 C. C. A. 384. But, as was said by this court in Tomlinson v. C., M. & St. P. Railway, 134 Fed. 233, 67 C. C. A. 218, this presumption cannot stand against positive and uncontradicted proof. Northern Pacific Railroad v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; Baltimore, etc., Railroad v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262. We are satisfied that a fair consideration of the evidence, with all legitimate inferences that may be drawn therefrom in favor of the plaintiff in error, still leaves the case in a position where all reasonable men must draw the conclusion that the deceased was guilty of negligence which contributed to his death. We base our opinion upon the fact that the undisputed evidence shows that, if the deceased had used his senses of hearing and seeing as the law required him to do, he could have seen and heard the train in time to avoid injury. The presumption that the deceased used due care is destroyed by the force of physical facts shown by undisputed evidence, and the inevitable inference must be drawn therefrom that deceased either did not look or listen, or, having looked and listened, he endeavored to cross in front of the train. He was therefore, as matter of law, guilty of contributory negligence. Garlich v. Railway, 131 Fed. 837, 67 C. C. A. 237; Chicago, etc., Railway v. Andrews, 130 Fed. 65, 64 C. C. A. 399; Chicago, etc., Railway v. Rossow, 117 Fed. 491, 54 C. C. A. 313; Chicago, etc., Railway v. Pounds, 82 Fed. 217, 27 C. C. A. 112; Pyle v. Clark, 79 Fed. 744, 25 C. C. A. 190.

It is urged by plaintiff in error that there is no evidence in the record that deceased knew that he was approaching a railroad track. We think that the evidence discloses such a state of facts as to warrant the court in fairly presuming that the deceased must have known that the highway on which he was traveling crossed a railway track at or near the place in question. The highway upon which he was traveling was a main traveled road between the home of deceased and Charles City. It ran through an old settled country with towns and villages scattered throughout the locality. Deceased was 26 years old, unmarried, and lived at his father's home, and had lived there, so far as it can be gathered from the evidence, for some time, and deceased and his team were well known by people living in the vicinity of the accident. When warned by Mr. Adams, as deceased started on his journey home, to look out for the cars, his reply indicated that he was aware that there was a necessity of looking out for the railroad trains. The wing fences at the Warner Crossing were recently whitewashed. The wing fence extending from the railroad track southwest along the highway was some 90 feet long. Ordinary care required deceased to heed these facts. Steinhofel v. C., M. & St. P. Railway Co. (Wis.) 65 N. W. 852.

There were exceptions taken in the court below to several rulings of the court on the admission of evidence; but, as said rulings did not affect the result, they need not be considered.

The judgment below is affirmed.

NATIONAL ENAMELING & STAMPING CO. et al. v. NEW ENGLAND ENAMELING CO.

(Circuit Court, S. D. New York. June 28, 1905.)

1. PATENTS—PROCESS—VALIDITY.

If the inventor of a process in the claims of his patent therefor has so defined his ingredients that there can be no mistake as to what he means, and has indicated a process which will transform those ingredients into the product claimed, it is immaterial that he was wholly ignorant of all of the chemical changes that take place in the course of such process, and such fact will not defeat the patent, but it may properly be taken into consideration in construing the language and terms used in the specification in describing the process.

2. SAME—INFRINGEMENT—ENAMELING METAL WARE.

The Claus patent, No. 527,361, for enameling metal ware, covering both the process and product, is not a broad and fundamental one, but discloses novelty and patentable invention when considered as an entirety and limited to a process (and product) wherein mottles are formed in a single coat of enamel as the result of a partial oxidation of the metal surface, produced by the action of metallic salts applied to an enamel while still moist, either on the article or in the dip, the ingredients of which enamel show a great preponderance of alkaline substances, but which nevertheless does not neutralize the metallic salts, but facilitates their presentation to the surface of the metal while still efficient as oxidizing agents. Claim 1 held void as too broad in view of the prior art, and claims 2 and 3 because they make no reference to the mottles nor to the intense alkalinity of the "mix" from which the enamel is made, which is the essential feature of the invention. Claims 4 to 8, covering the product, and 9 to 12, covering the process, held valid and infringed.

3. SAME.

Infringement of a patent for the enameling of metal ware by applying a single coat of mottled enamel as described is not avoided by the applying of a second coat, where, in applying the first, the process of the patent is used, and the product is an infringing article, and the second is merely a transparent coat of different material, and differently applied.

This cause comes here at final hearing upon pleadings and proofs. It is a suit in equity for infringement of United States patent No. 527,361, October 9, 1894 (on application filed November 18, 1893), to Hubert Claus for enameling metal ware.

See 123 Fed. 436.

Arthur v. Briesen, Walter D. Edmonds, and Louis Marshall, for complainants.

Kenyon & Kenyon, Steinhardt & Goldman, and Walter F. Rogers, for defendant.

LACOMBE, Circuit Judge. The specification states that the "invention consists in the process of enameling and the article of manufacture hereinafter set forth and claimed"; that it relates to enameling metal ware, and "has for its object to coat steel or other homogeneous metallic surfaces, such as the Siemens, Martin, and Thomas products, with a single coat of enamel exhibiting mottled effects." The specification proceeds:

"Heretofore it has been customary to coat iron, meaning fibrous iron, with a mottled enamel by oxidizing the surface with free acid contained in or applied to the enamel. This process has been found unavailable for coating steel or other homogeneous metallic surfaces with a mottled enamel on account of the density and homogeneity of the metal and for other reasons.

"According to my invention I prepare an intensely alkaline enamel, preferably by mixing various more or less vitrifiable substances, some of which are alkaline, the alkaline constituents of the mass being in great preponderance. This alkaline enamel may, however, be variously compounded, the essential feature being to obtain as a preliminary step an enamel which will give a strongly alkaline reaction. This enamel may be brought to the proper condition for applying to the surface to be coated in any suitable manner, such as by the common process of melting, grinding, and mixing with water. This intensely alkaline enamel is very refractory, and the high melting point increases the power of resistance of the enamel against chemical influences, and also brings about the intimate union of the metal and the enamel during the process of burning. The surface to be coated is cleaned and the alkaline enamel applied in a thin layer in any suitable manner. The metallic salts are now applied to the enamel coating by dusting or by sprinkling, or the salts may be mixed with the enamel before it is applied to the surface to be coated. The reactions between the alkaline constituents of the enamel coating and the metallic salts bring about oxidation, the oxides permeating the coating, and producing, when burned, a beautiful mottled effect closely resembling coarse-grained broken granite. [The 'oxidation' thus brought about refers manifestly to oxidation of the surface of the metal.] The oxide in certain cases may be directly produced by the reactions between the alkaline enamel and the metallic salts.

"Having thus set forth my process, I will now describe specifically one mode of enameling under that process, giving proportions and ingredients, it being expressly understood that I in no manner limit myself to the proportions nor to the ingredients thus set forth in this specific process, as it is only one of the many forms in which my invention may be clothed.

"I prepare an enamel by mixing the following ingredients in about the proportions specified, viz.: 130 parts by weight feldspar; 125 parts by weight borax; 70 parts by weight quartz; 25 parts by weight soda; 17 parts by weight saltpeter. To these I may add a small proportion of fluorspar and cobalt or either.

"Various other ingredients may be used instead of the ingredients specified, it being merely necessary to preserve to the enamel an intensely alkaline characteristic. In this instance it will be observed that certain alkaline ingredients, notably feldspar, are greatly in preponderance, thus imparting to the mass an intensely alkaline characteristic, which, as above pointed out, is essential. The ingredients, having been intimately mixed, are molten together and ground with water, which is most conveniently done, as is well known, by adding fatty clay while grinding, until the enamel can be spread out in a thin coherent layer. This enamel is applied to the clean steel surface, and while still moist a mixture of equal parts of pulverized sulphate of copper and pulverized sulphate of iron is applied thereto, as by sprinkling or dusting. I prefer to use both these metallic salts, but may use either alone, or equivalent metallic salts. By the dissolution of these metallic salts, which begins the moment they touch the enamel, the enamel is coagulated; that is to say, watery masses are formed in proximity to more coherent masses. The watery masses are produced by the sulphate of copper, and the tough or more coherent masses by the sulphate of iron. The solution of sulphate of copper descends through the watery masses until it reaches the metallic surface and a ferrous sulphate produced by the contact of the liberated acid with the steel. This ferrous sulphate is changed by the alkaline enamel into oxide of iron, which grows crystal-like from the metallic surface outwards and produces a spotting or mottling appearance on the surface.

"The particles of sulphate of iron are confined to the surface of the coagulated enamel by the tougher portions thereof, and are transformed by the alkaline enamel into ferrous silicate or borate. The unstable ferrous combinations quickly become ferric, and result in a growth of rust spots from the surface of the enamel downward. These various oxide spots produced by the metallic salts impart to the enamel, when burned, a beautiful mottled appearance.

"The character of the mottling may be varied by varying the size of the particles of the salts, and the effect can be materially enhanced by adding

hypomanganate of potassium to the salts that are sprinkled on, or by previously mixing it together with the said salts, or either of them, or alone with the enamel mixture. The enamel when sprinkled is dried by mere exposure to the air, and then burned. A single coat of this enamel is effective for all practical purposes; but of course nothing herein stated is to be understood as precluding the application of several coats.

"The effect of the process is to produce an article wherein the steel or homogeneous iron surface upon which the coat of mottled enamel is superposed is partly oxidized."

Here follows a description of the drawings representing the mottles. The claims in controversy read as follows:

"(1) As a new article of manufacture, a steel or homogeneous iron article having one coat of mottled enamel.

"(2) As a new article of manufacture, a steel or homogeneous iron article having one enamel coat having therein a preponderance of alkaline constituents.

"(3) As a new article of manufacture, a steel or homogeneous iron article having a single enamel coat of an intensely alkaline nature.

"(4) As a new article of manufacture, a metallic article having a coat of enamel of an intensely alkaline nature permeated by metallic oxides, substantially as described.

"(5) As a new article of manufacture, a steel or homogeneous iron article having a single coat of mottled enamel on a partly oxidized metallic surface, substantially as described.

"(6) As a new article of manufacture, a metallic article having a mottled coat of alkaline enamel and within said enamel metallic oxides extending from the outer surface of the enamel inwardly, substantially as described.

"(7) As a new article of manufacture, a steel or homogeneous iron article having a mottled coat on a partly oxidized metallic surface, and having metallic oxides extending from the outer surface of the enamel inwardly, substantially as described.

"(8) An enamel for surfaces having therein a preponderance of alkaline constituents together with metallic oxides, substantially as described.

"(9) The process of enameling which consists in coating an article with an alkaline enamel, and in applying thereto, while still moist, a metallic salt or salts, substantially as described.

"(10) The process of enameling which consists in coating an article with an alkaline enamel, and in applying thereto, while still moist, sulphate of iron and sulphate of copper, substantially as described.

"(11) The process of enameling which consists in coating an article with an alkaline enamel, and in applying thereto, while still moist, sulphate of iron, substantially as described.

"(12) The process of enameling which consists in coating an article with an alkaline enamel, and in applying thereto, while still moist, sulphate of copper, substantially as described."

There is a thirteenth claim, which is not in controversy, and therefore need not be recited.

The drawings showing the mottles and the description of the drawings were inserted on suggestion of the Patent Office. The words "hyper-manganate of kali" in original application were changed to "hyper-manganate of potassium." The paragraph which states that the effect of the process is to partly oxidize the metal surface was added while the application was in the office. These changes are manifestly immaterial. The only other modification which the file wrapper discloses is in the sentence which now reads: "To this end my invention consists in the process of enameling, and the article of manufacture hereinafter set forth and claimed." In the original it reads: "To this end my invention

consists broadly in applying an intensely alkaline enamel coating to steel or steel-like surfaces and producing the mottles by means of the chemical action of metallic salts applied to the enamel by being mixed therewith or by being applied to the enamel coat while the said coat is still moist." Defendant contends that the change imports a limitation of the original application. This seems not to be a fair inference. The original statement referred solely to a process; the amended one covers both process and product. The original sentence stated in detail that the metallic salts might be applied to the enamel either by being mixed with it or by being applied to the moist coat; the amended sentence gives no details, but defines the process as the one "hereinafter set forth and claimed." Subsequently in the specification the application of the salts by dusting on the wet coat is described elaborately in what the patentee says is "one mode of enameling" under his process -- "only one of the many forms in which my invention may be clothed." But it is expressly stated that besides being dusted or sprinkled "the salts may be mixed with the enamel before it is applied to the surface to be coated." Further down in the specification it is stated that the mottling effect can be enhanced by adding hypomanganate of potassium to the salts that are sprinkled on, or by mixing the hypomanganate together with the said salts with the enamel mixture. It does not seem, therefore, to be a fair contention that the applicant, by any action of his in the Patent Office, abandoned so much of his process as contemplated mixing the metallic salts with the enamel while in its pasty state before application to the metal surface. Every one of the twelve claims was allowed in the precise language of the original application.

As appears from the specification, the invention is concerned with applying enamel to steel in contradistinction to iron. Wrought iron is a fibrous structure, between the fibers of which strands of vitrifiable slag are interposed. When an enamel is applied to sheet iron, this slag is rendered fluid by the high temperature, and combines or coalesces with the layer of enamel, and serves to dovetail, as it were, the enamel into the sheet iron, thus forming a coating which adheres directly to the metal; and as the metal surface in use expands or contracts when heated or cooled, the enamel follows it, possessing sufficient elasticity to do so. Besides this quality of elasticity, the enamel, when applied to cooking utensils (one of its principal uses), must be refractory, so as to prevent its being soluble in fruit juices, etc. Before the patent in suit so-called "mottled" enameled ware sold under various names had become very popular, and, if well made and durable, commanded a ready sale. As practiced generally before the Claus patent, this mottled ware was produced by first applying and burning on a ground coat of some uniform color, frequently dark, and then upon that as a foundation applying a decorative coat.

The use of sheet steel in the metal articles to be enameled, especially when they are to be used in cooking, presented difficulties not experienced in the case of fibrous iron. Sheet iron expands and contracts slowly in the presence of heat and cold; sheet steel ex-

pands and contracts rapidly under the same conditions. It is necessary therefore to secure greater elasticity in the enamel so that it will follow the rapid motion of the particles of steel, and yet not break; but such elasticity must not interfere with its refractoriness. Moreover, since the steel is homogeneous without vitrifiable slag, it presents no convenient anchorages to which the enamel may attach itself. In order to secure adherence, artificial anchorages must be created. This is done by exposing the surface of the steel to the action of acids, thus scarring it sufficiently for the molten enamel to seize hold of it. The theory of the Claus invention, as stated by complainants' experts and counsel, is as follows: He did away altogether with the use of any ground coat, compounding an enamel which would by the application of a single coat adhere to the steel surface, and on cooling exhibit the ornamental mottles desired. The composition of this enamel was such that it was sufficiently elastic to be a good adherent, and at the same time sufficiently refractory to be valuable on cooking articles. To affix it to the steel surface he added at a certain stage of the process metallic salts, which not only ornament the coat by producing mottles, but also attack the steel, corrode it in isolated places, forming pock-marks therein, into which the enamel then extends root-fashion to fasten the enamel coating to the metal body. The mottles visible on the completed article indicate places where the enamel is thus anchored to the steel surface. It is understood that the above-recited differences between the structures of iron and steel, the methods of securing adhesion, and the action of metallic salts both in mottling and in oxidizing the metal in isolated places simultaneously are not seriously controverted. Defendant insists that it does not use the process nor make the product of the patent, and that the composition of matter which Claus described disclosed no patentable novelty.

Before undertaking to determine precisely what the specification does disclose, it will be well to learn something of the personal equation of its author. Its language is apparently clear and simple, and a layman, observing its frequent use of chemical terms and its exposition of chemical processes, would naturally suppose that Claus was an experienced chemist. The exact converse is the case. However clever he may have been as a practical enameler, and however ingenious in contriving improvements in the details of his art, he was wholly ignorant of the chemical processes involved, and hopelessly confused as to the chemical meanings of the words he used. It will not be necessary to refer to the passages in the patent which demonstrate this statement to be correct. There is entire unanimity on that point among all the experts and all the counsel. From the defendant's side we have such assertions as these: "I do not find exhibited in the patent a knowledge of scientific chemistry;" "it seems almost certain from the language of this patent that the patentee was in ignorance of the difference between the ingredients of a mixture of chemicals to be made into enamel and the constituents of the resulting enamel;" "the patentee was evidently grossly ignorant of the nature of the materials which

he employed, and of what took place when they were melted together." The principal expert for complainant says that he has "every reason to suppose that the inventor was totally ignorant of what would happen when his various ingredients were mixed together and subjected to the process of fusion." He calls the elaborate description of the process (profusely "mottled" though it is with chemical terminology) the "equivalent of a cooking recipe." One of defendant's counsel upon the argument referred to the patentee, with more truth than politeness, as a "chemical ass." This is important only as a guide to us when we come to construe the language of the patent. If the writer had only the skill of his trade, and was grossly ignorant of chemical science, it will be presumed that he used words with the meaning which would be given to them, not by chemists, but by men as ignorant—and as practical—as himself. If it be found, moreover, that he has so defined his ingredients that there can be no mistake as to what he means, and has indicated a process which will transform those ingredients into "the single coat of enamel on steel exhibiting mottled effects," which the opening sentence of the patent declares to be his invention, it makes not a particle of difference that he was wholly ignorant of all the chemical changes that take place in the course of such process.

Before taking up the patent it will be well to review in more detail the usual process of enameling. Enamel is a glass, and the substances out of which it is made must be what are known as vitrifiable; i. e., such as will be transformed into glass when subjected to the action of heat in the smelting oven. Many different formulas have long existed prescribing the kinds and proportions of these ingredients. These formulas have involved the use of some ingredient or ingredients termed "acid," and some termed "basic" or "alkaline" by enamellers; the joint presence of ingredients of both the acid and basic types being usually relied on to bring about or facilitate the required melting or "fluxing" of individual ingredients. The ingredients selected, being brought together and reduced to a suitable size, are put, in whatever proportions the particular formula calls for, into a box, and stirred together so as to mix them mechanically. This mechanical mixture of the dry ingredients is known in the enameler's art as the "mix." The mix is then put into a smelting furnace, and the ingredients are melted together at a high temperature. In this melting or fusion the volatile constituents of the ingredients are driven off, and what are left fused into a molten mass, which is run into water, and thus cooled. The resulting product is a vitreous or glass-like body, which is called the "frit." It is a new chemical compound. The frit is then placed in a grinding mill with water and clay, and is ground into a fine condition, forming a cream-like mixture or paste, which is called the "dip," because the vessel is ordinarily dipped into it. After the vessel is thus dipped, it is burned in a muffle at a high temperature sufficient to fuse the enamel which the dipping spread in a coat of greater or less thickness upon the surface.

It will be remembered that the patentee makes frequent use of

the word "alkaline," and it is a hotly contested question as to what he meant by it. On behalf of the defendants it is argued that the ordinary meaning of the word when applied to a chemical substance or material is that it will give an alkaline reaction to an indicator, such as litmus paper. It is suggested also that when chemical analysis shows that a compound body contains an excess of acid constituents over alkaline constituents it cannot properly be called an alkaline substance. On the other hand, it appears that enamelers sometimes use the term as the equivalent of "basic," and apply it to the basic ingredients, which behave as fluxes relatively to the acid ingredient (usually silica), and joining with the latter to form the glass. These basic ingredients used in the art are not composed of pure alkali, but are compounds containing alkali or alkaline metals, or nonalkaline bases, or even some acid in various proportions. Defendant's expert Dr. Doremus admits that "chemical terms are used in the enameling art in a way not entirely in accord with the fact," and it would not be surprising to find that the unscientific patentee had so used them. The patent itself conclusively shows in what sense Claus used the word "alkaline." In describing the mix, which he gives as an illustrative example, he says: "It will be observed that certain alkaline ingredients, notably feldspar, are greatly in preponderance, thus imparting to the mass an intensely alkaline characteristic." Now, the constituents of feldspar are silica, alumina, and potash; the silica, which is concededly an acid—the chief acid constituent of enamels—being about 65 per cent. On the other hand, feldspar is one of the best known and longest used of the materials for making enamels and glazes, and recognized in the enamelers' art as a basic substance. Complainants' expert says that the "fluxing property—the property of uniting with silica to form a glass—* * * is notably a quality exhibited by feldspar"; and this statement is not disputed. Other similar evidence is found in the patent, but it seems unnecessary to rehearse it. The sentence already quoted is conclusive that when Claus used the word "alkaline" he had in mind this fluxing property, rather than the relative chemical proportions of alkali and acid in the substance to which he referred.

It will be observed that the keynote of Claus' declarations as to what his invention is is found in the phrase "intensely alkaline," or some similar expression. Evidently he understood that it was this intense alkalinity which (in part at least) differentiated his process and product from the prior art, and thus became the test by which one might determine whether some subsequent enameleer was following some prior formula, or was appropriating what Claus, by the use of this phrase, undertook to earmark as his own.

The next disputed question, therefore, to be determined is, what is it that is to be intensely alkaline (i. e., alkaline as Claus used the word), the mix or the frit? These are two different things, for the mechanical mixture of several distinct substances in the mix is transformed in the smelting pot into a new chemical compound, which, when broken up by chemical analysis, presents a table of constituents and weights by no means the same as the aggregate tables of the chem-

ical analyses of the original substances. The defendant contends that the only alkalinity which is of any importance is the alkalinity of the frit or dip or burned coat, and the argument in support of this proposition is a very strong one. The problem is to affix a suitable coat of enamel to a metal surface. The mix never comes in contact with the metal surface. The collocation of ingredients which it contains has disappeared to be born again as a new substance before that contact comes. The capacity for diffusing itself smoothly and evenly over the metal surface; for receiving metallic salts and passing them on so as to produce oxidation and pock-marks in the metal to serve as anchorages and also ornamental mottles in the coat itself; for penetrating and hardening its tentacles in these anchorages, thus clinging firmly despite the shocks of common use; for elastic yielding as the surface to which it is adherent expands or contracts; for resistance to fruit acids, etc.—manifestly all these capacities are displayed by the enamel at stages subsequent to the mere admixture of original ingredients. The natural and logical test to select for determining whether or not an enamel is Claus' would seem to be a determination, by the most accurate means which science affords, as to what are the constituents of the enamel just before it is put in condition for application. Moreover, it would seem that such would be the safest means of identification for the inventor to adopt, otherwise it might happen that some one would appear with a frit which, when analyzed, would be found substantially identical with his own, and would therefore *presumably* (since it is the frit and dip that do the work) accomplish all the useful results which he had pointed out, and yet escape infringement, because the alkaline substances in the mix were not in great preponderance—perhaps even outweighed by the acid substances. The word "presumably" in the last sentence is italicized, because there is evidence in the case which indicates that the conclusion above expressed might not necessarily follow.

The experts for both sides unite in the statement that they know of no chemical or physical method of analysis which would enable a chemist to determine exactly how the constituents of an enamel frit are chemically united and what compounds the constituents might form. Analysis of a frit will not show accurately what ingredients were employed in making it, nor the ingredients as they exist in the enamel. It discloses only the fragments obtained by their destruction. As one of defendant's witnesses expresses it:

"Our knowledge as to what takes place when we melt together such ingredients as would produce an enamel frit amounts substantially to this: we do know that a glassy material is produced. Further than this we know very little that is at all definite or capable of proof as to the combinations which may take place among the various constituents."

Prof. Chandler, called for complainant, says:

"No one can tell exactly how the substances * * * are combined in the finished enamel, whether they represent one complex alkaline silicate, * * * or whether two, or even more, of such complex silicates exist side by side in the enamel."

In the light of this testimony it is conceivable that there may be two frits which will give tables of analyses substantially the same, and yet, by reason of differing inter-relations of their respective components, may possess different characteristics. Therefore, although the natural and logical test may seem to be the analysis of the frit, we need not be surprised to find some inventor taking his chances of establishing patentable novelty and infringement upon his statement of a formula of ingredients and proportions as introduced into the original mix. The patentee has evidently taken this course. The language of the patent is clear and positive on this point. He says:

"According to my invention, I prepare an intensely alkaline enamel, preferably by mixing various more or less vitrifiable substances, some of which are alkaline, the alkaline constituents of the mass being in great preponderance."

It is manifest from the patent that Claus did not appreciate the difference between the words "ingredients" and "constituents." In his ignorance of chemical nomenclature and of chemical reactions he evidently supposed them to be interchangeable, and used them accordingly. Now, it will be noticed that the "mass" the alkaline constituents of which are to be in great preponderance is the mass of vitrifiable substances in the mix. The "enamel" which is to be intensely alkaline is referred to again in the next sentence:

"This alkaline enamel may, however, be variously compounded, the essential feature being to obtain as a preliminary step an enamel which will give a strongly alkaline reaction."

Defendant's counsel quite accurately suggest that the word "enamel" in its ordinary meaning imports the fused substance, the glass, not the vitrifiable substances out of which the glass is made. Undoubtedly a chemist would so use the word. Indeed, the same would be expected of any well-educated writer appreciative of the meaning of the words he used and careful in their selection. But the inventor was, as we have seen, grossly ignorant of chemistry, and careless in the use of terms. He may have intended by the word "enamel" (used in the patent, as will be seen, in various collocations) to cover the particular thing he was concerned with from start to finish, sometimes in its crudest inception, sometimes more or less advanced in condition, sometimes in final use on the cooking utensil resisting the fruit acids and the shocks of daily wear and tear. The use of the phrase "as a preliminary step" would seem to indicate that in this sentence he was using it as referring to the first aggregation of vitrifiable substances in the mix. Such aggregation, when mixed, does give a strongly alkaline reaction. All doubt as to his meaning is resolved, however, in the very next sentence:

"This enamel may be brought to the proper condition for applying to the surface * * * by the common process of melting, grinding, and mixing with water."

There can surely be no doubt that the "enamel" the inventor has been heretofore referring to is the "enamel" before it has been melted. Further on in the patent he gives in detail the "one mode

of enameling under that process," naming various ingredients of which alkaline substances are to acid substances about four to one; says that in changing ingredients it is merely necessary to preserve to the enamel an intensely alkaline character; and calls attention to the fact that when the precise formula of the patent is used "certain alkaline ingredients, notably feldspar, are greatly in preponderance, thus imparting to the mass an intensely alkaline characteristic, which, as above pointed out, is essential." Manifestly "the mass" means the mass of ingredients in the mix, and it is the intense alkalinity of that mass which is declared to be "essential"—the test of similarity or dissimilarity in the prior art, and the test of future infringement. He refers to "the intensely alkaline enamel" at various stages of its progress—reacting with the metallic oxides, intimately uniting with the metal, resisting chemical influences; but it is quite evident that he is merely carrying forward the name which he applied at the very inception of his process to the ingredients when first brought together in proper proportions, with alkaline substances in great preponderance. The conclusion from a study of the patent is that the thing whose alkalinity is determinatively characteristic of the Claus invention is the mix, the formula of ingredients which he supposed to be sufficiently new in proportions to warrant the issue of a patent. This conclusion is fortified by defendant's analysis of the Claus frit. It shows 200 pounds of acid constituents to about 88 pounds of all other constituents. Certainly the frit does not exhibit a great preponderance of alkaline constituents; and, as we have already seen, no analysis of the frit will enable even an expert chemist to determine out of what ingredients it was compounded, nor what proportion of such ingredients was alkaline.

Inasmuch as the patentee has unmistakeably selected the formula for the mix as the test of his invention, the court cannot repudiate his selection, and substitute therefor the analysis of the frit. If the theory that there may be some subtle variations in the character of the frit, produced by the specified great preponderance of alkaline ingredients in the mix, which variations analysis of the frit will not disclose, is sound, the selected test will secure him in the monopoly of his invention. But if it be not sound; if, as suggested in a hypothetical question, a formula for the mix which shows a ratio of acid to alkaline ingredients of two to one will nevertheless produce a frit which responds to analysis substantially as Claus' frit does, and also, when ground and treated as the patent indicates, produces the same result as to adherence to steel, mottling, etc.—the patent may not be of much value. But we are not dealing with any such compound now. Possibly, as suggested in one of the answers of complainants' expert, the greater cost of materials will prevent its ever troubling the patent owner or the court. It is sufficient now to decide that Claus selected the mix, and not the frit, as the earmark of his patent; that he was entitled to do so; and that the patent should be thus construed, with whatever results may follow as to prior art or infringement.

As we have seen, there were before Claus many formulæ for

making enamels by combining acid and alkaline ingredients. Is the contribution of Claus a mere change of degree of alkalinity, or such a radical departure from all prior formulæ as exhibits patentable invention? Counsel for the L. & G. Company submits a table of comparative alkalinity in the mixes of various patents, which indicates that they vary from those containing a preponderance of acid substances to those in which the ratio of alkali to acid was 1.40 to 1.00. The ratio of Claus (4.24 to 1.00) is so enormously in excess of any of the others, and apparently runs so counter to the teaching of the art, as to warrant the conclusion that his radical departure from prior methods was a patentable contribution to that art (*Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279; *National Newsboard Co. v. Elkhart Egg Case Co.*, 123 Fed. 432, 59 C. C. A. 471), especially in view of the adaptability of enamel compounded in accordance with his formula to so handle the metallic salts as to secure adhesion to the metal and mottling of the coat simultaneously and on a single application.

Of the prior patents which have been introduced, *Quinby & Whiting* reissue No. 7,900 of 1877 is for an enamel vitreous enough to carry a glaze of itself, with an affinity for wrought or sheet iron, which causes it to adhere thereto with extreme tenacity when burned upon it. The enamel is applied in a single coat, which, when fixed, exhibits spots or mottles. A small quantity of sulphate of magnesia (an equivalent of the metallic salts of Claus) is added to the dip. Evidently the patentees do not believe that this is instrumental in producing the spots, for they state that the sulphate of magnesia is introduced for the purpose of keeping the enamel coating in proper condition for dipping, and attribute the spots to salts of iron produced by the usual pickling and cleaning of the metal surface. If the spots are in fact produced as they are in Claus' patent, it is immaterial that *Quinby & Whiting* were mistaken in their theory. The requisite tenacity is obtained by the use in the mix of $1\frac{1}{8}$ per cent. of arsenious acid. They assert that without this ingredient their enamel coat will not have the adhesive qualities necessary to a good enamel. The formula of *Quinby & Whiting* is silica 100 pounds, soda ash 35 pounds, borax 75 pounds, plaster of paris 20 pounds, arsenous acid $2\frac{1}{2}$ pounds. This gives the ratio of alkaline ingredients to acid at 1.26 to 1.00. The analysis of the *Quinby & Whiting* frit is substantially like that of the Claus frit, but, as we have seen, it is the character of the mix which is to be considered, and it certainly cannot be held a ratio 1.26 to 1.00 disclosed the great preponderance of alkaline ingredients, the intense alkalinity, which is exemplified in Claus formula as about 4 to 1.

The *Niederlinghaus* patents (reissue 7,779 of 1877, No. 199,735, January 29, 1878) are for a process of enameling sheet iron by causing an oxidation of the metallic base during the process by reason of the presence of the acid (sulphuric acid) in the glaze. It is single-coat process; but, although the analysis of the frit is almost identical with that of the Claus frit, the mix is less alkaline even than *Quinby & Whiting's*, the ratio being 1.08 alkaline to 1.00 acid

ingredients. In the Puttman & Fligel patent (No. 336,157, February 16, 1886) there is a preponderance of acid substances in the mix; while in Milligan's patent (No. 296,206, April 1, 1884) acid and alkaline substances are about equal. These are all for single-coat enamels.

The patent to Vollrath (No. 415,485, November 19, 1889) describes a process for enameling by first fusing onto the metal a ground mass or foundation coating and afterwards applying a finishing coating presenting a "mottled or pleasingly speckled appearance." This double coating would differentiate it from Claus, but the specification says: "If desired, the finishing coating (consisting of mixtures A & B) may be applied directly to the cleaned metallic articles; but ordinarily I prefer to apply a foundation coating." These mixtures A and B, according to the formula given in the patent, are composed wholly of alkaline substances; but there is a statement that the formula may be modified by substituting for 60 parts of pulverized feldspar the feldspar mixed, if preferred, with quartz sand. The proportions of these ingredients can be arranged so as to give the great alkaline preponderance of the Claus formula. But there is no suggestion in Vollrath of mottling by metallic salts carried in or through the enamel and operating to partly oxidize the metal surface. Vollrath seeks to produce his mottling by having the two mixtures (A and B), which together make up the finishing coating, ground to different degrees of fineness. The process is somewhat analogous to that described in an earlier patent to Kegriesz, which was before this court and the Circuit Court of Appeals (*Lalanc & Grosjean Mfg. Co. v. Habermann Mfg. Co.* [C. C.] 53 Fed. 375; *Id.*, 55 Fed. 292, 5 C. C. A. 111), but is very far removed from Claus.

It seems unnecessary to refer in detail to the other patents given in the record. Defendant's experts both agree that the Quinby & Whiting and the Niederinghaus come nearest to the patent in suit.

A large part of the record is devoted to testimony bearing on the question of prior public use, notably by Block and by Chester Comstock. It is not thought necessary to go into the details of this testimony. As may be inferred from what has been already written, the invention of Claus was not the broad and fundamental one which counsel contends it is. It avoids prior patents only when considered as an entirety and limited to a process (and product) wherein mottles are formed in a single coat as the result of a partial oxidation of the metal surface, produced by the action of metallic salts applied to an enamel, while still moist, either on the article or in the dip, the ingredients of which enamel show a great preponderance of alkaline substances, but which enamel nevertheless does not neutralize the metallic salts, but facilitates their presentation (still efficient as oxidizing agents) to the metal surface. Parts of such a process may be found in one place or another in the prior art, but neither the patents, the literature, nor the testimony as to prior use has satisfied the court that the combined features of Claus' process were known before the date of his application; while it is satisfied that there was patentable invention in the novel combination which he devised.

Nor is it necessary to discuss the question of utility. If the formula and process which defendant has used be found to be an infringement, the large number of articles made and sold, and apparently accepted as satisfactory by the trade and consumers, is abundant evidence that the process is useful, although there may be many other processes quite as good and cheap, and producing ware quite as satisfactory.

Concededly, the defendant used a mixture which was known as "100 Granite." The two formulæ are as follows:

Claus Patent in Suit.				100 Granite.			
	Parts.	Alk.	Acid.		Lbs.	Alk.	Acid.
Borax	125	125		Borax	90	90	
Feldspar	130	130		Feldspar	126	126	
Quartz	70		70	Quartz	40		40
Soda	25	25		Soda	32	32	
Fluorspar				Fluorspar	12	12	
("small				Bone ash	14	14	
proportion").				Nitrate Soda	16	16	
Cobalt ("small				Antimony	4	4	
proportion").				Sulphate Soda	4	4	
Salt peter	17	17		Manganese	2	2	
				Cobalt, 16 gr.			
	<hr/> 367	<hr/> 297	<hr/> 70		<hr/> 340	<hr/> 300	<hr/> 40

"Add fatty clay. Mix with enamel before applying to surface sulphate of copper and sulphate of iron or either (or equivalent metallic salts)."

"On 100 lbs. of enamel 4 lbs. E. B. (English Ball Clay). Two pounds of nickel and 1 lb. of Epsom salts (sulphate of magnesia), hot."

When the eleven materials of defendant's formula had been mixed together mechanically, 18 ounces of sulphate of nickel in solution were sprinkled over the mixture to produce a color effect. These ingredients were then smelted, and the frit ground in a mill with one pound of natural magnesite (carbonate of magnesia), one-quarter pound of red oxide of iron, and five pounds of V clay. To the dip thus formed a solution of sulphate of magnesia was added, and sometimes a little sulphuric acid to accelerate the action of the magnesia. In this the vessels were dipped, and then burned in a muffle. Afterwards they were dipped again, and burned a second time. The expert testimony leaves little doubt that the sulphate of magnesia is the equivalent of the sulphate of copper, sulphate of iron, or equivalent metallic salts of Claus. The changes introduced by the bone ash, antimony, and magnesite, etc., are slight, and, so far as the essential feature of the Claus mix is concerned, unimportant. The substances are "neutral in glass-making." Manganese and antimony are coloring agents, bone ash "helps to make a good body of the mix." The important change in the formula is in the ratio of alkaline substances to acid; 4.24 to 1.00 in Claus, 7.50 to 1.00 in 100 Granite. Nevertheless there is still a "great preponderance of alkaline substances," and there is no suggestion that there is anything gained, or any new result effected, by thus increasing the ratio. The advance from the nearly balanced columns of the earlier patents to Claus' 4.24 to 1.00 was a radical

change; but, the new departure in that direction being once made, a still further increase of alkalinity does not necessarily put the formula outside of the scope of the patent.

The most important question in this branch of the case is whether by putting a double coat on its articles defendant avoids infringement of this patent, the object of the invention being, as stated in the specification, "to coat steel surfaces with a single coat of enamel exhibiting mottled effects"; it being further stated therein that "nothing herein stated is to be understood as precluding the application of several coats." It was the circumstance that the defendant dipped and fired a second time that induced Judge Townsend to refuse a preliminary injunction. There is fuller proof in the present record as to this second coating. When the first firing is finished, and the article has cooled off, and is set aside, it is an infringing article; a metallic article of the kind described and claimed. It is a complete article, which may be sold and used in that condition; or it may be kept an indefinite time, and then dipped again; or it may be redipped forthwith. If this infringing article were dipped in a mix which would merely coat it with a film of colorless, transparent flint glass, the second coating would not take it out of the patent. If the second coating covered it with an opaque blue glass, so that the first coat no longer "exhibited mottled effects," it might not recommend itself to persons who wanted to purchase mottled ware, but it is thought that it would be none the less an infringement. The process of the patent would still have produced the product of the patent, which the surface coating had not destroyed. If the second dip were absolutely identical with the first dip, and the result accomplished by dipping and firing a second time were precisely the same as that accomplished by the first dipping and firing, a more difficult question might be presented. But such is not the fact. The witness Louis Haberman testifies to several changes in the second dip. It would not be safe to find infringement upon his unsupported testimony, but defendant's own witnesses testify that in making the second dip a different kind of clay is used, and it seems highly probable that it is thinned with a larger proportion of water. Moreover, the evidence is persuasive that the result is a transparent coat, through which the original mottles of the first coat are all distinctly visible, and which itself exhibits no mottles, for the reason that the first coat prevents the metallic salts from coming in contact with the metallic surface, and thus producing the partial oxidation referred to in the patent as the cause of the spotted or mottled appearance. Therefore, while there are two coats on the article, only one of them is the coat of the patent, viz., a coat of enamel applied to steel (or other analogous metallic surfaces) and "exhibiting mottled effects." The conclusion is therefore reached that defendant has made and sold articles which are within the patent. It only remains to see what claims, if any, have thereby been infringed.

Claim 4 is for "as a new article of manufacture, a metallic article having a coat of enamel of an intensely alkaline nature permeated by metallic oxides, substantially as described." As we have seen,

the words "intensely alkaline" do not refer to any analysis of the frit, but to a great preponderance of alkaline substances in the mix. The words "substantially as described" indicate that the "metallic oxides" are products of the oxidation of the metal base attainable because of "the reactions between the alkaline constituents of the enamel coating and the metallic salts." It must be limited to "steel or other analogous homogeneous metallic surfaces, such as the Siemens, Martin, and Thomas products." It is valid and infringed.

Claim 1 is for "as a new article of manufacture, a steel or homogeneous iron article having one coat of mottled enamel." This is altogether too broad in view of the prior art. It is not restricted to the great preponderance of alkaline substances, which is characteristic of Claus' formula. It cannot be sustained.

Claim 2 makes no reference either to the metallic salts or to the mottles. It refers to a "preponderance"—not to a "great preponderance"—of alkaline constituents. Whether it could be saved, if it stood alone, by reading into it the essential characteristics of Claus' invention, need not be considered, because, if thus qualified, it would be but a duplicate of claim 4.

Claim 3 may be similarly disposed of. It contains no reference to the mottles, and is not confined to a "coat of enamel exhibiting mottled effects."

Claim 5 contains no reference to the "great preponderance" or "intense alkalinity" which may fairly be read in since the "coat" referred to is evidently the "coat" of claim 4. As thus qualified, it would be distinguishable from claim 4 by reason of its reference to a "partly" oxidized surface. As so qualified, it is valid and infringed.

Claims 6 and 7 must be in like manner restricted to an enamel of intense alkalinity, as those words are used in the patent. As thus qualified, they are slightly variant from claim 4. As so qualified, they are valid and infringed.

Claim 8 is for the enamel irrespective of the surface. It also must be qualified by restricting it to an enamel of intense alkalinity; i. e., having a great preponderance of alkaline substances in the mix. As so qualified, it is valid and infringed.

Claims 9, 10, 11, and 12 all refer to the process. Claim 9 reads: "The process of enameling, which consists in coating an article with an alkaline enamel and in applying thereto, while still moist, a metallic salt or salts, substantially as described." The other three contain the same phrase "and in applying thereto while still moist." When the patentee filed his application he set forth two methods of applying the metallic salts. One was to dust or sprinkle them on the enamel coating after dipping (or some suitable process) had spread the enamel in a thin layer over the metal surface; the other was to mix the salts with the enamel before it is applied to the surface to be coated. As was stated above, it is thought that Claus did not abandon either method while his application was pending in the Patent Office, and the claims for an "article of manufacture" sustained supra will cover such article in whichever of the two ways the metallic salts may be applied. But these four process claims

are all confined to the dusting or sprinkling method. It is true that the enamel is "still moist" when it is in the dip condition, but it would be an improper straining of the language used to hold that these four claims covered any process other than one in which the salts were applied to the moist enamel after such enamel had coated the article. Inasmuch as defendant does not use the dusting or sprinkling method, it cannot be held to infringe these claims.

Since all the 12 claims were insisted on, and some only have been sustained, there should be no costs to either side. A decree may be entered for injunction and accounting in conformity with this opinion. Defendant has an extensive plant, and many workmen on its pay rolls. The case was a close one, as the event has shown. It is proper that there should be a reasonable time allowed to substitute methods of manufacture which will prevent infringement. Therefore after decree is entered the court will, by order, suspend issuance of injunction for 30 days. In view of the testimony put in by defendant as to numerous noninfringing processes producing articles which they insist are as good, if not better, than complainants', that period of delay seems ample.

MARLIN FIREARMS CO. v. DINNAN.

(Circuit Court, D. Connecticut. July 7, 1905.)

No. 1,137.

PATENTS—INFRINGEMENT—MAGAZINE GUNS.

The Hepburn patent, No. 584,177, for a magazine gun, was not anticipated, and discloses invention. Also *held* infringed.

In Equity. On final hearing.

Robert C. Mitchell, for complainant.

Louis C. Raegener and Milton E. Robinson, for defendant.

PLATT, District Judge. This is a suit in equity, brought on the Hepburn patent, No. 584,177, dated June 8, 1897, for certain improvements in firearms, which relate to a "magazine gun." The defenses are that the claims, construed narrowly, as they must be, in view of the prior art, are not infringed, and that, if broadly construed, they are void for want of novelty and invention.

Claim 4 has been given the right of way by experts and counsel, and the court is content to follow the selected path. It is:

"(4) In a firearm, a barrel carrying a rearwardly-extending side plate, a stock portion carrying a forwardly-extending side plate, attaching-tenons carried by said plates, a recess in the stock portion to receive the tenon of the barrel portion, and a recess in the barrel portion to receive the tenon of the stock portion, and means for detachably holding said parts in an engaged position."

This claim must be read in the light of the specifications and of the prior art before it can be construed with a fair degree of intelligence. In no other way can an open mind grasp the scope of the inventive thought, and perceive whether that thought has been

clearly expressed, and to what lengths others may be allowed to travel before they can rightfully be charged with invading the pre-empted territory.

Defendant insists that it covers nothing more than the use of a joint or splice between the barrel and stock portions, so that the gun may be conveniently separated. That this has been done in the Mason, Bennett, and Browning patents, and that the use of a like splice-joint by Hepburn was merely a matter of substitution, and showed no invention at all; and further that Pritchard, in a rail patent, shows just such a splice-joint, and that it is a matter of common knowledge in carpentry, as well as in rails, that when one portion carries a rearwardly-extending side plate, and the other a forwardly-extending side plate, each with tenon so constructed as to fit into recesses in the other, you have a splice-joint, pure and simple, and that the words of the claim mean no more; that in the case of a fork one would speak of the "tine portion and handle portion," and so with a wheelbarrow. This line of reasoning seems to me to be finespun and extremely technical. It eliminates and misses the spirit and essence of Hepburn's invention. Nor can the court agree that complainant shifted its position between the times of taking direct and rebuttal testimony. The complainant has, it is believed, maintained the one position consistently and continuously, from beginning to end, elaborating it possibly somewhat on the rebuttal. This view of the matter leads us away from the thought expressed in *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303, and other cases.

It may be that complainant is confined to a take-down splice of the peculiar kind described, but it is equally clear that Hepburn was the first one to think out the peculiar form which we find in both complainant's and defendant's structures. When the splice is made on the side instead of the top, it becomes an important invention. That was the real advance in the art. Each side plate is independent—one plate carried by the stock, and the other by the barrel—and the great ingenuity resides in separating the side plates, and in the attachment of the internal mechanism partly to one plate and partly to the other, in such a way that the entire organization works harmoniously, and is also easily reached for purposes of cleansing and repair.

The Bennett patent, No. 487,406, is admitted to be the nearest approach to the Hepburn invention which the art produces. Here the side plates are both rigidly attached to the barrel. The mechanism is in a cavity between the rigid side walls. To prepare for its introduction is strictly inside work, and a solid block of metal must be milled out therefor in advance. The connection is provided for by making the tang, G, carried by the stock portion, and sliding into the space between the rigid side plates, and must of necessity be less efficient than the connection provided by Hepburn's construction. And again, after taking down the Bennett gun, the cartridge-handling mechanism is not by that act rendered accessible in any such sense as it certainly is in the Hepburn construction. The manifest differences are those which are inherent in the methods of taking the guns down.

Every fresh examination of this matter brings the court the more clearly to the conclusion that Hepburn invented a new and distinct type of take-down magazine gun, and, from the view point thus reached, the defendant has, it would seem, without any serious straining of the doctrine of equivalents, come about as near as its peculiar style of cartridge-handling mechanism will permit to offering the public a gun containing a copy of that invention. The differences which defendant's counsel so ingeniously point out finally resolve themselves into immaterial differences which are inherent in the variant action of the operative mechanism of the two guns, and, beyond all that, they appear to be studied evasions, which may perhaps be somewhat hidden from the ordinary observer by using those inherent differences as a cloak to cover them. Indeed, it is so plain that he who runs may read it that the defendant's method of taking its gun down would never have existed if Hepburn had not blazed out the trail so that it could be followed.

Claim 4 being valid and infringed, it is unnecessary to waste space or time upon claims 1, 2, and 3. Claim 1 only differs in specifying "an undercut recess or mortise in the reinforce of the barrel portion." This is so that the end of the side plate engaging therewith cannot be pried off. Defendant copies this feature identically and for the same purpose. Claim 2 requires an "abutment" on the stock portion to engage in a recess at the rear end of the side plate of the barrel portion. The projecting head of the screw upon which the hammer is mounted is such an abutment. See Exhibit Allen Drawing, Fig. 2. It projects into a recess, D^2 , and prevents vertical dislodgment of the rear end of the side plate. In Fig. 1 of the same exhibit we find another abutment, D , which fits into the recess, D^1 , and helps to hold the parts together when assembled. Defendant appears to have made assurance doubly sure in the matter of abutments. Claim 3 merely differs from the others in specifying the means for holding the parts together. That means shall be "a bolt passing through one of the side plates and engaging the other side plate," with "a suitable head or shoulder * * * outside of the first-mentioned plates." Defendant has copied this with engaging accuracy.

Claims 7 and 8 remain:

"(7) In a firearm, a barrel portion carrying a rearwardly-extending side plate, and an overlapping top piece, a projection carried by said side plate underneath said top piece, and spaced apart therefrom, a reciprocating breech-bolt in the space between said top plate and said projection, and means for detachably holding said breech-bolt in its operative position.

"(8) In a magazine-firearm, a barrel portion carrying a rearwardly-extending side plate, a top piece carried thereby, a projection carried by said side plate underneath said top piece, a breech-bolt sliding in the space between said top plate and said projection, a stock portion carrying a forwardly-extending side plate, and means for detachably securing said parts in the operative position."

The essential features of these claims are that they provide "means" for holding the breechblock against "accidental detachment" when the gun is taken down. When defendant's gun is

taken down, we find that the "breachblock is prevented from becoming accidentally detached from its support," which demonstrates that "means" to accomplish that object must be present. Not stopping to dissect such "means" into its constituent elements, I am in accord with complainant's expert when he says that, "Nothing except an out and out duplicate construction could be more clearly an embodiment of the terms of said claim 7." As to claim 8, the means employed by defendant to hold the breachblock in place have been alluded to, and the means for securing the parts in operative position, which is done by the thumb screw, is identically the same as that used in the patent in suit.

Defendant vainly endeavors to set up Hepburn's prior patent, No. 434,062, in anticipation of claims 7 and 8, because the claims in suit relate solely to the take-down type of gun. It is only when the gun is actually taken down that any value resides in the means employed to hold the breachblock in place. The claims at issue are valid and infringed.

Let an injunction issue, and a master be appointed to take an accounting.

FARMERS' LOAN & TRUST CO. v. MERIDIAN WATERWORKS CO. et al.

(Circuit Court, S. D. Mississippi, E. D. April 28, 1905.)

No. 42.

1. MORTGAGES—RIGHTS OF MORTGAGEE—GROUNDS FOR APPOINTMENT OF RECEIVER.

Under a mortgage given by a water company on all of its property to secure bonds, which conveys the legal title, the mortgagee has the right to ask the appointment of a receiver to prevent the property from being wasted, or its value impaired, although there has been no default in the payment of either interest or principal of the debt; and a decree which deprives the company of the right to longer maintain and operate its plant is sufficient ground for such appointment.

2. CONSTITUTIONAL LAW—FRANCHISE—CONTRACT PROTECTED FROM IMPAIRMENT.

A franchise granted to a water company to maintain pipes in the streets of a city to supply the inhabitants and the city with water for a term of years constitutes a contract, which is protected from impairment by the Constitution of the United States.

3. JUDGMENT—RIGHTS OF MORTGAGEE—CONCLUSIVENESS OF JUDGMENT AGAINST COMPANY.

Such a grant also creates an easement which may be mortgaged, and the mortgagee cannot be deprived of such security by a decree against the company annulling the franchise, entered in a suit begun after the mortgage was given, and to which the mortgagee was not a party.

4. LIS PENDENS—EFFECT OF AGREEMENT FOR EXTENSION PENDENTE LITE.

A water company having a franchise from a city to construct and maintain waterworks therein executed mortgages to a trustee covering all of its property and franchises to secure bonds with the proceeds of which it built its works and made extensions. Subsequently the city brought a suit against the company to annul its franchise, and pending such suit the company made a new issue of bonds to make extensions ordered by the city, secured by another mortgage to the same trustee, which also provided for the renewal and extension of the liens of the prior mortgages. At the time

neither the trustee nor holders of the bonds had actual knowledge of the pending suit. *Held*, that such provision for renewal and extension of the prior mortgages did not operate to discharge such mortgages, which still remained of record, nor to revest the title conveyed thereby so as to affect the trustee with *lis pendens* with respect to his rights and those of the bondholders thereunder in the mortgaged franchise, and subject them to a decree subsequently rendered in the suit annulling such franchise.

In Equity. On demurrer to bill.

Brown & Spurlock, for complainant.

Miller & Baskin, S. A. Witherspoon, and Ethridge & McBeath, for defendants.

NILES, District Judge. This is a suit in equity, brought by the complainant, as trustee under several mortgages executed by the Meridian Waterworks Company and the city of Meridian for the purpose of preserving for the benefit of the bondholders represented by it the property included in the mortgages, and to have the complainant's rights therein declared as against both of the defendants. It is alleged, among other things not necessary to be stated: That on the 20th day of July, 1886, the city of Meridian contracted with W. S. Kuhn, his associates and assigns, for the erection and maintenance of a system of waterworks for the purpose of supplying to the said city and its inhabitants water for domestic and public uses. The bill and contract exhibited therewith describe the works as originally designed, and which have since, under the directions of the city, acting in accordance with the provisions of the contract, been largely increased. After said contract was duly executed, it was assigned to the Meridian Waterworks Company, which, in accordance with its terms, erected the works and had ever since operated and maintained the same, and was still in possession thereof, but with no right to continue their operation, as had been decreed in a suit brought against it by the city of Meridian, wherein the contract aforesaid was annulled, and as a result of which the defendant city was claiming that its co-defendant had no longer the right to use its streets to maintain said works, or to collect from it the hydrant rentals which said city had agreed to pay for and during the whole period of said contract. That said contract granted to said Kuhn, his associates, successors, and assigns the right to construct said works, and to use the streets and public places of the city to maintain and operate the same for a term of 25 years from the date when completed and accepted. That on November 1, 1886, the Meridian Waterworks Company, in order to secure the necessary funds to build said works, executed and issued bonds to the amount of \$150,000, and secured the payment of the same by a conveyance to the complainant of said works and all franchises, rights, and contracts incident thereto; and on July 1, 1892, it executed and issued bonds in the additional amount of \$100,000 to pay for the extensions of its mains and pipe lines, as directed by the defendant city, and secured this loan by a mortgage of the same date, again conveying the same property, rights, and franchises to the complainant. That in September,

1898, the city began a suit in the chancery court of Lauderdale county, Miss., against the Meridian Waterworks Company, alleging that the water then being supplied its inhabitants was not pure and wholesome and suitable for drinking purposes, and that the pressure afforded for fire protection was not such as the contract required. This bill, it is alleged, was not answered until November, 1900, and no steps were taken for the purpose of bringing it to a hearing until February, 1902. In the meantime the defendant city had directed the laying of a large amount of additional mains, and by its legislative boards had authorized the dismissal of the suit previously brought against it; and the Meridian Waterworks Company for the purpose of securing the necessary funds to make these extensions, and to pay for other improvements, had borrowed the additional sum of \$100,000, secured by a mortgage executed to the complainant on November 1, 1899, and in which provision was also made for renewing and extending the lien of the two issues of bonds secured by the mortgages executed in 1886 and 1892. That at the time this mortgage was executed neither the complainant nor the bondholders represented by it knew of the pending of the said suit in the state court, and would not have agreed to renew or extend the prior issues of the bonds if they had had such knowledge. That after the Meridian Waterworks Company had completed all of the extensions ordered by the city, and had, with the city's knowledge and consent, added other extensive improvements to its plant, costing nearly the sum of \$140,000, the city, through its counsel, began the active preparation of its suit for a hearing, and it was heard with the result that the contract was annulled by a decree of the chancellor, which decree was, on appeal to the Supreme Court of the state of Mississippi, affirmed. That the defendant city was claiming since the rendition of said decree that the Meridian Waterworks Company had no longer any claim upon it for hydrant rentals, or any right to use and occupy its streets for the purpose of maintaining its plant, under the contract which had been previously assigned to the complainant as security for the sums borrowed as aforesaid. That the defendant the Meridian Waterworks Company, under the several mortgages executed to the complainant, had agreed to keep the property conveyed as security free from liens and incumbrances of all kinds, and to so manage it as not to impair its value as security for the debts described in the several mortgages; but that it had, by the decree aforesaid, been deprived of its power and right to manage said property, or to collect and apply its income from any source, or to maintain the same; and that, if it was deprived of the possession of this property, it would be utterly destroyed and rendered valueless as security for the outstanding bonds. That said mortgagee company had no other property, and was by said decree rendered insolvent, and unable to pay its outstanding bonds, or to preserve the property by which they were secured. The relief sought as against said defendant was that a receiver be appointed to take possession of said property, and to operate and maintain the same for the benefit of the bondholders, and, as an incident to said proceeding, that the rights of the plaintiff as against the defendant city be declared.

To this the mayor and boards of councilmen and aldermen of the city of Meridian have demurred, and assigned in substance the following defenses: (1) The bill fails to show that any legal or equitable rights of the plaintiff have been violated, or threatened to be violated. (2) That the plaintiff has no legal or equitable right or title authorizing it to maintain the bill. (3) That the decree of the state court is valid, and no reasons are assigned for declaring the same void, and that the plaintiff is bound and concluded thereby. (4) That the bonds issued under the mortgages executed in 1886 and 1892 have been exchanged for the bonds issued under the mortgage executed in 1899, and were therefore extinguished, so that the plaintiff had no rights in said property except as conveyed to it under the mortgage last named. (5) That the right of the plaintiff to collect hydrant rents due from the city is a legal action, and will not accrue at all unless necessary to pay interest upon the outstanding bonds, which is not now in default; and that the plaintiff, having no greater rights than the waterworks company in said contract, and the same having been annulled, no suit, either legal or equitable, can be maintained to collect said rents.

After the Meridian Waterworks Company had conveyed its property and the franchises incident thereto to the plaintiff to secure the bonds issued under its several mortgages, the water company had only an equity in these properties, and the right to continue in possession of the same, subject to the terms and limitations stated in the deeds of conveyance. At the same time, and under the same conveyances, the plaintiff held the legal title for the benefit of the bondholders, with the right to take possession of the property whenever it became either necessary to sell it or to preserve it from waste and loss. The mortgagor company having no other property besides that conveyed, the trustee had in fact a greater interest in the preservation of the property than in its sale. If the mortgagor had voluntarily abandoned its right of possession, and left the property to go to waste, or if its existence as a corporation had been terminated at the suit of the state, so that it could not have performed its duties in caring for the property under its mortgage, in either event the right of the trustee to take possession would have accrued. The result would not be different where it was disabled in the performance of these duties by any other character of decree; and when it is necessary to preserve the property the trustee may ask the appointment of a receiver to prevent the subject-matter of his mortgage from being impaired and wasted, without waiting until there has been a default, either in the payment of the principal or of interest on the indebtedness secured. *Brassey v. New York N. E. R. Co.* (C. C.) 19 Fed. 663-669.

It is alleged in the bill of complaint that a decree of the chancery court of Lauderdale county, Miss., in a suit brought by the city of Meridian against the Meridian Waterworks Company, and affirmed by the Supreme Court of the state of Mississippi, had adjudged that the waterworks company has no longer any interest in the contract under which the waterworks were constructed and being

maintained. The practical effect of this decree was to destroy the water company's right to possess and operate the plant which it had conveyed to the plaintiff. It had no power thereafter to collect and use the income of the company from any source to pay the taxes annually assessed against the property, to continue its value as a going concern, or to do any act necessary to prevent it from being entirely wasted and destroyed. Under both the expressed and implied conditions of the mortgage executed by this company, the trustee had an undoubted right to take possession of this property, and save it for the benefit of the bondholders, who were most vitally interested in its continued existence. But the defendant city contends that the decree of the state court which annulled the contract as to the waterworks company is also conclusive and binding as to the interest of the trustee, and that the latter is equally, under said decree, without the right to use the streets of said city for the purpose of maintaining and operating the waterworks. But this decree can have no such effect. In a case involving the same question the Circuit Court of Appeals for the Sixth Circuit, in *Louisville Trust Company v. City of Cincinnati*, 76 Fed. 296, 22 C. C. A. 334, has said:

"That these street easements originate in certain statutes of the state of Ohio and certain ordinances of the city of Cincinnati does not affect their character as contracts entitled to the protection afforded by the Constitution of the United States. The grant of a right to enter upon and occupy a public street with the necessary tracks, poles, wires, and equipment of an electric street railway is a grant of a typical easement in property, and as such is a contract right, capable, in the absence of express restrictions, of being sold, conveyed, assigned, or mortgaged, and is therefore a right entitled to all the protection afforded other property or contract rights. Such a grant as we had occasion to decide in *Detroit Citizens' Street Ry. Co. v. City of Detroit*, 22 U. S. App. 570-580, 12 C. C. A. 365-372, and 64 Fed. 628, 635, 26 L. R. A. 667, may be for a time longer or shorter than the corporate life of the company receiving it; the duration of the estate being dependent upon the terms of the grant and the power of the grantor to make it. We then said there was nothing in the nature of the property rights involved in a grant of an easement in the streets for street railway uses which distinguishes it from the property acquired by a corporation in the exercise of its franchises."

In *Railroad Company v. Delamore*, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244, it was held that a grant by a municipal corporation to a railway company of a right of way through certain streets of the city, with the right to construct its railway thereon, and maintain and occupy them in its use, is a franchise which may be mortgaged, and would pass to a purchaser at a sale under a foreclosure of the mortgage. There is nothing in the law of Ohio which in any way contravenes the right of a railway company to mortgage its street easements, or which would prevent such easements from passing to a purchaser at foreclosure sale. It therefore follows that the complainant under the mortgage mentioned has acquired the substantial right in the street easements of the mortgagor company, and cannot be deprived of this security by a proceeding directly impeaching their validity and duration without being made a party thereto. It is true that a grantor can transfer no greater estate or interest than he has, and that the title in the grantee's

hands must be subject to all the burdens and limitations which rested upon it at the time of the conveyance. But in *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301-314, 14 Sup. Ct. 592, 597, 38 L. Ed. 450, Mr. Justice Brown, in delivering the opinion of the court, said:

"While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given, he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he, or some one authorized to represent him, like a trustee of a mortgage bondholder, is made a party to the litigation, although it would be otherwise if the mortgage were executed pending the suit or after the decree."

Hassall v. Wilcox, 130 U. S. 493, 9 Sup. Ct. 590, 32 L. Ed. 1001; *Southern Bank & Trust Co. et al. v. Folsom et al.*, 75 Fed. 929, 21 C. C. A. 568.

The mortgage under which the complainant was trustee was executed before the suit in the state court was begun, and we think there is no reason why a mortgage of property interests, such as the street grants claimed by the mortgagor company, should be concluded by a decree to which only the mortgagor was a party, than if the mortgage had been on a different character of estate. See *Baltimore Trust and Guarantee Co. v. Mayor, etc., of City of Baltimore* (C. C.) 64 Fed. 153.

In the more recent case of *Columbia Ave. Sav. Fund, etc., Co. v. City of Dawson* (C. C.) 130 Fed. 152, Judge Pardee, of this circuit, held that a mortgagee was not privy to or bound by a judgment against the mortgagor rendered in a suit commenced after the mortgage was given, and to which he was not a party. This case was, on appeal, reversed upon another point, but the above holding was in no wise disturbed.

Demurrant relies upon the case of *New Orleans Water Works Company v. Louisiana*, 185 U. S. 342, 22 Sup. Ct. 691, 46 L. Ed. 936, but this case involved nothing more than the right of a state to revoke a charter of incorporation granted under its laws, or to recall the right to be a corporation, which belonged to the stockholders of the corporation, a right that was not assignable, and in which the creditors of the corporation could have no interest. The creditor has the right and does rely for the satisfaction of his debt against the corporation upon the appropriation or sale of whatever property of any character the corporation may possess. In effecting a satisfaction of his debts, either by sale under execution or in the foreclosure of a mortgage, the property passes from the corporation, and purchasers at a foreclosure sale do not take the right to be a corporation which belonged to the stockholders constituting the corporation when property was sold. When, therefore, the decree of the court terminated the corporate existence of the *New Orleans Waterworks Company*, the rights of its creditors, as said by the court in that case and cases cited, were not affected. The other rule applies where the decree operates against property belonging to the corporation itself that is assignable in its character, and is subject to appropriation in the payment of whatever debts the company may owe.

There are a great number of cases holding that grants by municipal corporations to railway companies, water companies, and other such public corporations to use streets in the construction and operation of their works constitute easements or property which are assignable in their nature, and as such within the protection of the Constitution of the United States. Some of the cases are cited in the opinion of the court in *Louisville Trust Company v. Cincinnati*, before referred to, and the decision in that case resulted from the distinction stated.

It was declared by Mr. Justice Bradley in *Memphis and Little Rock Co. v. Railroad Commissioners*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837, in which case he stated:

"The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchaser at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating as such. And the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence after the corporation has parted with all its property and all its franchises."

In *State v. Water Company*, 61 Kan. 547, 60 Pac. 337, it was held that, notwithstanding the fact that the charter of the mortgagor company had been forfeited at the suit of the state, the purchaser at a foreclosure sale took and had the right to operate franchises granted by the city for the construction and use of the waterworks involved. The reasons for this conclusion are clearly stated in the syllabi of the case:

"(1) Corporations—Franchise from City—Right to Mortgage. A corporation organized under the laws of Kansas for the purpose of furnishing the inhabitants of a municipality with water had granted to it, by an ordinance of the city, the right to occupy its streets for the laying of pipes, erecting hydrants, and other privileges usually enjoyed by water companies, for the period of twenty years. The company executed a mortgage on all rights, privileges, and franchises granted to it by the state, together with all its property used in and about the maintenance of a waterworks plant, and income, rents, profits, and emoluments derived therefrom, including revenue from all sources, to secure the payment of certain bonds. Held, that the mortgage created a valid incumbrance upon its property, including all rights to supply the city and its inhabitants with water derived under the ordinance mentioned.

"(2) Secondary Franchises may be Alienated. Corporations cannot sell or mortgage those franchises received from the state which confer power upon them to exist as artificial bodies, but those franchises denominated as secondary, which include the privileges granted by a city to a water company with the right to take tolls, etc., may, under our statute, be lawfully alienated or incumbered."

In *City Water Company v. The State*, 88 Tex. 600, 32 S. W. 1033, the statement of the case showed that before the institution of the quo warranto proceeding a receiver had been placed in possession of the property of the company by the United States Circuit Court for the Western District of Texas. In the suit brought

by the state the water company pleaded this fact in abatement, but the plea was overruled for the reasons thus stated by the court:

"The franchise or right to be a corporate body is a right vested in the stockholders, and not in the corporation itself; and the property or rights of the stockholders are not affected by the receivership or by any action of the court with reference thereto. Where a corporation is placed in the hands of a receiver, and is not dissolved, although it may be insolvent in fact, after the property has been sold to another person, such corporation may reacquire the property which formerly belonged to it by purchase from the person who bought it of the receiver, and will take it free from claims against the receiver to same extent as this vendor held it so exempt."

It was further said:

"If the receiver cannot convey to any person the right to exist as a corporate body by virtue of the charter of appellant, then we cannot understand how the forfeiture or destruction of that existence can affect legally the rights of property in the receiver. If the receiver were to sell the property, the corporation still existing, the purchaser would acquire all the property rights that the corporation has, with all such franchises and easements as were necessary for the use of the property. *Threadgill v. Pumphrey*, 87 Tex. 573, 30 S. W. 356. If the corporation be dissolved pending the receivership, the receiver would continue to enjoy the easements of the corporation, and, upon sale being made of the property, its franchises necessary to the use of the property, such as the right to use the streets, granted by the city, would vest in the purchaser. If the charter of appellant corporation be forfeited, and the receiver shall sell the property of the corporation, the purchaser would acquire all the rights of every kind that could be conveyed if the corporation were still in existence. Therefore we conclude that as a matter of law the judgment of the court declaring a dissolution of the corporation can have no effect upon the value of the property, nor upon the rights of the receiver, nor can it in any way impair or interfere with the jurisdiction of the United States Circuit Court."

See *Fiske's Estate*, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387.

A street railway company had been granted the right to occupy and use certain parts of Broadway, in the city of New York, and the franchise thus acquired was assigned to secure the mortgage indebtedness of the company. Subsequent to this the Legislature of the state of New York passed an act dissolving the street railway corporation. The claim in behalf of the state was that the dissolution of the corporation operated to terminate the rights of the corporation and of the trustee representing the bondholders to use the street franchise, but it was held:

"That, while the annulling act was constitutional and valid, its effect was only to take the life of the corporation; that the corporation took through its grant from the city an indefeasible title in the land necessary to enable it to construct and maintain a street railway in Broadway, and to run cars thereon, which constituted property; that all its property including street rights or franchises, also its mortgages and valid contracts, including the traffic contract, survived its dissolution."

In this connection it may be said that creditors accepting assignments of such street easements as security for their debts take them subject to forfeiture on a failure to comply with the conditions upon which they were granted. *Farmers' Loan & Trust Company v. Galesburg*, 133 U. S. 156, 10 Sup. Ct. 316, 33 L. Ed. 573. But it cannot be said that the assignee's interest can be forfeited and annulled except upon due process of law and a hearing, as was ac-

corded in that case. What was said by the Court of Appeals of New York in *People v. O'Brien*, 111 N. Y. 36, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684, is pertinent in this connection:

"The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice, as well as the tradition of the Anglo-Saxon race in respect to security of the rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary; and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the Legislature, or even the framers of our Constitution, in respect to the effect of the power of repeal reserved in acts of incorporation upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the federal Constitution."

In conclusion of this proposition it is not inappropriate to say that the bondholders whose money had been borrowed and used with the consent and acquiescence of the city in the original construction and all subsequent extensions and improvements of the waterworks system were the parties most vitally interested in the contract, which constituted the very life of these works. In the absence of any constitutional provision guarantying the protection of vested property interests, the simple dictates of common justice would require that these parties should be heard before destroying that property upon which they depended for a return of their money. The investment was a large one, and was necessarily made upon faith in the city's implied promise not to revoke the franchise without a fair and impartial hearing being accorded to all parties interested therein.

The bill filed in this case does not question the validity of the decree announced in the state court, or seek to review the same in any respect whatever. On the contrary, it admits that the decree has canceled the contract so far as the water company is concerned, and deprived that company of the right to further maintain and operate the works under the contract. But the claim is—and it is a substantial one—that the Constitution of the United States stands in the way of the operation of this decree against the interests of the plaintiff, who was not a party to the suit in which it was pronounced.

In *American Water Works & Guarantee Co. v. Home Water Co.* (C. C.) 115 Fed. 172 to 178, it was held that, where a municipal corporation, by contract entered into by legislative authority, grants the use of its streets for waterworks, the grantee could not be deprived of property thus acquired without due process of law; and this constitutional protection extended to mortgagees to whom the rights had been conveyed. The constitutional provision guarantying due process of law avoids all decrees operating on the rights of parties who were not given their day in court. See *Burns v. R. Co.* (C. C.) 15 Fed. 183; *Ex parte Ulrich* (D. C.) 42 Fed. 588, 597; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *Baltimore & O. R. Co. v. Voigt*, 176 U. S.

511, 20 Sup. Ct. 385, 44 L. Ed. 560; *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165.

It only remains to be considered whether the trustee in this case had acquired its title prior to the time of the institution of the suit in the state court, or whether it was an intruder, and acquired its interests after the suit was begun. It is not claimed that the Meridian Waterworks Company had not, prior to the institution of that suit, executed the mortgage dated November 1, 1886, for the purpose of securing \$150,000 in bonds, and the mortgage dated July 1, 1892, for the purpose of securing \$250,000 in bonds, and that these mortgages were both in force and of record at the time the bill was filed in the chancery court of Lauderdale county, Miss. The contention on this point is that the execution of the mortgage dated November 1, 1899, providing for an additional loan of \$100,000, which had then become necessary, and to continue therein the lien of the prior issues of bonds by their renewal, had the effect to extinguish the two preceding liens, and to deprive the plaintiff of the benefit of the rule announced in the cases already cited. The effect of such a renewal or extension is thus stated by the Supreme Court of the United States in *Bernhisel v. Firman*, 22 Wall. 170, 22 L. Ed. 766:

"There is another ground upon which a judgment for the appellant may well be placed. As before remarked, the new securities were intended to take the place of the prior ones. If the new ones are adjudged invalid, the cancellation and surrender of the prior ones will have been without the shadow of a consideration. If the cancellation and surrender are permitted also to stand, Bernhisel will have lost his debt without fault on his part, and contrary to the interest of both debtor and creditor in making the change of securities. Bernhisel will be in no better situation than if he had given up the old securities upon being paid in coin or currency which he believed to be good, but which turned out to be counterfeit. Where there is a failure of consideration and fraud or mistake in such cases, a court of equity will annul the cancellation and revive the securities. Upon being so revived, they resume their former efficacy. This is an ordinary exercise of the jurisdiction of such tribunals. It is a rule in equity that an incumbrance shall be kept alive or considered extinguished, as shall most advance the justice of the case."

It has been declared in *Young v. Sharer*, 73 Iowa, 555, 35 N. W. 629, 5 Am. St. Rep. 701, that a new mortgage would be regarded as but a renewal of the old, where necessary to displace an intervening lien. In *Burns v. Thayer*, 101 Mass. 426, and *Pouder v. Ritzinger*, 102 Ind. 571, 1 N. E. 44, that the taking of a new note and mortgage by a mortgagee from a mortgagor for the payment of the same debt upon the same land will not discharge the lien of the first mortgage, but such lien will be continued in the new mortgage, even though the first be canceled. In *Shaver v. Williams*, 87 Ill. 472, the contest was between the holder of the second mortgage and the owner of another mortgage executed subsequently, but in renewal of one that was prior in date to the second. As to the rights of the parties thus situated, the Supreme Court said:

"The conveyance or release of all the rights held by the complainant in and to the premises to the mortgagor and the execution and delivery of a new mortgage were simultaneous acts, and no intent was shown to change the

relative rights of the parties by the change of the form of the security for the debt. It is a principle well established that equity always looks to the substance, and not to the form, of the transaction, to determine its validity. Under this rule no good reason can be shown why appellant should have priority. When he made the loan and accepted a mortgage the record disclosed the fact that appellee had a prior lien. This record was constructive notice to him and all others of appellee's rights, and whatever interest he acquired in the premises was subordinate to that held by appellee. Appellant has in no manner here been misled or deceived; and under such circumstances to give him priority of lien, from the fact alone that appellee canceled of record one mortgage, no portion of his debt having been paid, and at the same time accepted another mortgage deriving no substantial advantage which he did not previously have, would be neither just nor equitable."

Courts of equity have gone to the extent of holding that, where a mortgagee has accepted a second mortgage in renewal of the first, which was surrendered and canceled, in the absence of laches or other disqualifying fact the mortgagee would be restored to his original position to defeat intervening liens. See *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *Campbell v. Trotter*, 100 Ill. 281; *Jones v. Parker*, 51 Wis. 219, 8 N. W. 124.

In *Cansler v. Sallis*, 54 Miss. 449, the Supreme Court of Mississippi said:

"There can be no doubt that under the allegations of the bill the intention between the parties was to substitute the second note and trust deed for the first as a mere change in the form of the indebtedness for some fancied convenience to the parties. Whenever this is the case, a court of equity will look through the form to the substance, and keep alive the original security, if justice require it. *Dillon v. Byrne*, 5 Cal. 455; *Swift v. Kraemer*, 13 Cal. 526; *Flower v. Elwood*, 66 Ill. 438; *Nichols v. Overacker*, 16 Kan. 54."

And again, in *Sledge, McKay & Co. v. Obenchain*, 58 Miss. 673:

"It is a well-established principle that courts of equity, where there has been a mere change in the form of the indebtedness or security, and where the rights of innocent third parties are affected, will keep alive the original security to enforce the very right and justice of the case. *Thompson v. Hunter*, 55 Miss. 656; *Cansler v. Sallis*, 54 Miss. 446. The evident intention of complainants was to retain a security upon the identical property named in the first mortgage to secure the identical debt thereby secured, and the mere fact that a new mortgage was executed to secure that debt and another and the old security surrendered does not preclude them from insisting upon the security afforded by the original mortgage."

In *Hopkins v. McLaren*, 4 Cow. 667-679, the court said:

"The doctrine of *lis pendens* applies only where a third person attempts to intrude into a controversy by acquiring an interest in the matter in litigation pending the suit."

The reason of the rule was thus stated:

"The reason of the rule is that, if a transfer of interest pending a suit were to be allowed to affect the proceedings, there would be no end to litigation, for as soon as a new party was brought in he might transfer to another, and render it necessary to bring that other before the court; so that a suit might be interminable. But this reason has no application to a third person whose interest subsisted before the suit was commenced, and who might have been made an original party."

This was said in a case where a mortgagee had made a conditional assignment of his interest in a mortgage and was reinvested with title by breach of the conditions in the contract of assignment.

And it was held that he was not precluded by a judgment obtained by the mortgagor against the assignee before the reassignment of the mortgage.

The application of the rule was denied in *Hammond v. Paxton*, 58 Mich. 398, 25 N. W. 321, where the party sought to be affected with notice by *lis pendens* held an interest by an unregistered mortgage of prior date to the institution of the suit; and in *Hunt v. Haven*, 52 N. H. 162, where it was held that a second mortgagee was not bound by a decree obtained by the first mortgagee against the mortgagor in a suit instituted after the second mortgage was executed.

As already stated, the facts clearly show that the plaintiff in this case did not secure its interest in the property in question by intruding in the litigation then pending, but that it represents bondholders from whom was borrowed the money to pay for the original construction of the waterworks, and to pay for all subsequent extensions and improvements added thereto. The first two mortgages, which admittedly antedate the institution of the suit in the state court, still stand upon the records uncanceled, and it was not the intention of the mortgagor and the plaintiff in the last mortgage executed to do more than renew and continue the lien of the prior issues of the bonds. It is not necessary for this court to hold, as it would be warranted in doing on the authorities cited, that the liens of the preceding mortgages should be revived in order to promote the ends of justice. Those liens were never extinguished, and it must be held that the plaintiff is within the rule hereinbefore stated.

If necessary to do so, it might be held that at the time the last mortgage was executed there was no such prosecution of the suit that had been filed in the state court as would be necessary to constitute notice by *lis pendens*. In *Johnston v. Standard Mining Co.*, 148 U. S. 370, 13 Sup. Ct. 589, 37 L. Ed. 480, it was said:

"It has frequently been held that the mere institution of a suit does not of itself relieve a person from the charge of laches, and that, if he failed in the diligent prosecution of the action, the consequences are the same as though no action had been begun."

The rule will not be applied, especially where it appears that the delay was accompanied by circumstances or representations from which it could be reasonably inferred that the suit had been abandoned, or which were calculated to throw the adversary and parties dealing with him off their guard. *Durand v. Lord*, 115 Ill. 610, 4 N. E. 483; *Davis v. Bonar*, 15 Iowa, 171.

The primary relief sought by the bill of complaint was the appointment of a receiver to take, hold, and maintain the property covered by the several mortgages executed to the plaintiff. The collection of the hydrant rents due from the city under the contract existing between it and the water company is not an essential object of the bill. Whether or not the city will be called upon to pay the amount of rents due from it will depend upon the necessity for collecting the amount thus due for the purposes stated in the contract and mortgage and upon the conditions therein stated.

It results from these views that the demurrer will be overruled.

FARMERS' LOAN & TRUST CO. v. MAYOR, ETC., OF MERIDIAN et al.

(Circuit Court, S. D. Mississippi, E. D. April 28, 1905.)

No. 38.

WATERS—PUBLIC SUPPLY—GRANT OF FRANCHISE TO WATER COMPANY—CONSTRUCTION OF CONTRACT.

A city ordinance granting a franchise to construct and maintain waterworks therein expressly stated that when accepted it should constitute a contract, and should be the measure of the rights and liabilities of the parties. It obligated the grantee to construct waterworks according to plans furnished by the city, and to maintain the same for the period of 25 years with a capacity sufficient to supply all the needs of the city and its inhabitants. It bound the city to take and pay for water during the full term, but gave it the right at its election to purchase the works at either of certain stated times on specified terms and conditions. *Held*, that such ordinance, when accepted and acted on by the grantee by the construction of the works to the acceptance of the city, constituted a contract which precluded the city from constructing competing works while such contract was in force.

In Equity. On demurrer to bill and motion to dissolve injunction.

Brown & Spurlock, for complainant.

Miller & Baskin, S. A. Witherspoon, and Ethridge & McBeath, for defendants.

NILES, District Judge. This was a bill in equity, filed by the trustee holding title to the property and franchises of the Meridian Waterworks Company, to enjoin the mayor and aldermen of the city of Meridian from erecting a competing system of waterworks during the term of the contract under which the plant now in operation was constructed. The demurrer to the original bill was overruled, and answer has been filed. Under leave granted to the complainant, it filed a supplemental bill amplifying its allegations of title to the waterworks and franchises. The case is now submitted on motion to dissolve the injunction and on demurrer to the supplemental bill. It will be sufficient for present purposes to determine these two leading questions: Did the defendant city agree not to construct waterworks to supply itself and inhabitants with water during the continuance of the contract set forth in the bill? Is the decree of the state court annulling this contract binding on the complainant without its being made a party to the suit in which the decree was rendered? All of the questions submitted may be reduced to these two.

The question as to when a city may be enjoined from constructing and operating waterworks to supply water for its public uses and the consumption of its citizens has been the subject of consideration in several recent cases decided by the Supreme Court of the United States, and the controlling principles appear to be clearly established as the result of these cases. One rule is that, where the proposed action of the city violates no contract existing between it and the complaining company, the injunction will not be granted;

and that a contract not to compete will not be implied from the mere grant of a franchise or license to build. This was the holding in *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 20 Sup. Ct. 40, 44 L. Ed. 92, and *Id.*, 186 U. S. 212, 22 Sup. Ct. 820, 46 L. Ed. 1132. In that case the water company received its right to construct its system and to use the streets of Mobile for that purpose directly from the Legislature of the state. After its erection it did make a contract with the city to supply water for its public uses. This contract was about to expire at the time the suit was brought, and it was not the contract which the bill sought to protect. The bill was therefore dismissed. The water company then filed an amended bill, claiming that its charter derived from the state constituted a contract that was violated by the subsequent act of the Legislature empowering the city to build a plant of its own. But the Supreme Court on the last appeal held that this act was constitutional, and did not violate any valid provision of the water company's charter. There being no contract, the proposed action of the city was not a violation of the complainant's rights. Such was also the effect of the decision in *Skaneateles Water Co. v. Skaneateles*, 184 U. S. 354, 22 Sup. Ct. 400, 46 L. Ed. 585. There the water company, under a statute of the state, applied to the village for authority to become a corporation, with the right to construct and maintain waterworks for furnishing water to the village and its inhabitants. The certificate issued by the village in this application became the charter of the company. All that the company secured from the village was the right to be a corporation, and to use the streets for its waterworks, a right which it was conceded any other company might acquire in the same way. After the works were completed, the village contracted for its supply of water for a period of five years, being prohibited by the laws of the state from contracting for a longer period. This contract had expired before the bill was filed. The injunction was denied on the holding "that, when the contract for five years had expired, there was nothing in the state Legislature upon which to base an implied contract."

In *Joplin v. Light Company*, 191 U. S. 150, 24 Sup. Ct. 43, 48 L. Ed. 127, there was no contract existing between the complainant and the city. Under a statute authorizing the city to erect and operate lightworks to light the streets and supply the inhabitants with lights for their own use, or to grant the right to any other person on such terms as it chose to prescribe by ordinance, the city granted a franchise to the complainant company. It was not claimed that the license was in itself a contract, or that it was not such a grant as might not be made to other light companies. It was only claimed that the city, by granting this franchise, had impliedly agreed not to construct works of its own during the term of the license.

Neither of the cases was founded on an actual contract, but each of them depended on the right of implying a contract from the mere grant of a franchise or license to construct and maintain. The

answer to this claim, as stated in the Skaneateles Case, and repeated in the Joplin Case, was as follows:

"There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with the water, to be left to implication. We think none such arises from the facts detailed."

The latest case that I have been able to find in this line of authorities is *Helena Water Works Co. v. Helena*, 195 U. S. 383, 25 Sup. Ct. 40, 49 L. Ed. 245. In this case it appeared that the city had granted to the water company (section 1 of ordinance) for a term of 20 years the license and franchise of laying and maintaining water mains through the streets for the purpose of selling water to all persons or companies "desiring to purchase the same." By another provision (section 6) the grantee was obligated "to furnish and provide a full, ample, and sufficient supply of good, pure, wholesome, and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fires, sewerage (maintenance and construction), and for other purposes; and such supply shall be full, ample, and sufficient for the present population of said city, as the same may be from time to time during the full term of five years." Section 21 made appropriations for the payments of hydrant rentals and other public uses during the five years. It was held that section 1 was not a contract, but the grant of a license to lay pipes to sell water to whoever might desire to purchase, and that the only contract was contained in section 6. The language of the court on this point was as follows:

"Properly construed, we think this ordinance shows an agreement upon the part of the company to furnish water to the inhabitants of the city at not exceeding certain maximum rates, and to the city itself upon terms to be agreed upon, made definite, as far as the city was concerned, for the term of five years. As thus interpreted, we do not find anything in this contract that prevents the city, certainly after the expiration of five years, from constructing its own plant. It has not specifically bound itself not so to do, and, as has been frequently held in this court, nothing is to be taken against the public by implication."

This case was heard by the Supreme Court on appeal from the Circuit Court of Appeals of the Ninth Circuit, and the judgment of the latter court was affirmed. That court had said of section 6 of the ordinance:

"This section might properly be construed as a contract with the water company that the water company should have the exclusive right of supplying the city and its inhabitants with water during the first five years of its franchise. It might also be construed as an implied agreement that the city would not establish a plant of its own for the purpose of supplying water to its inhabitants or for its own purposes during that period. But this period of five years has long since expired, and the section now only serves to indicate that for the remaining fifteen years of the franchise there was no exclusive franchise granted to the water company, and no implied agreement that during this last period it would not engage in the business of supplying water to the inhabitants of the city, or for its own municipal purposes." *City of Helena v. Helena Water Works Co.*, 122 Fed. 13, 58 C. C. A. 381.

From these authorities it would seem that a city may bind itself not to compete with one to whom it has granted a license or franchise only by express stipulation that it will not build and maintain a plant during the term of the license. The exclusive nature of such a grant will not be implied.

In the simple grant of an ordinary franchise a city does not act in the exercise of its contractual, but of its legislative, powers, which cannot be limited by implication. Its freedom of action in this respect is only subject to legislative control. If the law has imposed no restrictions, the courts will not imply them. But this principle is equally as well established: That, where a city has entered into a contract, it will be enjoined from impairing by legislative authority either the express or implied conditions of the contract. This rule is recognized in all the cases cited, and is expressly declared in those now to be considered.

In *Walla Walla City v. Walla Walla Water Company*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, the case was this: The city, under legislative authority, had by contract granted to the water company the right to lay its pipes in the streets for 25 years, reserving the right to maintain five hydrants and flush sewers during the term free of charge. The city stipulated that during the existence of the contract it would not erect, maintain, or become interested in any other works. It was held that during the life of that contract the city could not build and operate works of its own. Objection was made that that provision of the contract wherein the city agreed not to build a plant to supply itself and citizens with water was void; but the provision was thus construed:

"Taking sections 7 and 8 together, they amount simply to this: that, if the city should desire to establish waterworks of its own, it should do so by condemning the property of the company, and making such changes in its plant, or such additions thereto, as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith. An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any person or association of persons for a time not exceeding twenty-five years. In establishing a system of waterworks the company would necessarily incur a large expense in the construction of the power house and the laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered into this large undertaking in view of the possibility that, in one of the sudden changes of public opinion, to which all of the municipalities are more or less subject, the city might resolve to enter the field itself—a field in which it would have become master—and practically extinguish the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intentment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking."

In *Vicksburg Water Works Co. v. Vicksburg*, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808, there was an express contract between

the city and the water company in force at the time the suit was brought; and, while it in terms contracted to grant exclusive rights, the jurisdiction of the court was not sustained on this ground, as will appear from the following language of the Supreme Court (pages 80, 81, 185 U. S., page 591, 22 Sup. Ct. 591, 46 L. Ed. 808):

"It cannot be seriously contended that under the act of March 18, 1886, authorizing the city to provide for erection and maintenance of a system of waterworks, and to contract with a party or parties to build and operate waterworks, and under the ordinance of the city November 18, 1896, providing for a supply of water to the city and its inhabitants by contracting with Samuel R. Bullock & Company, their associates, successors, and assigns, and the acceptance of said ordinance by Samuel R. Bullock & Company, no contract was entered into. The subject-matter of the contract was within the powers of the city to make. The terms were explicitly set forth in the ordinance; the works erected were approved by the city; and the respective obligations created by the contract were duly complied with, without question or complaint, for a period of fourteen years."

Coming now to the contract involved in the suit at bar, it will be noticed that by an amendment to the charter of the defendant city approved March 16, 1886, its mayor and board of aldermen and councilmen were given legislative authority "to make a contract with any person or company for the supply of a sufficient amount of pure and wholesome water to the people of said city," and to "bind said city by contract to pay an agreed sum every year to such company or person for a supply of such water." But before entering into such contract the act provided that the mayor and board should employ an engineer, skilled in the planning and construction of waterworks, as might be needed, and the cost thereof; his report to be made under oath, and filed in the office of the mayor, subject to the inspection of all persons, for 10 days prior to the making of any contract. The contract was to be drawn so as to secure the city in the performance thereof, and this performance was to be further assured by provisions for such penalties and forfeitures as might be deemed expedient, as well as the requirement of ample security to be given by the person undertaking to build the works.

This act not only contemplated that the city should enter into a contract to secure the building of waterworks, but required that said works should be built according to the city's own plans. These provisions of the enabling act bring this case within the principle declared in *Vicksburg Water Works Company v. Vicksburg*, before referred to. The plans required by the charter of defendant city were made by an engineer selected by it, and the contract in suit was then executed in the form of an ordinance passed by the city and accepted by W. S. Kuhn, whose bid, among others proposed, was adopted by the city authorities. This contract was subsequently assigned to the Meridian Water Works Company, and was by it conveyed, together with all its other property, to the Farmers' Loan & Trust Company, the complainant herein, to secure a loan of the funds necessary to build the works. The substance of this contract, so far as necessary to be stated, was as follows: There was granted to W. S. Kuhn, his associates and assigns, sub-

ject to the right of the city to purchase, and to certain conditions of forfeiture stated, the use of the streets, alleys, and other public grounds of the city to construct, own, and maintain waterworks for a period of 25 years, unless such right should be sooner terminated by purchase or forfeiture, as therein provided. The original pumping capacity and pipe lines was stated in the contract, which also empowered the city to order such future extensions as it desired. The system was to be at all times sufficient to supply all the demands of the city and its people. If there was a failure in this respect at any time during the life of the contract, and the grantee and his assigns should not make due and reasonable efforts to replenish and increase the same, the contract should be revoked. In section 6 the grantee was made to "agree to use and constantly operate the said works during the full term and continuance of this franchise and license." And the city itself undertook (sections 13-21) by its ordinances to protect the grantee in the enjoyment of its franchise against the waste of water by consumers, the pollution of its water supply, "and also to carry into effect the provisions of this ordinance and the contract thereunder entered into," and to repeal all ordinances conflicting with the one then adopted. Sections 15 and 19 are as follows:

"Sec. 15. In consideration of the benefits which will be derived by the said city and its inhabitants, from the construction and operation of the said waterworks, and in further consideration of the water supply hereby secured for public use and as an inducement for the said grantee, his associates, successors or assigns to enter upon the construction of the said waterworks, the franchise and the license hereby granted to and invested in him shall remain in full force and effect for a term of twenty-five (25) years subject, however, to a prior termination by the rights of purchase made as in this ordinance provided; and for the same consideration, and as the same inducement, the city of Meridian rents of the said grantee, his associates, successors or assigns, for the uses hereinafter mentioned, the hydrants hereinbefore described, for and during the term of twenty-five (25) years from the completion of said works, unless said term shall be sooner terminated as provided herein."

"Sec. 19. This ordinance is passed under the express condition and reservation that the city of Meridian reserves to itself the right to acquire of the said grantee, his associates, successors or assigns, the said waterworks and all the land and machinery, pipes, mains, hydrants, property, privilege rights, leases and appurtenances thereto belonging; and the said grantee, his associates, successors, or assigns, in accepting this ordinance, expressly covenant and agree, that they will sell to the city of Meridian, the said waterworks and all the land and machinery, pipes, mains, hydrants, property privileges, rights and leases and appurtenances, thereto belonging, at the expiration of ten (10) years, and at any interval of five years thereafter at an appraised value of said works to be determined as follows."

It was expressly stipulated that the ordinance, when accepted, should be "a contract between the city and said grantee, and should be the measure of rights and liabilities of the city and said grantee, his associates, successors and assigns."

In 2 Parsons on Contracts (8th Ed.) 515, we find the following:

"The law, as we have already had occasion to say in reference to various topics, frequently supplies by its implications the want of express agreements between the parties. But it never overcomes by its implications the express provisions of parties. If these are illegal, the law avoids them. If they are legal, it yields to them, and does not put in their stead what it would have

put by implication if the parties had been silent. The general ground of a legal implication is that the parties to the contract would have expressed that which the law implies, had they thought of it, or had they not supposed it was unnecessary to speak of it because the law provided for it. But where the parties do themselves make express provision, the reason of the implication fails."

It is not necessary in this case to imply a contract binding upon the city or obligating it not to construct competing works. It is only necessary to enforce plain, expressed provisions of this contract, and the necessary legal implications therefrom. The grantee in the contract in question being expressly obligated to construct waterworks according to plans furnished by the defendant city, and to maintain the same for a period of 25 years, so as to supply all the needs of the city and its inhabitants, the implications cannot be escaped that the city thus onerated itself with the corresponding obligation to do no act on its part that would prevent the performance of that duty which it had imposed upon the other part. If the city has the right now by competition to destroy the waterworks built under this contract, it would have had the same right the day after the same were completed. Such action then would have been so contrary to simple justice and the contractual rights of the parties that no such action would have been contemplated for a moment. It is now established as a matter of law that the construction of a municipal system of waterworks destroys the value of any private plant then in operation. *Walla Walla City v. Walla Walla Water Co.*, *supra*:

It is strongly insisted in behalf of defendant that this case is controlled by the decision of the Supreme Court in the case of the *City of Dawson v. Columbia Avenue Saving Fund, etc., Co.* (not yet officially reported) 25 Sup. Ct. 420, 49 L. Ed. 713. But the Supreme Court of the United States refused to take jurisdiction of that case as one arising under the Constitution of the United States, for the reason that the action of the city which it was sought to enjoin was not authorized, but, as alleged, opposed to the laws of the state. In the case at bar it is alleged in the bill and admitted in the answer that the city was proposing to build waterworks under an act of the Legislature directly conferring authority upon it to do so. Concerning the question as to whether the decree of the state court annulling the contract is conclusive against the complainant in this suit, it is only necessary to state the following facts: Under the laws of Mississippi the Meridian Water Works Company was authorized to pledge its property and franchises incident thereto to secure loans. The contract already discussed shows upon its face that the parties thereto contemplated that it would be necessary for the grantees to borrow money to construct the works provided for. On November 1, 1886, the Meridian Waterworks Company did execute a mortgage wherein it conveyed to the complainant in this suit its property and franchises to secure a loan of \$150,000, evidenced by negotiable bonds, for the purpose of constructing the plant originally. In November, 1892, it executed another mortgage conveying the same property to the same trustee, to secure an ad-

ditional loan of \$100,000 to pay for extensions required by defendant city. On November 1, 1899, it executed another mortgage for the purpose of securing an additional loan of \$100,000 and continuing previous loans as a first mortgage upon the property. For reasons more fully stated in the case of the Farmers' Loan & Trust Company v. The Meridian Water Works Co. et al. (No. 42 in this court) 139 Fed. 661, the last mortgage was no more than a continuance of the first, and did not destroy the effect of the fact that at the time the decree in the state court was rendered the title to the property of the waterworks company and the contract in suit was in the complainant for the benefit of the bondholders who had furnished the money for the purpose of building and extending this system of waterworks. On the authority of the Louisville Trust Company v. Cincinnati, 76 Fed. 296, 22 C. C. A. 234, and Columbia Ave. Savings Fund, etc., Co. v. City of Dawson (C. C.) 130 Fed. 152, it must be held that the complainant, who was not a party to the proceedings in the state court, is not bound by the decree therein entered.

I am therefore of the opinion that the demurrer to the supplemental bill is not well taken, and an order will be entered overruling the same. I am further of the opinion that the motion to dissolve the injunction heretofore granted is not well founded, and is disallowed.

WALTER BAKER & CO., Limited, v. PURITAN PURE FOOD CO.

(Circuit Court, S. D. New York. July 3, 1905.)

No. 8,588.

1. TRADE-MARKS—INFRINGEMENT—IMITATION OF LABELS.

Equity will afford relief against the infringement of a trade-mark consisting in part of a picture or figure, although the alleged infringing picture is not a close imitation, but is merely of the same generic character, where the resemblance is such as is calculated to mislead ordinary purchasers into buying the product of defendant for that of complainant.

2. SAME—LABELS FOR CHOCOLATE AND COCOA—SIMULATION OF PICTURE.

Complainant and its predecessors for 30 years or more have used as a trade-mark for their preparations of chocolate and cocoa, both in advertisements and in their labels, a full length picture of a woman or girl in the dress of a waitress, copied from a painting, in connection with their name and location as manufacturers. During such time complainant's products have become widely known, and are called for by a considerable class of customers, notably children and others unable to read, as the kind with the woman or girl on the label. *Held*, that the later adoption and use by defendants of labels on the same kind of products, the principal feature of which is the full-length picture of a woman or girl, having a general similarity in appearance, although differing in dress and position, from that of complainant, and in connection with its own name as manufacturer, constituted an infringement, which entitled complainant to an injunction; the similarity being such as is calculated, and as indicates an intention, to deceive purchasers.

In Equity. Suit for infringement of trade-mark.

Archibald Cox and William L. Putnam, for complainant.

Robinson, Biddle & Ward (Artemas Ward, Jr., and Henry Galbraith Ward, of counsel), for defendant.

HAZEL, District Judge. This action was brought to enjoin the defendant corporation from infringing complainant's trade-mark or brand, which was registered on October 16, 1883, and for an accounting. The trade-mark consists of a representation of Liotard's painting "La Belle Chocolatiere," which is a full-length figure of a woman or girl, dressed as a waitress, wearing a cap and apron, and carrying a tray bearing cups of chocolate, and of the letters and words, "Walter Baker & Co's. Chocolate, Broma and Cocoa Preparations, Dorchester, Mass." The symbol or trade-mark was originally adopted by complainant for its product—chocolate and cocoa—and was also first used by complainant or its predecessor upon all labels, packages, cartons, or boxes in which the merchandise is sold. The answer denies infringement, and particularly asserts that the wrappers and pictures upon defendant's packages differ from those of complainant, and are not calculated or intended to deceive the public.

Discussion was had at the bar as to whether the complainant relied upon its registered trade-mark or a technical common-law right. This contention may be decided conveniently at the outset, for the proofs abundantly establish the existence of a common-law right in complainant to its indicated trade-mark or brand. Jurisdiction is conferred upon this court by reason of diversity of citizenship, and not because of the registration of the trade-mark, the effect of which was to "afford and perpetuate the complainant's title" to a vested property right. Trade-Mark Cases, 100 U. S. 92, 25 L. Ed. 550; Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60; Godillot v. American Grocery Co. (C. C.) 71 Fed. 873. The defendant's principal contention is that the indicated appropriation of the trade-mark by complainant did not confer the exclusive right to its use, unless associated with a distinctive dress or design. The argument proceeds upon the theory that the full-length figure or representation of a woman or girl printed upon labels or wrappers is generic in character, and accordingly no monopoly rights therefor are conferred by law. This proposition is not strictly maintainable. It has many times been held that equity affords relief in this class of cases upon the ground that no one is permitted to offer his merchandise for sale with a view of palming it off to purchasers as that of another. McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828. Whether there is such a degree of resemblance between complainant's and defendant's trade-marks that ordinary purchasers are likely to be deceived must be determined by the facts. Upon this branch of the case the authorities uniformly hold that no one can appropriate a trade-mark similar to that used by a rival dealer if the resemblance is such as to mislead the ordinary purchaser into the belief that his goods are those of his rival. Coats v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; Fuller v. Huff, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332, and cases cited. The registered trade-mark or brand used by defendant and its predecessor since October, 1889, in advertising and selling its chocolate and cocoa, consists

of a picture of a full-length figure of a girl dressed in a Puritan costume against a white background, with a rock to the left. The defendant's product is put on the market as "Puritan Pure Foods," which words, together with the name of defendant, appear upon the labels, wrappers, and boxes in which it is sold. The label or wrapper on the front of defendant's cans or boxes of cocoa contains a colored representation of the defendant's trade-mark. Complainant contends that the picture displayed by the defendant upon its standard cans and packages, in connection with its commodity, though of different color and differentiating accessories, is nevertheless a counterfeit of its previously adopted trade-mark. Evidence has been introduced to show that complainant has constantly used its trade-mark or emblem since about 1875, and at enormous expense has thus advertised its product in the leading newspapers and periodicals published throughout the United States and Canada. As a natural result thereof, complainant's appropriation not only attracted the attention of the public generally, but was the means of identification of its chocolates and cocoa by the consumer. That such chocolate and cocoa is frequently purchased and designated by the buyer as "the cocoa with the picture of the woman or girl," or "the chocolate with the picture of the lady," is abundantly established by the evidence. Hence it cannot be successfully controverted that complainant's chocolate and cocoa, irrespective of the words "Walter Baker & Co." printed upon the labels, became and were distinctively known and identified by its trade-mark. The full enjoyment of such reputation and means of identification by complainant is unmistakably entitled to protection. The fact that its product is also known or identified by the name of "Baker," or "Walter Baker's Chocolate or Cocoa," is not material. The purchaser is entitled to receive the commodity which he desires and intends to buy, although other persons may know it by different marks of identification or accessories. When a trade-mark or brand, standing alone, is relied upon as the distinguishing feature, the origin and ownership of the article must be indicated. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997. And when this is shown a rival trader employing a spurious and imitative device is not permitted to escape the charge of infringement. The question is whether the resemblance between the genuine and counterfeit trade-marks is such as to mislead the ordinary purchaser buying with reasonable care. The rule is succinctly stated in *Bass, etc., Co. v. Feigenspan* (C. C.) 96 Fed. 206, as follows:

"The lawful appropriator and employer of a trade-mark has an exclusive right of use, and is entitled to be effectually secured in the full enjoyment of that right. If other persons are to be permitted to violate that exclusive right on the plea that the counterfeit symbol, as applied in a given case, has such accessories as to render deception of purchasers improbable, or even impossible, an element of uncertainty and confusion will be introduced, which cannot fail to encourage fraud and promote litigation. A sound public policy requires that the spurious trade-mark be suppressed, whether it is or is not for the time being accompanied by such accessories, not constituting part of it, as to avoid deception or render it unlikely."

Gannert v. Rupert, 127 Fed. 962, 62 C. C. A. 594.

The Supreme Court of the United States, in *Gorham Co. v. White*, 14 Wall. 511, 20 L. Ed. 731, in speaking of the similarity of design, said:

"It must be the sameness of appearance, and mere difference of lines in the drawing or sketch, a greater or smaller number of lines, or slight variances of configuration, if sufficient to change the effect upon the eye, will not destroy the substantial identity."

The origination of a trade-mark, or rather the conception thereof, as it is variously expressed, would seem to be entitled to protection. Neither the name, "Walter Baker Co.," and the words, "La Belle Chocolatiere," upon the labels and wrappers, appealed as strongly to the mind of the consumer as did the picture. The facts show that it was through the picture of the full-length figure of the woman or girl that the vendable goods of complainant became popularly known to many persons, especially to children and others who are unable to read and write. This would seem to be the test. *Pillsbury v. Pillsbury-Washburn Flour Mills Co.*, 64 Fed. 846, 12 C. C. A. 432; *Thos. Hubbuck & Son, Ltd., v. Brown*, 17 R. P. C. 645. The case of *Bickmore Gall Cure Co. v. Karns Mfg. Co.* (C. C.) 126 Fed. 574, cited by defendant, is clearly distinguishable. In that case complainant's trade-mark, consisting of a picture of a single horse on packages and labels, was properly held not infringed by a picture of four horses facing in an opposite direction, and harnessed together as a four-horse team. A strikingly similar case is that of *Read v. Richardson*, 45 L. T. (N. S.) 54. There it was held that complainant is entitled to the protected use of a trade-mark consisting of a dog's head, as applied to "Dog's Head Beer." The adoption by a rival trader of the head of another breed of dog for his trade-mark for bottled beer was restrained on the ground that complainant's goods had become distinctively known by the mark or device, and therefore could not be used by a rival dealer. See, also, *Price's Patent Candle Co. v. Jeyes, etc., Co.*, 19 R. P. C. 17.

For the foregoing reasons, despite the differences in colors and direction in which the figures face, I have reached the conclusion that defendant's trade-mark adapted and used by it is in similitude of that of complainant; that confusion is likely to arise, and the goods of defendant be purchased in the belief that they are those of complainant. The defendant was familiar with complainant's chocolates and cocoa, and had knowledge of the extensive advertising of its commodity. Hence there is little doubt that the draftsman of the defendant's trade-mark contemplated a resemblance to complainant's device, rather than an active effort to differentiate. In the circumstances I deem the infringement of complainant's trade-mark sufficiently established, and proof of actual deception or fraud is unnecessary. *Gannert v. Rupert*, *supra*; *Collinsplatt v. Finlayson* (C. C.) 88 Fed. 693; *Von Mumm v. Frash* (C. C.) 56 Fed. 830; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526.

Complainant is entitled to the relief demanded in the bill, with costs.

INGRAHAM v. NATIONAL SALT CO.

(Circuit Court, E. D. New York. May 17, 1905.)

FEDERAL AND STATE COURTS—CONFLICT OF JURISDICTION—PRIOR ATTACHMENT BY FEDERAL COURT.

Plaintiff in an action in a federal court against defendant, a corporation, procured the issuance of an attachment, which was levied on real estate of the defendant. Pending the action, insolvency proceedings against defendant were instituted in a state court, which, through receivers, took possession of all of defendant's property, including that attached, and sold the same; the execution of a conveyance, however, having been deferred, for the convenience of the purchaser, until final settlement of the insolvent estate. Subsequently plaintiff recovered judgment in the federal court, and an execution was issued, under which the marshal advertised the attached property for sale. Thereupon the state court enjoined such sale in a suit instituted by its receivers against plaintiff and the marshal, in which the validity of the attachment was attacked. *Held*, that while, under the principle of certain decisions of the Supreme Court of the United States, the authority of the state court to deprive the federal court of control of its own process and to draw to itself the determination of the validity of the attachment lien was doubtful, where its own jurisdiction over the property was acquired after the lien attached, yet in view of other federal decisions holding that the levy of an attachment on real estate does not give the court issuing the attachment either actual or constructive possession of the land, nor prevent its subsequent seizure by a court of another jurisdiction, the federal court would not enjoin the receivers from further prosecuting their suit, but would await the final determination thereof by the state tribunals.

[Ed. Note.—Conflict of jurisdiction between state and federal courts, see note to *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 356.]

On Motion for Injunction.

George S. Ingraham, in pro. per.

Putney, Twombly & Putney, for receiver.

THOMAS, District Judge. The plaintiff, on July 16, 1901, commenced this action to recover money alleged to be due by virtue of certain instruments issued by the defendant, and on August 9, 1904, obtained a judgment against the defendant for \$14,821.15. On November 6, 1901, a warrant of attachment herein was issued, a notice of which was in November, and, as amended, in December, 1901, filed in the office of the clerk of the United States District Court for the Western District of New York, located at the city of Buffalo, in the county of Erie. After the recovery of judgment an execution was issued out of this court on February 6, 1905, to the United States marshal for the Western District of New York, who, pursuant thereto, advertised for sale, on April 4, 1905, certain real property owned by the defendant at the time of filing such attachment, and situated in the county of Wyoming. But it appears that on September 29, 1902, in a suit in the Court of Chancery of the state of New Jersey, a decree was entered against the defendant herein, adjudging it insolvent, and appointing certain persons receivers to wind up its affairs and distribute its property to the persons proven entitled thereto; and on October 1, 1902, in a similar action, the Supreme Court of the state of New York appointed the

same persons ancillary receivers for the purpose of aiding the courts of New Jersey in marshaling and distributing the property of the defendant. Thereafter the receivers, enabled so to do in such actions, on May 25, 1904, sold the property of the defendant, including the real property alleged to be under the levy of the attachment in this action, surrendered possession to the purchaser, and retained title pending the payment of the purchase price pursuant to an order of the state court, which sale was confirmed July 27, 1904. The receivers undertook to sell the property free from all incumbrance, pursuant to the decree of the state court that "the proceeds of the sale thereof to stand in the place and stead of the property, and the lien of such incumbrance to attach to such proceeds." The purchaser of the property paid in cash \$19,386.75, and on July 29, 1904, obtained an order in the state court, whereby the receivers were directed to allow the purchaser, as part payment on account of the purchase price of the property so purchased by him, the balance (\$184,278.12) of the dividend on indebtedness of the defendant to him in the sum of \$283,504.60, and all further dividends to be declared on his said claim, and it appears that the transfer of title is awaiting the declaration of a final dividend. On April 3, 1905, the Supreme Court of the state of New York denied a motion made in the suit in that court to enjoin the marshal from selling the property under the execution issued out of this court in this action, and the ground of the decision was that "neither of the parties sought to be restrained is a party" to the suit in the state court. Thereafter the receivers filed a bill in the Supreme Court of New York against the marshal and the plaintiff herein, to enjoin sale by the marshal, and thereupon such court, upon motion, stayed the sale. The plaintiff herein made the present motion in this action at law, in which the National Salt Company is the sole defendant, to enjoin the receivers from taking or continuing proceedings to enjoin the sale of the property by the marshal.

It will be observed that the plaintiff's execution lien is wholly dependent for priority upon the validity of the lien of the attachment; that such attachment lien, if valid, is prior in time to the suits in the state courts; that the receivers have long since sold the property, and parted with possession thereof, and are merely delaying the delivery of the formal deed to convenience the purchaser in paying the purchase price, and not for the interests or purposes of the suits in the state courts, and that such convenience, unless interrupted, will continue until the liquidation of the complicated and extensive affairs of the National Salt Company shall have been effected. Meantime, awaiting such convenience of the purchaser, the power of this court to enforce its judgment by execution based upon a prior attachment lien is suspended. But counsel appearing herein for the receivers, not parties to this action, urge (1) that the attachment lien is invalid, because notice of the attachment was not filed in the office of the clerk of Wyoming county, where the property is situated, but in the clerk's office of the Circuit Court of the United States for the Western District of New York, which is the district of the Second Circuit wherein the county of Wyoming is;

(2) that, even if the lien of the attachment be valid, it cannot be enforced against the property, but the receivers, in behalf of the state court, having first taken the land into possession, are by aid of that court empowered to sever the lien from the property, adjudge its validity, and, if found valid, transfer it to the proceeds of the sale of the property, and direct its payment therefrom, if such proceeds be sufficient, and that the federal court's control of its own process is lost.

The first question is whether the levying of the attachment upon the land is such seizure by this court as to give it priority over the state court, through its receivers thereafter appointed. The attachment, when levied, laid a lien upon the land, the further enforcement of which was conditioned upon the attaching creditor obtaining a judgment for damages whereon an execution could be issued to the marshal. The marshal did not take the land into his actual possession, for only a purchaser after sale on the execution could gain such possession, after the time of redemption had expired, and in default of such redemption. In this respect the levying of an attachment on land differs from an attachment of personal property, of which the attaching officer takes such possession that the property is actually or constructively in the possession of the court. In *Re Hall & Stilson Co.* (C. C.) 73 Fed. 527, it was held that the levy of an attachment upon real estate gives to the court from which the process issues neither actual nor constructive possession of the property, but only creates a lien thereon in favor of the attachment creditor; and that where real property, under attachment upon process from a state court, is taken into the possession of a receiver of a federal court, leave should not be granted by the latter court to sell such property under execution in the attachment suit, if the property is not ample to meet all claims upon it, or if the condition of the title is such that the property would be likely to be sacrificed if sold before the title is cleared up by a decree. The consequence of the holding, as applied to the case at bar, is that a state court may, in a suit later begun, appoint receivers of the land previously attached in an action in the federal court, draw to itself the power to stay the enforcement of prior processes of the federal court, and decree their validity or invalidity, or postpone the satisfaction of decrees by virtue of such attachment to await the disposition of the property for the purposes for which it was seized by the state court. Hence all levies on land by attachment or execution become subjected to the after-acquired jurisdiction of another tribunal. The federal court in the action at bar appointed and appropriated the land to the payment of such judgment for money damages as it should direct to be entered. The state court has intervened, and stayed such payment until it shall have determined the validity of the attachment and the levy thereunder, whereupon, according to the receivers' contention, it may distribute the property of the judgment debtor to whomsoever it finds entitled to the same. If the state court has this power, the federal court is deprived not only of the control of its processes, but also of power to determine whether they are valid and may be enforced. Thus the

court of one sovereignty is compelled to yield its powers to the commands of a foreign tribunal, taking later cognizance of the property that has been subjected to the exercise of the powers of this court.

The Supreme Court of the United States, in *Freeman v. Howe*, 65 U. S. (24 How.) 450, 458, 16 L. Ed. 749, referred to the opinion expressed by Chancellor Kent in his *Commentaries* (volume 1, p. 410), which is as follows:

"If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the federal courts. But if there be no jurisdiction in the instance in which it is asserted—as if a marshal of the United States, under an execution in favor of the United States against A., should seize the person or property of B.—then the state courts have jurisdiction to protect the person and the property so illegally invaded."

And said:

"The error into which the learned chancellor fell, from not being practically familiar with the jurisdiction of the federal courts, arose from not appreciating, for the moment, the effect of transferring from the jurisdiction of the federal court to that of the state the decision of the question in the example given; for it is quite clear, upon the principle stated, the jurisdiction of the former, and the validity and effect of its process, would not be what the federal, but state, court might determine. No doubt, if the federal court had no jurisdiction of the case, the process would be invalid, and the seizure of the property illegal, for which the aggrieved party is entitled to his remedy. But the question is, which tribunal, the federal or state, possesses the power to determine the question of jurisdiction or validity of the process? The effect of the principle stated by the chancellor, if admitted, would be most deep and extensive in its operation upon the jurisdiction of the federal court, as a moment's consideration will show. It would draw after it into the state courts not only all questions of the liability of property seized upon mesne and final process issued under the authority of the federal courts, including the admiralty, for this court can be no exception, for the purposes for which it was seized, but also the arrests upon mesne, and imprisonment upon final, process of the person in both civil and criminal cases, for in every case the question of jurisdiction could be made; and until the power was assumed by the state court, and the question of jurisdiction of the federal court was heard and determined by it, it could not be known whether in the given case it existed or not. We need scarcely remark that no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another."

The instance suggested by Chancellor Kent, and adverted to by the court in the language stated, referred to a direct intervention of a state court to pass upon the validity of the seizure of property under process of the federal court, but does not necessarily involve the question whether the attachment of land is such seizure as precludes another court from taking later possession of such property and administering it for its own purposes. It will be observed that in the opinion there is no disclaimer of the rule laid down in *Wiswall, Plaintiff in Error, v. Sampson*, 55 U. S. (14 How.) 52, 14 L. Ed. 322. There *Sampson* in an action in ejectment claimed the right to the possession of land by virtue of judgments entered in 1840, levies by execution thereon in February and April, 1845, sale on July 7, 1845, on such execution, and deed executed August 13, 1845, to the purchaser. The defendant claimed under a deed given on the sale of the land in 1847, by a receiver, who had been in pos-

session since June 27, 1845, by virtue of a decree in chancery rendered in April, 1845, on a bill filed by Wiswall in 1843 against Ticknor, the judgment debtor in all the judgments, and one Day, to set aside a conveyance from Ticknor to Day by deed dated April 28, 1840, as fraudulent against a judgment recovered by Wiswall against Ticknor June 14, 1842. It will be observed that the judgments of 1840, upon which Sampson claimed, were prior to the filing of the bill in chancery in 1843; that the levy in February and April, 1845, was subsequent to the filing of the bill, but prior to the appointment of the receiver in June, 1845. In the ejectment action the Supreme Court held that Sampson obtained no title, as at the time of the levy and sale under which he claimed the land was in the custody of the Court of Chancery, of which the judgment creditor had notice, and that the proper proceeding was for the judgment creditor to apply to the Court of Chancery for the protection of his interests. This case differs from that at bar in this: that in *Wiswall v. Sampson* there was only a prior judgment lien on the land, attaching at the time of its entry; in the present case there is a judgment lien, enforceable by execution against the land by virtue of the prior attachment, assuming that the same was levied regularly. Nevertheless, if the levy of the attachment only creates a lien, and does not give the court control of the subject of the levy, the present case falls under the holding in *Wiswall v. Sampson*, and such is the decision in *Re Hall & Stilson Co.*, *supra*.

The question is whether, if in *Wiswall v. Sampson* it had appeared that the levy of the judgment had been prior to the filing of the bill under which the receiver was appointed, the court would have still held that such levy was interrupted by the filing of the bill and the appointment of the receiver. If such would have been the decision, then the holding clearly would be that, after land has been levied upon by process issued out of the federal court, the state court may seize and administer the land in equity, and that the attaching creditor may proceed no further. As already said, such a holding enables the foreign tribunal, by its later action, to enjoin the enforcement of the processes of this court earlier in date of issue and levy, and require federal suitors, who have obtained such prior rights, to submit their validity and right of enforcement to another independent court. In the *Wiswall Case* the decision seems to regard chiefly the fact that a receiver was appointed before the sale. The opinion states:

"At the time, therefore, of this sale, the receiver was in the possession of the premises under the decree of the Court of Chancery: in other words, the possession and custody of them were in the Court of Chancery itself (as the court is deemed the landlord) to abide the final decree to be thereafter rendered in the suit pending. * * * When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it without the leave of the court first obtained will be a contempt on the part of the person making it."

But it is further said:

"The settled rule also appears to be that, where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the court pending the litigation by the appointment of a receiver or by sequestration, the title is bound from the filing of the bill."

Therefore the holding essentially was that the filing of the bill suspended the power of Wiswall to levy upon the property and sell the same, and that the subsequent appointment of the receiver related to the time when the bill was filed. The court did not decide that Wiswall would not have had power to sell had his levy preceded the filing of the bill.

In *Heidritter v. Elizabeth Oilcloth Co.*, 112 U. S. 294, 303, 5 Sup. Ct. 135, 139, 28 L. Ed. 729, the opinion referring to Wiswall v. Sampson, states:

"It is a significant fact in that case that at the time of the appointment of the receiver by the state court the executions upon the judgments had been issued and levied, and were a subsisting lien upon the premises."

But the opinion does not advert to the fact that the bill in which the receivers were appointed was filed before the executions upon the judgments were levied.

In *Re Hall & Stilson Co.*, *supra*, the levy of the attachment issued from the state court did precede the seizure of the property by the federal court, and yet it was held that the property could not be sold while the federal court retained such possession.

In *State of Georgia v. Jesup*, 106 U. S. 458, 1 Sup. Ct. 363, 27 L. Ed. 216, it appeared that the state of Georgia had levied execution for taxes upon certain real property of the Atlantic & Gulf Railroad Company, which property was afterwards taken in possession by a receiver appointed in a foreclosure suit in the United States court against said company, wherein Jesup, surviving trustee, was plaintiff. The state of Georgia petitioned the Circuit Court for leave to proceed with said executions, which petition was refused, and the Supreme Court, on appeal, affirmed the order entered on such petition, mainly on the ground that the state had not made itself a party to the suit, but had declined so to do; and it was said that the action of the court below "cannot be reviewed upon the appeal of the state, for the reason, if there were no other, that the order did not conclude the rights which she acquired by virtue of the executions or of the levies made thereunder." The value of the holding, as regards the present case, is that the levying of the execution for the taxes did not preclude a subsequent seizure of the property by the receiver in the suit in the federal court.

In *Walling v. Miller*, 108 N. Y. 173, 15 N. E. 65, 2 Am. St. Rep. 400, it appeared as follows: Miller and another, judgment creditors of one Vanderoef, on the 17th of April, 1883, commenced an action in the name of Miller against Vanderoef to reach the latter's interest in certain buildings, regarded for the purpose of the decision as personal property; and in such action, on May 14, 1883, a receiver was appointed. On September 11th, by order of the court, he sold the buildings. Thereafter the plaintiff brought action against Miller and Price, the receiver and purchaser of the buildings, claiming that he was the owner thereof, and charging the defendants with conversion. The plaintiff claimed title to the buildings by virtue of sale on June 1, 1883, on an execution levied May 12, 1883, issued on a judgment recovered May 7, 1883. Therefore the plaintiff's levy on May 12, 1883, was subsequent to Miller's action begun

April 17, 1883, but was prior to the appointment of the receiver, May 14, 1883. The facts, therefore, are substantially the same as in *Wiswall v. Sampson*. The plaintiff's levy was subsequent to the filing of the defendant's bill, but was prior to the appointment of the receiver. The Court of Appeals held that a sale of property made under an execution, without leave of the court, while the property is in the possession of the receiver, is illegal and void, although the levy was made before the appointment of the receiver; and the ultimate question now under discussion—whether a prior levy of an attachment or execution can be interrupted by a bill in equity subsequently filed—was not involved. But the court seems to have observed no such distinction, for the opinion states:

"In *Albany City Bank v. Schermerhorn*, 10 Paige, 263, the chancellor, speaking of a case where an execution creditor claimed a prior lien, said: 'If the plaintiffs in the execution had acquired a legal lien, so as to overreach the lien of the complainants in the creditors' bills, they could not get the property out of the hands of the receiver except by an application to the vice chancellor for an order upon the receiver to deliver over the proceeds to be applied on the execution.'"

It will be observed that a conflict of independent jurisdiction was not involved in *Walling v. Miller*, *supra*.

In *Central National Bank v. Stevens*, 169 U. S. 464, 18 Sup. Ct. 415, 42 L. Ed. 807, it is said:

"But it has been frequently determined by this court that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied. Thus it is said in *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768, that 'process subsequent to judgment is as essential to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.' And in *Amy v. Supervisors*, 11 Wall. 136, 20 L. Ed. 101, it was said: 'The two sets of tribunals—state and national—are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees.' 'An execution is the end of the law. It gives the successful party the fruits of his judgment.' *United States v. Nourse*, 9 Pet. 8, 28, 9 L. Ed. 31."

Of course, this does not intend that federal judgments may be satisfied out of property which the state court has earlier seized, nor that a state court may not stay the process, if such an attempt were made. But the same practical arrest of process obtains, where the federal court has already attached the property, that it may be in readiness to meet its executions, and the state court thereupon seizes such property, enjoins sale on the attachment, while it proceeds to determine the validity thereof and award or refuse payment according to its judgment.

However, in view of the decisions noticed above, and especially in *re Hall & Stilson Co.*, it is considered that this court should not stay the parties in the state court under the facts now presented. The propriety of this conclusion is strengthened by the fact that Judge Davis has passed upon the right of that court to stay the marshal, and that an appeal from the order of Judge Gildersleeve has been argued before the Appellate Division, whose decision must carry its proper authority. The fact is that the state court has moneys, or may constrain the purchaser of the land to pay the

same into court, whereby the judgment in this action may be paid in case there was a valid levy of the attachment. It is to be presumed that, if the matter were properly presented to the state court, there would be an early decision, and prompt payment of the plaintiff's judgment, if he show himself entitled to the same.

The present motion is denied.

In re MUNDLE.

(District Court, S. D. New York. March 20, 1905.)

BANKRUPTCY—ADVERSE CLAIM TO PROPERTY—PROCEDURE.

Where property in possession of a bankrupt, which passed into the hands of his receiver, is claimed by a third person, who alleges title by virtue of a bill of sale, and that the bankrupt was in possession as his agent, both of which allegations are denied by the receiver, the court will not determine such issues of fact summarily on affidavits, but will retain the property in the hands of its receiver until the claimant has established his right in a plenary suit.

In Bankruptcy. On order to show cause.

Clark & Taylor, for the motion.

Lesser Brothers, opposed.

ADAMS, District Judge. This is the return of an order to show cause why an order, heretofore granted in this matter, restraining G. W. Martin & Brother and their agent etc., from in any way taking possession of certain property contained in two stores in the borough of Manhattan, should not be modified, and why the receiver heretofore appointed to take possession of the bankrupt's property should not be required to turn over to the said Martin & Brother the property covered by an alleged bill of sale.

It is alleged by the moving parties that the bill of sale is a bona fide instrument, executed upon a proper consideration, and that the bankrupt was only in possession as their agent. On the other hand it is said that the bill of sale was signed because the bankrupt did not examine it carefully, and that it was intended thereby to prefer the said Martin & Brother over his other creditors. Further, it is denied that the bankrupt was in possession as Martin & Brother's agent.

There is a conflict of fact, which cannot be determined upon affidavits, and it is evident that a plenary action is necessary to reach the proper result. Under the circumstances I do not think it would be proper to turn the property over to the claimants at this time, but that their remedy is to bring such action against the receiver, or the trustee when appointed. In view of the fact that the bankrupt was in possession of the property, and the only claim of the moving parties is, that he was so as their agent, it seems to me that it is incumbent upon them to prove their claim, and that the property in the meantime, or the proceeds thereof, should remain in the possession of the representative of the court.

The motion is denied.

THE NORTHMAN.

THE OLYMPIA.

(District Court, S. D. New York. July 11, 1905.)

COLLISION—STEAM VESSELS MEETING—VIOLATION OF RULES.

A steamer and a tug with a tow both *held* in fault for a collision when meeting in East river; the tug for indicating a course to the left for passing when she should have gone to the right, and the steamer for not keeping a lookout, who could have seen the course of the tug, and enabled the steamer to stop and reverse in time to avoid collision, one blast of the tug's signal having been drowned by the steamer's signal, and not heard.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 40.]

In Admiralty. Suit for collision.

James J. Macklin, for libellants and the Olympia.
Convers & Kirlin, for the Northman.

ADAMS, District Judge. This action was brought by Harry Goodwin and Frederick Goodwin, the owners of Scow No. 28, to recover from the steamer Northman the damages caused to the scow by a collision with the Northman in the East River on the 30th day of December, 1901. The scow, in tow on the port side of the tug Olympia, and projecting about 30 feet ahead, was bound up the East River. The Olympia was also owned by the libellants. The Northman was bound down the river. About 10 o'clock A. M. the scow and the Northman came together doing some injury to the scow. The collision occurred less than 300 feet from the Manhattan shore, off Coenties slip. The tide was flood.

The principal dispute is with respect to the positions of the vessels to each other, when first seen, the libellants contending that the tug and tow were rounding the Battery and had the steamer on their starboard bow, while the latter contends that the vessels were meeting a trifle to the port of each other, but substantially head and head.

The Olympia, proceeding upon its theory, attempted to pass to the left, giving a signal of two blasts and starboarding slightly. The Northman, considering the positions to be such that they should go to the right, gave a signal of one blast and ported. Their respective positions were not very much affected by the steering but when in the close vicinity of each other, seeing the danger of collision, both vessels reversed, throwing their bows to the starboard and their sterns to the port. They came together without great force, the Northman headed somewhat towards New York and the Olympia somewhat towards Brooklyn, the Northman's port bow striking the scow's port corner, and doing some damage.

The testimony with respect to the original positions is conflicting but I think decidedly preponderates against the libellants. While it is doubtful if the tug and tow were ever to the port of the steamer, as claimed by her, they were without doubt end on or nearly so and should have gone to the right, under Rule 1 and Art. 18, Inland Rules. In attempting to initiate a two whistle course,

the tug made a fatal mistake. The only question that remains is, whether the steamer contributed to the collision. It is urged by the libellants that she had no lookout and did not reverse as soon as she should.

The steamer did not have a lookout, and it is probable that if she had had one and he had properly performed his duty, that the tug's attempted passing to the left would have been observed sooner and the steamer could have seen the danger in time to have avoided it, as the reversing of the vessels almost overcame their motion through the water. One of the tug's blasts of the signal of two was probably drowned by the steamer's blast of one. *The Ne-reus* (D. C.) 23 Fed. 448; *In re Central R. R. of New Jersey* (D. C.) 92 Fed. 1010, 1012. It appears that a lookout might not have aided the situation so far as the signals were concerned but it is probable that one would have seen the movement of the tug to the left sooner than those on the bridge of the steamer did. It seems to me that the absence of a lookout must be deemed a contributing fault, in connection with the steamer's failure to reverse when it could have been determined that without that movement of the steamer's engine there would doubtless be a collision. The navigating officers who were on the bridge say that the tug and tow were first seen $\frac{1}{4}$ of a mile away, just after the rounding of the Battery. The signals were then exchanged, which were supposed by those on the steamer to constitute an agreement to go to the right. The tug, however, did not act on such a theory of navigation but kept getting closer to the steamer and finally sheered to port across her bow. The steamer kept on at her full speed, of about 5 miles, until in the jaws of the collision, and then reversed. She should have seen the necessity for reversing sooner. It soon became obvious that the tug was not changing her course to starboard, as her bearing did not widen, notwithstanding the steamer's change to starboard, and it should have been apparent that a collision was imminent. Notwithstanding the necessity of preparing for danger, however, the steamer did not reverse until it was too late to stop her headway in time and for this fault, I think she must also be condemned.

Decree for the libellants for half damages.

KEMMERER et al. v. HAGGERTY et al.

(Circuit Court, N. D. West Virginia. July 15, 1905.)

FEDERAL COURTS—JURISDICTION—CITIZENSHIP—STOCKHOLDERS' ACTION.

A corporation, being a citizen of the same state as the defendants, and therefore incapable of suing in the federal courts to restrain defendants from inducing its employes to strike, brought a suit for such relief in the state courts, pending which complainants, who were nonresident stockholders, made a demand on the officers of the corporation to bring suit in the federal courts, knowing that the corporation could not do so, and, on the corporation's refusal, themselves filed a bill for such relief in the federal court. *Held*, that such acts did not constitute a compliance

with equity rule 94, relating to stockholders' bills, and requiring that such suit shall not be collusive to confer federal jurisdiction, and that the court had no jurisdiction.

[Ed. Note.—Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

In Equity.

A. W. Burdett and C. T. Caldwell, for complainants.

Charles B. Johnson and G. M. Hoffheimer, for defendants.

GOFF, Circuit Judge. This case has been submitted on complainants' motion for a permanent injunction, as also on defendants' motion to dissolve the restraining order issued herein by Judge Jackson, and to dismiss the bill. Complainants allege that they are citizens and residents of the state of Pennsylvania, and that the defendants are citizens and residents of the state of West Virginia. The Pennsylvania Consolidated Coal Company, one of the defendants, is a corporation organized under the laws of the state of West Virginia, and is engaged in business in the counties of Taylor and Preston, in that state, where it owns and operates an extensive mining plant. The complainants allege that they are the owners of \$16,000 of the capital stock of said company, each of the four complainants owning more than \$2,000 in their own right. It is charged in the bill that the defendants Haggerty, Noon, True, and others, their confederates and associates, are members of an organization known as the United Mine Workers of America, which they are said to represent as "organizers"; that said defendants are interfering with the employes and servants of said coal company in the discharge of their respective duties, and that they are endeavoring, by threats, intimidation, and violence, to prevent them from working and from keeping said plant in operation; that, unless said mine is kept going and its miners permitted to work, the property of the company will be destroyed, and that the interests therein of complainants will be rendered valueless; that the defendants mentioned and others are determined in their efforts to compel the miners employed by said coal company to join the organization referred to, using for that purpose force and threats; that their object is to bring about what is known as a "strike," and thereby close the mines of said company; that in such efforts they have been partly successful, and have to a certain degree interfered with the working of the mines, and will, if permitted, close and destroy the same; that said defendants are insolvent, and cannot be made to respond in damages in a court of law for the injury that they have done and are doing to the property of said coal company. The complainants also allege that they duly prepared and caused to be presented to the president and board of directors of said coal company a written statement setting forth in substance the matters hereinbefore mentioned, and requesting said officials or said company to institute such proceedings in the courts as might be necessary and proper to protect the interests of the stockholders and to preserve the property of the company; that such board of directors,

in a regular and legally called meeting, a majority of the board being present, duly considered such request, and declined to take the action so requested, and refused to call a meeting of the stockholders for the purpose of considering the same, the complainants thereby being left to such redress as they might think proper for the purpose of protecting their said interests as stockholders. Complainants therefore claimed that as the corporation, through its directors and its stockholders, had refused to protect its property by suitable legal proceedings, it was incumbent upon them to take such action as was necessary to protect their respective holdings of stock in said company. The prayer of the bill was for an injunction and for general relief. The defendants have answered, replication thereto has been filed, affidavits and exhibits have been read, and the argument of counsel has been heard and considered.

I do not find it necessary to dispose of the contention of defendants as to the insufficiency of the bill, as the conclusion I reach concerning the jurisdiction of the court renders that unnecessary.

The Pennsylvania Consolidated Coal Company, a West Virginia corporation, one of the defendants, could not, under the provisions of existing law, maintain a suit in this court against its codefendants, who are citizens of West Virginia. It is entirely clear that said company, acting by and through some of its officials, in connection with some of its stockholders, endeavored to create a condition of affairs that would justify an application to this court for an injunction, and that would make applicable to this litigation the requirements of the ninety-fourth equity rule, as announced by the Supreme Court of the United States. It appears that said company, in its own name, acting by its directors and other officials, had before the institution of these proceedings filed in the circuit court of Taylor county, W. Va., a suit, the object of which was to obtain from that jurisdiction, in substance, the relief now asked of this court. That suit was a recognition of the limitations placed by law on the jurisdiction of this court, and the fact that it was subsequently abandoned after the complainants in this suit, who were familiar with that litigation, and some of whom actively engaged in its prosecution, supposed that they had qualified themselves for this jurisdiction, emphasizes the effort that has been made in this case to evade the legislation of the Congress, and of the rules applicable thereto, relating to the diverse citizenship of litigants in this court. The complainants, stockholders in the defendant company, did not endeavor to induce the directors of that company to institute a suit in this court, having for its object the protection of the property and assets of the company, for they were well aware that this court would not have had jurisdiction of such litigation, for the reason that the parties complained of were citizens of the state of West Virginia. It was not necessary for the complaining stockholders to ask the directors to sue in the courts of the state of West Virginia, where the jurisdiction was unquestioned, for such a suit for the purpose mentioned was then pending. What the complainants intended to do, and what they in fact did, was to have the management of the coal company declare that nei-

ther they, as officials thereof, nor the company, as a corporation, would institute and prosecute the suit referred to; thereby providing, as they supposed, a method by which the complainants, who were stockholders and citizens of the state of Pennsylvania, would be able to sue in this court for the purpose mentioned. Such likely would have been the result, had the effort been an honest endeavor to further a sincere intention, and not the simulated action of designing men, who collusively formulated the scheme, and prepared the answer to the request that suit be brought before the petition containing it had been submitted for the consideration of those whose action it requested. It is quite evident that it was the plan of the complainants and of some of the directors of the coal company, collusively acting together for that purpose, to make the situation fit the conditions indicated by the terms of equity rule 94; and, when this conclusion has been reached, it follows that any pretense of jurisdiction by this court over this controversy has disappeared. The refusal of their request was the one thing they wished. The granting of it would have been the one thing that would have circumvented their plans. Their conduct was insincere, their effort was pretended, and the action they desired was not indicated by the request they submitted.

The question here involved is of great importance, including, as it does, the principles upon which in many instances the federal jurisprudence is based. Where the right to sustain a suit in this court depends upon the citizenship of the parties, the positive requirement of the law is that the litigants shall be citizens of different states. The case made by the bill is in fact a controversy between the Pennsylvania Consolidated Coal Company, a corporation and citizen of the state of West Virginia, and the defendants Haggerty, Noon, True, and others, all likewise citizens of that state. The efforts of complainants, citizens of the state of Pennsylvania, to produce the diversity of citizenship necessary to sustain the controversy in their names, utterly fails to meet the requirements indicated by the decisions of the courts relating to equity rule 94, which was adopted for the purpose of giving effect to the principles enunciated by the Supreme Court of the United States in *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827. In this connection, see *Huntington v. Palmer*, 104 U. S. 482, 26 L. Ed. 833; *Detroit v. Dean*, 106 U. S. 537, 1 Sup. Ct. 560, 27 L. Ed. 300; *City of Quincy v. Steel*, 120 U. S. 241, 7 Sup. Ct. 520, 30 L. Ed. 624.

By virtue of the fifth section of the act of Congress of March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508], relating to efforts to impose upon the courts of the United States the cognizance of cases not fairly belonging to them—finding, as I do, that this suit does not involve a dispute properly within the jurisdiction of this court, and that some of the parties to it have been collusively joined for the purpose of creating a case cognizable under said act—it is my duty to proceed no further with this case.

An order will be entered dissolving the restraining order and dismissing the bill.

UNITED STATES v. SCOTT et al.

(Circuit Court, N. D. Georgia. June 28, 1905.)

1. CONSPIRACY—MERGER IN COMPLETED OFFENSE.

A conspiracy to commit an offense against the United States, made in itself a criminal offense by Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], is not merged in the completed offense, where the two offenses are of the same grade and the punishment substantially the same.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, §§ 68-70.]

2. SAME—EVIDENCE.

Evidence that employés of the owner of a distillery joined and participated with him in removing from such distillery to a place other than a bonded warehouse spirits on which the internal revenue tax had not been paid, in violation of Rev. St. § 3296 [U. S. Comp. St. 1901, p. 2136], under circumstances from which they must have known the illegal nature of the transactions, is sufficient to sustain an indictment, under section 5440 [U. S. Comp. St. 1901, p. 3676], of both employer and employés, for conspiracy to commit an offense against the United States.

Criminal Prosecutions. On motion for a new trial and motion in arrest of judgment.

E. A. Angier, U. S. Atty., and Geo. L. Bell, U. S. Atty.

S. A. Darnell and Madison Bell, for defendants.

NEWMAN, District Judge. This case is now before the court on a motion for a new trial and on a motion in arrest of judgment. I think the law of the case was correctly given to the jury in the instructions of the court. The evidence was certainly sufficient to support the verdict.

The first question for consideration is whether, under the evidence, the conspiracy was merged in the completed offense. The indictment was drawn under section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676], and was for a conspiracy to commit an offense against the United States; that is, the offense of removing distilled spirits from a distillery where produced to a place other than the distillery warehouse without having paid the tax required by law. Whatever may be the correct rule as to merger of conspiracy in the completed offense under the practice in the courts of the United States where the conspiracy is a misdemeanor and the completed offense a felony, it is perfectly clear that the rule of merger does not apply here, where the penalty is so nearly alike as it is under sections 5440 and 3296 [U. S. Comp. St. 1901, pp. 3676, 2136]. Section 5440 makes the penalty for a conspiracy a fine of not more than \$10,000 or imprisonment for not more than two years, or both such fine and imprisonment, in the discretion of the court. Section 3296, for removing distilled spirits in violation of law, fixes the penalty at not less than \$200 and not more than \$5,000, and imprisonment not less than three months nor more than three years. In the conspiracy section, the imprisonment is only a year less, while the fine may be double that of section 3296. They are offenses of the same grade—both misdemeanors—and, under the well-established rule, there would be no merger of the conspiracy in the completed offense.

The other question is as to whether, under the facts in evidence in this case, a conspiracy is properly made out. The question is not wholly free from difficulty. The distillery as to which the alleged fraud is charged was operated and managed solely by John N. Scott. All the other alleged conspirators convicted with him were employes of John N. Scott. The difficulty arises from this fact. John N. Scott was the moving spirit, according to the evidence, in this plan to defraud the government. The others convicted as co-conspirators were under his direction and control, employed by, and subordinate to, him. But is this sufficient to justify the court in setting aside the verdict in this case? There is abundant evidence to justify the jury in believing that all of these parties knew of the unlawful nature of the transactions being carried on at the Scott distillery. They not only participated in, and were parties to, the removal of distilled spirits, but they must have known of the large amount of meal and malt being received at the distillery, and they must also have known that it was more than the capacity of the distillery required or authorized. Two barrels of unstamped whisky were removed by two of the co-conspirators, according to evidence which the jury must have believed. There was evidence to show that Fields, the distiller—that is, the man who had actual charge of the work of distilling—told Wheeler that he was a fool for not getting money as other storekeepers and gaugers had done. Whether these defendants, except Scott, received anything more than wages for their connection with this distillery does not appear; but I think the evidence is ample to show that they knew of, and participated in, these unlawful transactions all along. The evidence is also sufficient to justify the jury in concluding that they had such an agreement and understanding with John N. Scott as that it amounted to a conspiracy between all the parties to the transaction to commit an offense against the United States in removing distilled spirits, as set out in the indictment.

I have no question whatever about the correctness of the decision at the trial that the defendants were only entitled to ten challenges, under section 819 of the Revised Statutes. Indeed the court gave the defendants the benefit of the doubt in allowing them ten challenges instead of three, which number it might be argued they would only be entitled to when on trial under section 5440.

The foregoing embrace the only matters which it seems to me necessary to discuss in connection with these motions.

Both the motion for a new trial and the motion in arrest of judgment are denied.

JOHN D. PARK & SONS CO. v. BRUEN et al.

(Circuit Court, S. D. New York. June 17, 1905.)

1. RES JUDICATA—CONCLUSIVENESS OF JUDGMENT—NEW YORK STATUTE.

Under Code Civ. Proc. N. Y. § 1209, which provides that "a final judgment dismissing the complaint * * * does not prevent a new action for the same cause of action unless it expressly declares, or it appears by the judgment roll that it is rendered upon the merits," a failure to

state expressly, either in the judgment itself, or in some order directing the judgment, that the dismissal was on the merits does not permit a new suit for the same cause of action without further investigation; but it is the duty of the court in which the judgment is pleaded as a bar to a second suit to examine the judgment roll, and determine the question therefrom.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1028-1032.]

2. SAME—IDENTITY OF CAUSES OF ACTION.

A suit in a federal court *held* not barred by a prior judgment of a state court between the same parties, dismissing a complaint filed by complainant on a general demurrer, on the ground that the bill in the second suit alleged new facts, constituting a different cause of action.

In Equity. On plea of *res judicata*.

Henry T. Fay and Elihu Root, for complainant.

Robinson, Biddle & Ward, for defendants.

PLATT, District Judge. The plea herein sets up as a bar to the bill a final judgment in the Supreme Court of the state, dated May 15, 1900, sustaining a demurrer to an amended complaint filed in that court, and dismissing the complaint. It is not expressly declared in the judgment roll of the state court that the complaint was dismissed upon the merits.

Section 1209 of the Code of Civil Procedure says:

"A final judgment, dismissing the complaint * * * does not prevent a new action for the same cause of action, unless it expressly declares or it appears by the judgment roll, that it is rendered upon the merits."

The contention that a failure to state expressly, either in the judgment itself, or in some order directing the judgment, that the dismissal was "on the merits," permits, without further investigation, a new suit for the same cause of action, is not sound. *Alley v. Nott*, 111 U. S. 475, 4 Sup. Ct. 495, 28 L. Ed. 491.

The demurrer as filed was equivalent to a general demurrer, and goes far beyond mere matters of form. It admitted all well pleaded facts as completely as if they had been established by proof, and raised the legal issue that such facts did not constitute a cause of action. In that situation the judgment was, without doubt, upon the merits.

Leave to amend was not demanded or suggested, for the obvious reason that the complainant did not have in hand pertinent facts which would change its case. The protracted struggle had exhausted everybody, and rest was essential before gathering thought for a fresh start.

It is the duty of this court, as I view it, to examine the judgment roll, and determine whether the case in the state complaint is the same case which appears in the bill at bar. We must discover whether the bill involves any legal issues which were not deducible from the complaint. The test is not whether they were, but, rather, whether they could have been, raised on the facts in the complaint.

Upon examining the bill and complaint, it appears that many acts done by defendants since 1896 are now complained about,

whereas the acts set forth in the state court complaint were alleged to have been committed at that time. If the acts alleged in 1896 constitute a certain mode of action, and those now set forth as having been committed later constitute the same mode of action, it seems clear that a judgment sanctioning as lawful the methods adopted in 1896 would preclude a complaint against similar methods in 1904, as between the same parties and their privies. Otherwise there would be no end to litigation, so long as the respective parties retain their cash and courage. In some ways, however, it strikes me the case in the bill is not the case of the complaint. An analysis of both, pointing out the distinctions, would make too long a story. As we run along, it may be well to allude incidentally to the more accentuated ones.

The state court found that restraint of trade to be unlawful must either tend to enhance the price or to narrow the territory. No fault could attach as to price, because the goods were so situated as to be the subjects of an inherent monopoly, and as to territorial restriction, no facts were alleged from which such a thing could be inferred.

It is not clear that in the present bill the facts have been so changed as to avoid the argument of the state court on the first point, but in the matter of territorial restriction, the case now set up appears to be radically different. Then again, the averments about the tripartite plan, which is a joint agreement of wholesalers, manufacturers, and retailers, extending the restriction of prices so that it includes the consumer; and again, the exhaustive exploitation of the judicial powers conferred upon the committee on proprietary goods as a part of the unlawful plan; and again, the facts tending to show that manufacturers are hindered and restrained from dealing with complainant by reason of the rebate plan, but that they would so deal if it were not for the plan; and again, the facts showing that the committee on proprietary goods have charged the complainant with first joining the rebate plan, and then failing to live up to it, thus smirching its business character and injuring its trade; and the threats to break up the business of any one who shall presume to sell goods to the complainant; and the threats that after breaking up complainant's business, no goods will be sold to complainant's customers, putting them on cut-off lists and black lists for that purpose, thereby depriving the complainant of many of its present customers. As I have said, for these differences, and for many others which will appear after careful examination, the case made up in the bill is not, as I view it, the case made up in the complaint.

Let the plea be overruled, with costs.

BANKS LAW PUB. CO. v. LAWYERS' CO-OPERATIVE PUB. CO.

(Circuit Court, S. D. New York. June 16, 1905.)

1. COPYRIGHTS—INFRINGEMENT—PLEADING—SUPPLEMENTAL BILL.

In a suit for infringement of copyrights of a number of books the complainant may properly be allowed by a supplemental bill to set up further infringements of other books of the same series, occurring subsequent to the filing of the original bill, the parties being the same, and the subject-matter of the same general character, which may appropriately be determined in the same suit.

2. SAME.

Where a bill for infringement of copyright sufficiently alleges title in complainant to the cause of action by assignment, a supplemental bill otherwise good is not invalid because it alleges a further assignment in the nature of a confirmation or ratification of complainant's title.

In Equity. Suit for infringement of copyright. On demurrer to supplemental bill.

J. Adriance Bush, Wm. Hepburn Russell, and Frank L. Crawford, for complainant.

Frederick F. Church and Frank F. Reed, for defendant.

HAZEL, District Judge. This is a bill to enjoin infringement of a series of books, 24 in number, for which the complainant claims copyrights. The infringing acts consist of imitating complainant's publication of the Official Edition of Reports of the United States Supreme Court, in that the paging is reproduced, and the general arrangement of the reported decisions, together with complainant's system of numbering the volumes, is simulated. Since filing the original bill, and after taking evidence showing the nature and extent of the infringement and complainant's legal title to the copyrights, two additional books of decisions have been published by the defendant. Such later publications are claimed by complainant in the supplemental bill to infringe eight additional volumes of complainant's publication and copyrights. The supplemental bill also avers a so-called "confirmatory assignment" to pass to the complainant the legal title of Banks & Bros., a copartnership, to the certain copyrights of the books in question. The defendant demurs to the supplemental bill on the grounds that separate and distinct causes of action are alleged, and, further, that the allegation of a confirming assignment is inconsistent with and contradictory of the allegation of title as specified in the original bill. Defendant contends that the complainant cannot, during the pendency of the suit, cure a bad or defective bill; and also that the later charges of infringement are distinct and independent wrongs, which may not be brought into the suit by supplemental bill. The proposition that the original bill was bad or defective, however, is not strictly in question. The later infringements were not covered by the original bill, which properly alleges a cause of action of earlier wrongful acts; and it is elementary that any matter which has happened since the filing of the bill may be brought in by supplemental bill. Story on Equity Pleading (10th Ed.) § 330. In Foster's Federal Practice, § 187, the rule is thus stated:

"A supplemental bill, according to Lord Redesdale, is merely an addition to the original bill. * * * When an event happens subsequently to the filing of an original bill, which gives a new interest in the matter in dispute to any person, whether or not already a party, without depriving all of the original plaintiffs suing in their own right of their interest, the defect arising from this event may be supplied by a supplemental bill."

It has been held in this circuit that facts accruing after the filing of the original bill, showing, for instance, infringement of a patented device by the subsequently modified structure, where there was infringement before suit was brought, did not warrant filing a supplemental bill. *Westinghouse Air Brake Co. v. Christensen Engineering Co.* (C. C.) 121 Fed. 558; *Id.*, 126 Fed. 764. In such cases the scope of the original bill is deemed broad enough to include later charges of infringement, and, if the evidence under the original bill establishes the wrongful acts, the new infringing acts are provable upon the accounting, and proper relief may be afforded. The cases cited, however, do not strictly apply here, as the wrongful acts complained of in the supplemental bill not only subsequently occurred, but relate to separate infringements of separate copyrights of the books in question. In order to prove subsequent acts, assuming the original bill alleges a meritorious cause of action against the defendant, it was necessary for complainant to file a supplemental bill. The law abhors a multiplicity of suits; and when the parties are the same, and the subject-matter is of the same general character, courts will be slow to refuse leave to aver in an amended or supplemental bill additional actionable facts which will assist in a final disposition of the grievances which are the subject of the litigation. Although the allegations of later infringements are separate and distinct from earlier assertions of infringement, yet they are not so inseparable, when alleged in a supplemental bill, as to entirely preclude a determination in the pending action. In *Mellor v. Smither*, 114 Fed. 116, 52 C. C. A. 64, the rule where new matter arising subsequent to the filing of the original bill is introduced by supplemental bill is stated as follows:

"If he had no cause of action then, he cannot, by amendment or supplemental bill, introduce a cause of action that accrued thereafter, even though it arose out of the same transaction that was the subject of the original bill. * * * But where a cause of action exists at the filing of the bill which is defectively presented by the bill, the defects may be remedied by amendment, and matters occurring after the filing of the bill may be presented by supplemental bill. * * * Where material facts have occurred subsequent to the beginning of the suit, the court may give the plaintiff leave to file a supplemental bill, and where such leave is given the court will permit other matters to be introduced into the supplemental bill which might have been incorporated in the original bill by way of amendment. *Stafford v. Howlett*, 1 Paige, 200."

The quotation correctly states, I think, the practice covering the purpose of a supplemental bill. For this reason the first ground of demurrer is not sustained.

As already intimated, the supplemental bill avers an assignment, since the action was instituted, from two of the former owners of certain copyrights which are the subject of the suit. The original bill merely avers the assignment to Banks & Bros., No. 2, to one

David Banks, acting in behalf of the complainant, and the assignment thereafter by him to the complainant. These are not thought to be such inconsistent or contradictory averments as to invalidate the supplemental bill. The later assignments evidently are in the nature of a ratification of the earlier acts, and, as the allegation of title was concededly well pleaded, would seem to merely affect the weight of the evidence of the title asserted in the original bill.

Demurrer is overruled, with costs.

FREUND v. S. H. GREENE & SONS CORPORATION.

(Circuit Court, S. D. New York. May 16, 1905.)

PLEADING—VARIANCE—WAIVER OF OBJECTION.

A verdict will not be set aside because of a variance, where the court's attention was not called to it during the trial either by an objection to the evidence, a motion to strike it out, or a request for instruction, but the plaintiff will be permitted to amend the complaint to conform to the facts proved.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1438-1441.]

At Law. On motion to set aside verdict.

Hiram R. Steele, for plaintiff.

Lewis A. Freedman, for defendant.

TOWNSEND, Circuit Judge. Defendant's motion is predicated chiefly on the ground that the evidence on which the jury rendered its verdict in favor of plaintiff was inadmissible under the pleadings, except to the extent of proving a claim of \$400. The complaint claimed damages of \$50,000 for breach of contract, and alleged, *inter alia*, an indebtedness to plaintiff of \$10,800 for commissions due for work received from him by defendant. No objection was made at the trial to the reception of this evidence on the ground that it was not supported by the pleadings, no motion was made to strike it out by reason of insufficient pleading, no request was made to the court to charge the jury that it should be disregarded because of variance or departure, and no exception was made to the charge on any such ground. If the claim now made had been brought to the attention of the court in any way, it might have been corrected on the trial. In these circumstances, it is thought that the evidence was sufficient to support the verdict, and that an amendment should be allowed conforming the pleadings to the facts proved, in accordance with the rules established in the federal courts and in the courts of the state of New York.

An order may be entered for such amendment.

MATTILAGE v. UNITED STATES.

(Circuit Court, S. D. New York. December 21, 1904.)

No. 3,624.

CUSTOMS DUTIES—CLASSIFICATION—FISH—SMOKED HERRING.

Smoked herring, though salted before being smoked, are not dutiable as "herrings, pickled or salted," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 260, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], being a commodity distinct therefrom both commercially and in common speech.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 74.]

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision under review is G. A. 5,726, T. D. 25,429, which affirmed the assessment of duty by the collector of customs at the port of New York on importations by Charles F. Mattilage & Co. The board's opinion reads as follows:

Fischer, General Appraiser. In these cases the merchandise consists of smoked herring imported in wooden packages, each containing less than a half barrel of fish. Duty was assessed thereon at the rate of 30 per cent., under the appropriate provision of paragraph 258, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650]. The importers claim them to be dutiable properly under paragraph 260, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], as "herrings, pickled or salted," at one-half cent per pound, or under paragraph 261, at three-fourths cent per pound, or 1¼ cents per pound. In G. A. 4,908, T. D. 22,969, the board held, following the court ruling in the cases of Meyer & Lange v. United States and Reiss & Brady v. United States (since reported in 124 Fed. 293), that smoked herrings, packed the same as those now in question, were dutiable at 30 per cent., under paragraph 258, or at three-fourths of one cent per pound under paragraph 261, according to which was the higher rate. This ruling would be conclusive against the protests but for the fact that in this instance counsel for the importers has urged a contention which was not made in the protest subject of G. A. 4,908, namely, that the provision for salted or pickled herrings in paragraph 260 covers smoked herrings, the latter not being provided for *eo nomine* in the tariff. The ground for this claim is that herrings are first salted before being smoked. It is noted that he does not set up any claim under paragraph 260 at one-fourth of a cent per pound, as fresh herrings, on the ground that they were fresh before they were either salted or smoked.

We are of opinion that the contention noted is untenable. Conceding that the herrings must be salted before they are smoked, salted herrings and smoked herrings are two distinct commodities in ordinary speech, and that they are so commercially is shown by the testimony of one of the importing firm and another witness. The former testified in part as follows: "Q. On an order to your house for pickled herrings, would you deliver smoked herring? A. No, sir. Q. On an order for salted or fresh, would you deliver smoked herring for either of those? A. No, sir. Q. An order for smoked herring would have to be in what language? A. Plain words—just simply 'smoked herring.' * * * Q. What would you do upon an order for salted herring? A. Give them pickled herring." The importers' witness testified in part as follows: "Q. In your understanding as a merchant, are smoked herrings included or excluded from the group—from the class of salt fish? A. They are included in the class; but if a person sent me an order for salt herring I should want to know whether he meant pickled or smoked." The tariff acts of 1883, 1890, 1894, and 1897 all contain separate provisions for salted and pickled herring and for smoked fish, and the practice of customs officers in assessing such merchandise for duty has been in harmony with the common and commercial understanding; that is to say, smoked herring has been as-

sessed as smoked fish, or as fish in half barrels, according to the manner of packing. It may be added that in the course of the numerous protests as to the rate of duty on fish which have been passed on by the courts and by the board it has not been before suggested that the provision for salted or pickled herring would cover smoked herring.

The protests are overruled on all grounds, and the decision of the collector affirmed in each case.

Comstock & Washburn (Albert Comstock, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. Decision of the Board of General Appraisers affirmed.

J. M. CEBALLOS & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 16, 1904.)

No. 3,607.

CUSTOMS DUTIES—MEASUREMENT—OLIVES IN CASKS—"GALLON."

In assessing the duty of 15 cents per gallon provided in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 264, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], on olives in casks, the assessment should be based on measurement by the wine gallon, and not the dry gallon.

On Application for Review of a Decision of the Board of United States General Appraisers.

These proceedings were brought by J. M. Ceballos & Co., and relate to a decision of the Board of General Appraisers which overruled their protests against the assessment of duty by the collector of customs at the port of New York. Said decision is reported as G. A. 5,701, T. D. 25,359, and reads as follows:

Waite, General Appraiser. In these cases the collector has assessed duty upon olives in brine, contained in casks, at 15 cents per gallon, under paragraph 264, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], the number of dutiable gallons having been ascertained upon the basis of the wine gallon, of 231 cubic inches capacity. The classification is not questioned, but the protestants contend that the use of the wine gallon in measurement is an error, and that the olives should be gauged by the dry gallon, of 268.8 cubic inches capacity. With this contention we are unable to agree. The customs gallon of the United States is the wine gallon, of 231 cubic inches, which is uniformly referred to by the authorities as the standard gallon of this country. *Nichols v. Beard* (C. C.) 15 Fed. 435. See, also, 16 Ops. Attys. Gen. 359, and "gallon," Standard and Century Dictionaries. The dry or corn gallon is an old English unit of measurement, which we should judge has fallen into practical disuse. "Gallon," Century Dictionary. We are not aware that it has any common employment in the commerce of this country. The protestants, in any event, have offered no proof of its general commercial use, which would be incumbent upon them, since that fact is hardly within common knowledge. But were the use of the corn gallon as a unit of dry measurement notorious, it would still be open to serious doubt whether a commodity like olives in brine should be measured by it. It appears to be the practice to measure even dried olives by the liquid gallon. In its decision on the protest of Tai Hing (Abstract 35, T. D. 24,919), the board reversed the action of the collector at Honolulu in assessing dried olives at 2 cents per pound, as "edible fruits * * * dried," under paragraph 262 of the present tariff (30 Stat. 171 [U. S. Comp. St. 1901, p. 1651]), sustaining a claim that they were dutiable as "olives" by the gallon, under said paragraph 264. The board said in part: "The well-established practice at this port [New York] is to return dried olives under the specific provision for olives in paragraph 264, and

assess duty upon them at 15 cents per gallon; the unit of measure being the wine gallon, of 231 cubic inches, apparently the only gallon in common use in this country. *Nichols v. Beard* (C. C.) 15 Fed. 435. We are without any proof of trade usage or other evidence which would enable us to say that there is any theoretical or practical objection to measuring dry substances such as these by the liquid gallon, so as to make the construction adopted by the customs officers unjust, unreasonable, or absurd. * * * The construction placed upon a law by the officers who administer it frequently influences the construction given it by the courts. *Robertson v. Downing*, 127 U. S. 607, 8 Sup. Ct. 1328, 32 L. Ed. 269."

For many years prior to 1897, olives, when dutiable, had been assessed at ad valorem rates. In that year an effort was successfully made to have a specific duty by the gallon imposed. *Tariff Hearings*, vol. 1, pp. 988, 993, 997, 998. We quote below from one of the communications received by the committee on ways and means, which we think makes it sufficiently plain that the interests concerned expected that olives in brine would be measured according to the methods in vogue in United States customhouses: "The present rate of duty (20 per cent. ad valorem) on olives shipped in brine in bulk is satisfactory, except that we earnestly request that the duty be changed from an ad valorem duty to a specific duty, as under an ad valorem duty there is great opportunity for undervaluation. * * * We would therefore recommend that the duty be made 5 cents for each American gallon, and that the mode of ascertaining the number of gallons in each package be as follows: Package to be laid on its side, bung up, capacity being taken by the standard United States system of gauging, and then the outage rod inserted through the bung hole until it comes in contact with the solid fruit, and after taking the outage from the gauged capacity of the package, the residue shall be the actual number of gallons on which duty shall be paid. *Tariff Hearings*, pp. 993, 994." We are not concerned in this case with the above suggestion regarding allowance for outage, which probably aimed at the exclusion from assessment of the supernatant brine. See T. D. 23,742. The portion of the cask to be made dutiable, however, was to be assessed upon the basis of the "American gallon," which, in our judgment, can have reference only to the wine gallon. Moreover, it was to be measured by the "standard United States system of gauging," in which, according to the authorities cited above, no other gallon has been recognized.

For the reasons given, we think the protests should be overruled, and the collector's decision affirmed, which is accordingly ordered.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for the importers.

Henry A. Wise, Asst. U. S. Atty.

PLATT, District Judge. Decision of the Board of General Appraisers affirmed.

UNITED STATES v. GOLDBERG.

(Circuit Court, S. D. New York. December 21, 1904.)

No. 3,729.

CUSTOMS DUTIES—CLASSIFICATION—CAMEOS—IMITATION PRECIOUS STONES.

Held, that paste cameos, in imitation of shell cameos, which imitate certain descriptions of precious stones, are dutiable as imitation precious stones under paragraph 435, Schedule N, § 1, *Tariff Act July 24, 1897*, c. 11, 30 Stat. 192 [*U. S. Comp. St.* 1901, p. 1676].

On Application for Review of a Decision of the Board of United States General Appraisers.

The proceedings in this case were brought by the United States to secure a review of a decision of the Board of General Appraisers (*G. A.* 5,825, *T. D.* 25,713), which had sustained a protest of Mor-

ris Goldberg against the assessment of duty by the collector of customs at the port of New York. The opinion filed by the board is as follows:

Sharretts, General Appraiser. The merchandise in question consists of cameos made of paste, which the appraiser reports to be imitations of shell cameos. Duty was assessed thereon at 45 per cent. ad valorem under the provision of paragraph 112, Tariff Act July 24, 1897, Schedule B, § 1, c. 11, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635], for manufactures of paste. The alternative contention of the importer is that the merchandise is imitative of precious stones, and as such is dutiable at 20 per cent. ad valorem under paragraph 435, Schedule N, § 1, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676]. The board held in G. A. 5763, T. D. 25,512, that shell was not a precious stone, hence shell cameos were not dutiable as precious stones; but in this decision the conclusion was reached that the shell cameos in question imitated certain descriptions of precious stones. In the present case we find the articles in question are imitations of precious stones, composed of paste, not exceeding one inch in dimensions, not engraved, painted, or otherwise ornamented or decorated. The claim in the protest that the merchandise is dutiable under paragraph 435 is sustained, and the collector's decision is reversed.

Charles Duane Baker, Asst. U. S. Atty.
Comstock & Washburn, for importers.

PLATT, District Judge. Decision of the Board of General Appraisers affirmed.

CITY OF MEMPHIS v. POSTAL TELEGRAPH CABLE CO.

(Circuit Court, W. D. Tennessee. August 1, 1905.)

No. 565.

1. MUNICIPAL CORPORATIONS—POWERS OVER STREETS—CITY OF MEMPHIS.

The streets and alleys of the city of Memphis are public property, over which the state of Tennessee, as a sovereign, has the right of absolute control, and with respect to which the city, which is the creature of the Legislature, can exercise only such powers as have been granted by the Legislature, which are limited generally by its charter to the enactment of ordinances not in conflict with the general laws.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 167, 175.]

2. TELEGRAPH COMPANIES—CHARGE FOR USING STREETS.

The Legislature of Tennessee having by Acts 1885, p. 120, c. 66, granted to telegraph companies the right to construct, operate, and maintain their lines upon the public highways and streets of the towns and cities of the state, in consideration of the immediate dispatch of official messages as therein required, the city of Memphis has no power under its charter to require a company which has constructed its lines in the streets of the city under such statute to pay a tax or rental on its poles for the use of such streets, and an ordinance imposing such tax or rental is in violation of the statute and void.

[Ed. Note.—Rights of telegraph and telephone companies to use streets, see note to Southern Bell Telephone & Telegraph Co. v. City of Richmond, 44 C. C. A. 155.]

In Equity. On demurrer to bill.

H. F. Walsh, City Atty. of Memphis (J. P. Holt, of counsel), for complainant.

J. W. Buchanan, Felder & Rountree, and Metcalf, Minor & Metcalf, for defendant.

McCALL, District Judge. On June 5, 1902, the complainant, the city of Memphis, filed its original bill in the chancery court of Shelby county, at Memphis, Tenn., against the defendant, the Postal Telegraph Cable Company, seeking to recover a judgment against the defendant company in the sum of \$1,772 on account of rents alleged to be due and owing by the defendant for the occupancy of the streets of the complainant city by the telegraph poles of the defendant, or, in case such decree would not be proper, complainant asks that the rights of the defendant in and to said streets, etc., of the city of Memphis be declared forfeited, and its occupancy thereof terminated. The case was removed from the state jurisdiction to this court by the defendant on petition filed July 7, 1902, and the defendant answered the bill. Subsequently, by leave of the court, the defendant withdrew its answer, and on February 16, 1905, interposed its demurrer to the bill, and the case is now heard upon the demurrer.

There are five causes of demurrer assigned, but for the purpose of this hearing they may properly be grouped under three heads: First, that the complainant had no power or authority to rent its streets to, or collect pole rental of, the defendant; second, that the charge sought to be collected as a rental is a tax, and the city ordinance is in violation of the Constitutions of Tennessee and of the United States; third, that the rental alleged to be due complainant, accruing between December 20, 1894, and June 4, 1896, is barred by the statute of limitations.

I shall consider the first, second, and third grounds of demurrer together. As above indicated, they present this one question: Has the complainant, the city of Memphis, authority to rent its streets to, or collect pole rental of, the defendant company? To put it differently, has the city of Memphis the right to charge the defendant company for the use of its streets for the erection and maintenance of its telegraph poles? The city, assuming that it had the right, on December 20, 1894, by its legislative council, adopted an ordinance which reads as follows:

"That any telegraph or postal telegraph company, or person, occupying the streets, alleys or public grounds of, or within the limits of the city of Memphis, with telegraph poles and wires shall, as a condition of further occupancy, pay to the city annually the sum of two dollars for each of said poles, such payment to begin from January 1, 1894, in respect of all such poles that were erected prior to that date; and from the date of erection as to such as have been erected since that date."

This ordinance was amended by said council on February 25, 1902, so as to provide that such companies should "pay to the city annually a rental in the sum of three dollars for each of said poles." It should be noted here that the amendment to the original ordinance increases the sum to be paid for each pole from \$2 to \$3, and inserts the word "rental" in the ordinance. Watkins' City Digest, pp. 39, 947. If the city had the right to charge for and collect this pole rental under its charter, the ordinance is valid, and the complainant might be entitled to a recovery in this case. It is stated in argument of counsel for both the complainant and defendant that the

defendant company entered the city of Memphis and began the erection of its poles in August, 1890, and hence the question presented must be decided under the law of the state of Tennessee and the ordinances of the city of Memphis as they were at that date, and had become at the time of filing this bill.

It is not controverted, but, on the other hand, it is conceded in argument by counsel for both parties, that the sovereign power to control the streets of the city of Memphis rested in the beginning with the Legislature of Tennessee. Assuming this as a starting point, let us proceed and determine, if we can, what authority the city of Memphis has over its streets, alleys, and public grounds.

In section 1 of an act entitled "An act to reduce the charter of Memphis, and the several acts amendatory thereof, into one act, and to revise the same" (chapter 26, p. 225, Acts Tenn. 1869-70), it is provided, among other things "that the city council may do all things as a natural person." Section 46 (page 235) of said act provided that the general council of the city of Memphis shall have power "to close up, transfer, or sell any street, alley or public easement, and shall have and exercise complete and perfect control over all the streets, squares and other property of the city, whether lying within or without the limits of the city." The act of 1869-70 enumerated all the rights, powers, and privileges and property rights belonging to the city of Memphis prior to the act of 1879. By section 1, c. 10, p. 13, of the Acts of 1879, the act of 1869-70, just quoted, was repealed, and section 4, c. 10, p. 14, Acts 1879, expressly provided that:

"The public buildings, squares, promenades, wharf, streets, alleys, parks and fire-engines * * * and all other property, real and personal, hitherto used by such corporation for municipal purposes are hereby transferred to the custody and control of the state to remain public property, as it has always been, for the uses to which said property has hitherto been applied."

So it appears that whatever authority the state of Tennessee, the sovereign, had delegated to the city of Memphis prior to the act of 1879, p. 13, c. 10, it was by that act withdrawn from said city, and the property taken back to the sovereign, "to remain public property as it has always been," but it was to be held by the state "for the uses to which said property has hitherto been applied." For reasons satisfactory to itself, the Legislature of Tennessee of 1879 passed an act transferring this same property which it had withdrawn from the city of Memphis by chapter 10 of said acts back to the board of fire and police commissioners of that city—using almost the identical language that was used in section 4, c. 10, p. 14 of said acts—and conferred upon the said board of commissioners of the city of Memphis substantially the same rights and powers and control over its streets, alleys, and public easements. See section 3, c. 11, p. 16, Acts Tenn. 1879. It appears from this legislation that the charter of the city of Memphis, under which it was operating at the time the defendant company entered within its limits and began the erection of its poles, as well as at the time the ordinance was adopted authorizing the collection of the pole rental sued for in this case, vested the city council or board of commis-

sioners with the power "to close up, transfer or sell any street, alley or public easement, and to have and exercise complete and perfect control over all the streets, squares and other property of the city, whether lying within or without the limits of the city," and "that the city council may do all other things as a natural person." This is very broad language—quite as much so as the language used in the charter of St. Louis, referred to in the case of *City of St. Louis v. Western Union Telegraph Company*, 149 U. S. 468, 13 Sup. Ct. 990, 37 L. Ed. 810. In that case it was held that the language used in the charter of St. Louis was broad enough to vest the city with authority to enact an ordinance very similar to the one in the case at bar. It is said here, however, in argument, that the power granted to the city of Memphis by this act of 1879 is very limited. Generally speaking, that may be true, yet it appears that chapter 11 of the act of 1879 vests the board of commissioners of the city of Memphis with the same or with equal powers that the general council possessed prior to 1879 touching the control and management of its streets, alleys, and public easements. The mere fact that the charter of the city of St. Louis is provided for in the Constitution of the state of Missouri does not confer upon that city any greater authority over its streets and alleys than is conferred by a charter of a city granted by a state Legislature, if the latter charter, in conferring authority to such city over its streets, alleys, and public easements, uses the same, or substantially the same, language for that purpose as is used in the charter of a city provided for in the Constitution of a state. "Unless, therefore" (using the words of Justice Brewer in the case of *City of St. Louis, supra*), "the telegraph company had some superior right which excludes it from subjection to this control on the part of the city over its streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of its streets was within the grant of power to regulate the use." In the case at bar, for the reasons pointed out in the case of *City of St. Louis v. Western Union Telegraph Company*, the defendant company here gets no such rights under the act of Congress of 1866 from the general government. 148 U. S. 101, 13 Sup. Ct. 488, 37 L. Ed. 380.

Has the Legislature of Tennessee granted such a right to the defendant telegraph company? If it has, the demurrer must be sustained, and the bill dismissed. The Legislature of Tennessee (1849-50) enacted the original law granting rights of way to telegraph companies. Chapter 111, p. 303, Acts Tenn. 1849-50. This law remained practically unchanged until the adoption of the Code of Tennessee (1858). Section 1316 and subsequent sections, title 8, c. 9, of the said Code of Tennessee, provides, in substance, that any person or company may construct a telegraph line along the public highways or streets of this state, or across the rivers, or over any lands belonging to the state, free of charge, and over the lands of private individuals, as therein provided, and may erect the necessary fixtures therefor. Said fixtures not to be constructed

so as to obstruct any highway, street, or navigable stream; nor shall they be set up upon the lands of an individual, unless by contract, without paying such damages as the party sustained. In consideration of the right of way over the public property so conceded, every telegraph company, in case of war, insurrection, or civil commotion of any kind, or for the arrest of criminals, was to give immediate dispatch, at the usual rate of charge, to any message connected therewith of any officer of this state or of the United States. It was made a misdemeanor for any employé of such company to refuse to give immediate dispatch to such messages. These sections of the Code were repealed by the Legislature of 1885, and the following statute enacted:

"Any person or corporation organized by virtue of the laws of this state, or any other state of the United States, or by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence, the equivalent thereof, which may hereafter be invented or discovered, may construct, operate, and maintain such telegraph, telephone, or other lines necessary for the speedy transmission of intelligence, along and over the public highways and streets of the cities and towns of this state, or across and under the waters, and over any lands and public works belonging to this state, and on and over the lands of private individuals, and upon, along and parallel to any of the railroads or turnpikes of this state, and on and over the bridges, trestles or structures of said railroads: provided, that the ordinary use of such public highways, streets, works, railroads, bridges, trestles or structures and turnpikes be not thereby obstructed, or the navigation of said waters impeded, and that just damages shall be paid to the owners of such lands, railroads and turnpikes, by reason of the occupation of such lands, railroads and turnpikes, by said telegraph or telephone corporations. * * *

"Sec. 5. In consideration of the right of way over the public property herein conceded, every telegraph or telephone corporation shall, in the case of war, insurrection, or civil commotion of any kind, and for the arrest of criminals, give immediate dispatch at the usual rates of charge, to any message connected therewith of any officer of the state, or of the United States."

Acts Tenn. 1885, p. 120, c. 66.

It is conceded by counsel for complainant in argument that the defendant began its business and erected its poles within the city limits of Memphis since the passage of the act last above quoted. Here, by an act of the Legislature, the state of Tennessee provided by law that the defendant corporation (it belonging to the class named in the act) might construct, operate, and maintain its telegraph poles along and over the public highways and the streets and alleys of the cities and towns of Tennessee, provided that the ordinary use of such highways and streets be not thereby obstructed. The consideration to the state for the right of way granted to such companies over public property is fixed by the act itself, and that is the immediate dispatch of messages of state or United States officials, at the usual charge, "in case of war, insurrection or civil commotion of any kind, and for the arrest of criminals." The act also provides "that just damages shall be paid to the owners of such lands, railroads and turnpikes by reason of such occupation thereof as provided by this act. This provision has no reference to public property." It is insisted by the defendant company that it has the right, under this act of 1885, to erect

and maintain its poles in the streets and alleys of Memphis in accordance with the terms of said act, and that the city of Memphis has no authority or right to levy or collect any charge against it therefor, either as a tax or as a rental. If the streets and alleys of Memphis are public property, over which the state of Tennessee, as a sovereign, has the right of absolute control, then I think the contention of defendant is correct. And this must be true. The title to the territory comprising the streets and alleys of the city of Memphis was originally vested in the state. We have seen that such title and authority as the city had in and over its streets and alleys prior to the Act of 1879, p. 13, c. 10, was derived from the state, and that by that act, the state divested the city of Memphis of that title and authority, and took it back to itself. We have also seen, by the Act of 1879, p. 15, c. 11, that the state again transferred to the city of Memphis this property, and granted it certain authority over its streets and alleys. Certainly, if the state had the power and right to take this title and authority from the city to itself, and again return it to the city, the state would have the right to vest the title thereto in whomsoever it pleased, or to retain it permanently; and it would follow that the state would have the right to control the streets and alleys of Memphis as the Legislature may desire, not inconsistent with the rights of abutting owners. My opinion is, therefore, that the streets and alleys of the city of Memphis are such public property, and the state, for a consideration satisfactory to it, has conceded by law to the defendant company the right to erect and maintain its poles upon the streets and alleys of the city of Memphis, and that any ordinance of the city of Memphis repugnant to this general law of the state is invalid and void. To hold that the complainant has the right to rent to telegraph and telephone companies space in the streets and alleys of Memphis for the erection of one or a dozen of their poles is to hold, in principle, that it has the right to rent space for any number of poles to all of such companies, until, as Justice Brewer says in the case of *City of St. Louis v. Western Union Telegraph Company*, "by a sufficient multiplication of telegraph and telephone companies, the whole space of the highways might be occupied, and that which was designed for general use for the purpose of travel entirely appropriated to the separate use of companies and for the transportation of messages." The case at bar differs materially from the case of *City of St. Louis v. Western Union Telegraph Company*. There the state of Missouri had not granted the right to the defendant company to erect its poles in the streets of the cities of Missouri, and the city was not hampered by a state statute, nor, indeed, could it be, under the conditions surrounding the charter of that city, and its rights and powers under the charter. In this case the corporation of Memphis is peculiarly the creature of the state Legislature, and has no power not granted by the Legislature, and can enact no ordinance which is not authorized by the Legislature, or that is contrary to any general law of the state. Indeed, section 4, c. 11, p. 19 of the Acts of 1879, under which the municipality of

Memphis was organized, provides "that the legislative council shall be vested with the power, and charged with the duty of making all laws or ordinances not inconsistent with the general laws, for every object, matter and subject within the local governments instituted by this act."

The case of *Meridian v. Telegraph Company*, cited by counsel for defendant, is very similar to the case at bar. 72 Miss. 910, 18 South. 84. There, as here, the power of a municipality over its streets is subject to legislative control. There, as here, the state had enacted a statute, substantially the same as in Tennessee, granting rights of way to telegraph and telephone companies. There is, however, this difference: The Mississippi statute expressly grants rights of way to telegraph and telephone companies without compensation. The Tennessee statute originally used the words "free of charge," but omitted them in the act of 1885. It is insisted by counsel for complainant that this omission is significant, and that the Legislature meant thereby that telegraph and telephone companies could be required to compensate cities and towns for the use of their streets by such companies. After a careful reading of the old statute and the new, I cannot agree with this contention. The words "free of charge" are without any significance in the old act, because in that act the state required the companies to render certain services for the right of way over public property. This was itself a charge for the use of public property. And that act would have been invalid, had the Legislature undertaken to grant to such companies rights of way over private property free of charge. Hence my conclusion is that the words "free of charge" were omitted from the act of 1885 because they were meaningless in the connection in which they were used in the old act.

I hold that the ordinance of the city of Memphis under which this suit was brought is void. In this view of the case, it is unnecessary to consider the other grounds of demurrer.

The result is that the demurrer will be sustained, and the bill dismissed.

IN RE KNICKERBOCKER STEAMBOAT CO.

THE GENERAL SLOCUM.

(District Court, S. D. New York. June 13, 1905.)

1. ADMIRALTY—EXCEPTIONS TO INTERROGATORIES.

Exceptions to the answers to interrogatories propounded in the answer in a suit in admiralty for limitation of liability considered.

2. SAME—REFUSAL TO ANSWER INTERROGATORIES—CLAIM OF PRIVILEGE.

It is not necessary that a party to a suit in admiralty should be personally before the court in order to avail himself of the privilege given him by admiralty rules 31 and 32 to refuse to make answer to interrogatories which will expose him to any prosecution or punishment for crime, or for any penalty or any forfeiture of his property for any penal offense; but he is required to state specifically that his answers would have that effect, and a statement in refusing to make answer that the interrogatories were framed in support of allegations, which, if true, would or might tend to expose him to a penalty or forfeiture, is insufficient as a claim of privilege.

3. SAME--VERIFICATION OF ANSWERS.

The verification to answers to interrogatories in a suit in admiralty, while not strictly in the form used in such pleadings, held sufficient.

In Admiralty. On exceptions to answers to interrogatories.

Martin A. Ryan, for petitioner.

Coleman & Coleman and A. Gordon Murray, for exceptant.

ADAMS, District Judge. These are exceptions filed by the claimant, Louis Schiettinger, administrator of the estate of Dora Schiettinger and Freda Schiettinger, to the answers of the Knickerbocker Steamboat Company to interrogatories propounded by the present exceptant and annexed to his answer to the libel of the steamboat company seeking limitation of liability. Certain of the interrogatories were allowed and certain of them disallowed in an opinion herein filed on the 7th day of April, 1905. 136 Fed. 956. And see *In re Smith* (D. C.) 112 Fed. 509; *In re Shera* (D. C.) 114 Fed. 207.

The first exception is as follows:

"First: He excepts to the answer to the first interrogatory because the said answer does not state that a copy of the By-laws was not in existence and in possession on the 15th day of June 1904, the day of the loss of the Steamboat, 'General Slocum.'"

The answer was as follows:

"First:—The officers are Frank A. Barnaby, President, Frank G. Dexter, Treasurer, and James K. Atkinson, Secretary. The Directors are:—Frank A. Barnaby, James K. Atkinson, Frank G. Dexter, Robert K. Story, C. De Lacy Evans, Floyd S. Korbin and Charles E. Hill.

This Company was started a good many years ago and the present officers and directors have no possession (nor never did) of the original books containing the By-laws and are not now in possession of a copy of the By-laws."

The exceptant's contention is that the answer should state that there were no By-laws in existence on June 15, 1904, if that is what is meant by the answer.

The answer apparently covers the day in question. The officers could not be expected to give information concerning the By-laws which they did not possess.

The exception is overruled.

The second exception is as follows:

"Second: He excepts to so much of the answer to the second interrogatory as states 'as the officers and crew of the vessel were to be governed by the Revised Statutes of the United States and the rules and regulations of the Board of Supervising Inspectors, and any other statutes, laws and rules and regulations applicable thereto' and moves that the same be stricken out on the ground that the same is not responsive to the question and shows affirmatively that there was no rule or requirement to that effect, and the same is, at most, a conclusion, not warranted by the facts."

The answer was as follows:

"Second:—Do not know of own personal knowledge of any officer being on board during the year 1904.

Annexed hereto is copy of certificate of Inspection.

No rules or regulations were promulgated by the Company as the officers and crew of the vessel were to be governed by the Revised Statutes of the United States and the Rules and Regulations of the Board of Supervising

Inspectors, and any other statutes, laws and rules and regulations applicable thereto.

The 'General Slocum' was about 250 feet long and about 37 ft. 6 inches in beam. It was of wooden construction, three decks. It had 2 boilers, 2 smoke-stacks, side wheels, steam steering gear and a walking beam, low pressure engine. Her given tonnage was 1284 tons."

The petitioner's contention is that the words excepted to are responsive because in the absence of rules and regulations issued by the steamboat company, the rules, regulations and Revised Statutes of the United States must govern the conduct and action of the officers and crew, and therefore they are the implied rules and regulations of the company.

The interrogatory propounded by the answer, called for the rules and regulations promulgated by the steamboat company. The statement referring to the rules and regulations of the United States is not responsive.

The exception is sustained.

The third exception is as follows:

"Third: He excepts to the refusal to answer the third, fourth, seventh and eighth interrogatories because the same is based on reasons for which there is no authority of law, in as much as the same does not claim that the answers would expose the petitioner to any prosecution, punishment or forfeiture as is provided for by law, but simply 'that the same was framed *in support of allegations* in the answer *which, if true*, would or might tend to expose the petitioner to a penalty or a forfeiture' and for the reasons stated, the same is wholly insufficient."

The answer was as follows:

"Third:—The petitioner refuses to answer the Third, Fourth, Seventh and Eighth Interrogatories on the ground that the same are framed in support of allegations in the answer which if true, would or might tend to expose the petitioner to a penalty or forfeiture."

The petitioner urges in support of the answers, that they were framed in conformity with the practice established in the case of *La Bourgogne* (D. C.) 104 Fed. 823, where similar language used by the petitioner here was employed by the petitioner there. The point now in controversy does not seem to have been presented there but in entering the order deciding the exceptions, it was provided by the court that the petitioner might decline to answer the interrogatories if it should elect to claim the privilege of not answering on the ground that it would be exposed to penalties and forfeitures. In the opinion, *supra*, it was said (page 825):

"The object of most of the interrogatories to which objection is made, is to prove that the petitioner, or its responsible officers or superintendents, were in privy with the alleged negligence and violations of law, or in the language of section 5344, connived at such violations and negligence, by which the loss and injury arose, in consequence of which the petitioner is disabled from claiming the limitation of liability sought in this proceeding. The purpose of the interrogatories is no doubt material and vital. If established, it will defeat the petition. But the evidence to sustain the defense cannot be forced from the petitioner itself, as against its claim of privilege, so far as relates to the subject-matters that are embraced in the penal statutes above referred to."

The merits of the question were there disposed of prior to the party seeking the privilege putting himself in strictly the proper

attitude, but before he was allowed to avail himself of the decision, he was compelled to do what he doubtless would have been required to do in the beginning, if his right had been contested on such ground.

The point now in controversy was substantially covered by the entire decision, to the effect that a party desiring to resort to his constitutional privilege must assert it in advance of being permitted to do so.

My attention has been called by the exceptant to the recent case in the New York Supreme Court of *People v. Davy*, 94 N. Y. Supp. 1037, where it was said by Justice McLaughlin that a party can not claim his constitutional privilege until he is sworn so that his claim shall be made under the sanction of an oath. That language was applied to a case of a person who was before the Grand Jury and in conformity with the principle recognized in U. S. Supreme Court Admiralty Rules 31 and 32, applicable to this case, where it is provided that a person in answering interrogatories may object to answer such as would expose him to any prosecution or punishment for crime, or to any penalty of forfeiture of his property for any penal offense. In a case of this kind it is not necessary that a party should be personally before the court in order to avail himself of the privilege. The exceptant contends that the petitioner's answers are insufficient as they do not expressly invoke the privilege, but state that the interrogatories were framed in support of allegations in the answer which if true would or might tend to expose the petitioner to a penalty or forfeiture. It seems that if the answers would have the effect contended for, the petitioner should expressly put itself on record to that effect. Such is the ground for the privilege. Incriminating matter may appear but a party may not desire to resort to the privilege of not answering with respect thereto. If he does, he must say so in unmistakable language and give the reasons for shielding himself.

The exception is sustained.

The fourth exception is practically the same as the preceding and requires no other discussion.

The fifth exception is as follows:

"Fifth: He excepts to the verification of the said answers in that the same is insufficient and does not contain the oath required by law and the practice of this Court, in such cases made and provided, it not appearing that the said answers contain the truth, the whole truth and nothing but the truth."

The verification, duly sworn to, was as follows:

"Southern District of New York: ss:

Frank A. Barnaby being duly sworn deposes and says that he is the President of the Knickerbocker Steamboat Company; that he has read the foregoing answers to the interrogatories and that the same are true of his own knowledge, except as to the matters alleged on information and belief and as to those matters he believes them to be true. That the reason this verification is made by deponent is because the Knickerbocker Steamboat Company is a corporation.

Frank A. Barnaby."

This is perhaps not in strict accordance with the form of verification used in admiralty pleadings but it contains all the necessary averments and should be regarded as sufficient.

Exception overruled.

UNION TRUST CO. OF MARYLAND v. CARTER et al.

(Circuit Court, W. D. Virginia. April 14, 1905.)

1. CORPORATIONS—POWERS OF DIRECTORS—VALIDITY OF CHARTER PROVISIONS UNDER VIRGINIA STATUTE.

Under the Virginia Corporation Act of May 21, 1903 (Acts Ex. Sess. 1902-03-04, p. 437, c. 270), which authorizes the stockholders of a corporation formed thereunder to insert in its charter any provision which they deem best for the regulation and conduct of its business, and to define the powers of the corporation, its stockholders and directors, a provision in the charter of a corporation (also inserted in the contracts of subscription and referred to in the certificates of stock) that until a certain date the stockholders should have no right to vote or to participate in the control or management of the corporation or its affairs, but such control and management should be vested solely in the directors therein named, who should have power to do any act which the stockholders might do in the absence of such provision, was valid, and not in conflict with further provisions of the act relating to meetings of stockholders, their powers, etc., which apply only to corporations whose charters do not otherwise provide; and under such provision the directors had power to sell the property of the corporation where that was the principal object of the incorporators in forming the corporation, and the corporation itself was financially unable to develop, or even to hold, the property, which was largely incumbered.

2. SAME—CHARTER LIMITATION OF POWERS OF STOCKHOLDERS.

Under such charter provision, a meeting of the stockholders held before the time limited had expired, and the election thereof of new officers and directors, was in violation of the charter and void.

3. SAME—SALE OF PROPERTY TO DIRECTOR—VALIDITY.

While the sale of the property of a corporation to one of its directors will be closely scrutinized by a court when objected to by a stockholder, it will be upheld where it clearly appears that it was fairly made, and for an adequate price, and was for the best interest of the corporation and its stockholders.

In Equity. On motion for preliminary injunction and for the appointment of receivers.

William H. White, Fielder C. Slingluff, Charles H. Tuttle, Bradley W. Palmer, and Julien T. Davies, for complainant.

John D. Horsley, Mark W. Potter, J. Norman Powell, Edgar H. Gans, James Byrne, and Elihu Root, for defendant Carter.

John D. Horsley and J. S. Lemmon, for Clinchfield Corporation.

GOFF, Circuit Judge. The bill in this cause was filed by the Union Trust Company of Maryland, a corporation organized under the laws of the state of Maryland, a citizen of that state, against George L. Carter, a citizen of the state of Virginia, and a resident of the Western District thereof, and Clinchfield Corporation, a company organized under the laws of the state of Virginia, doing business in said Western District. The complainant, suing as a stockholder of the defendant Clinchfield Corporation, asks the court to set aside a contract alleged to have been made on the 19th day of December, 1904, between that corporation and the defendant Carter, by which, in consideration of the sum of \$2,600,000 cash, payable on the 1st day of January, 1906, with a discount at the rate of 6 per cent. if paid earlier, or, in the alternative, for the expenditure of

\$500,000 upon the properties of the Clinchfield Corporation, and the giving to it of a certain issue of bonds provided for in the contract, the Clinchfield Corporation sold to the said Carter all of the property and assets owned by it. This contract was authorized and executed by the board of directors of the Clinchfield Corporation, of which board Carter was a member. He, after presenting his proposition to purchase, withdrew from the meeting of the directors, and they then favorably considered his offer, and sold all the properties owned by the Clinchfield Corporation to him. The board of directors consisted of seven members, the other six voting unanimously in favor of making said sale.

The properties of the Clinchfield Corporation so sold consisted of all the stock of the Crane's Nest Coal & Coke Company, a corporation of Virginia, owning a large amount of land in fee simple, as well as the mineral rights connected with other lands. Carter was to take the properties subject to different mortgages on various portions thereof, amounting to \$550,000; also all the stock of the South & Western Railway Company, a consolidated corporation of the states of Virginia, Tennessee, and Kentucky, the holdings of which consisted of about 64 miles of railroad in operation, of approximately 80 miles of a partially graded railway bed, and of certain rights of way, which property was to be taken by Carter, subject to a mortgage of \$600,000; and all the stock of the South & Western Railway Company, a corporation of North Carolina, whose only property was a franchise; and certain terminal properties situated at Southport, in the state of North Carolina.

In order to understand the questions involved, and to better appreciate the decision that will be given concerning them, a further description of the properties of the Clinchfield Corporation, and of the circumstances under which that company became the owner thereof, is necessary. On March 6, 1902, Carter, for the purpose of forming a syndicate which would promote the enterprise, gave to the Union Trust Company of Maryland an option of purchasing for \$2,368,700 all of the capital stock of certain coal and railroad companies. Payment was to be made by the purchaser assuming incumbrances on the property to the extent of \$1,165,000 and by paying \$1,203,700 to Carter in cash. After the giving of this option, and before the organization of the Clinchfield Corporation, the coal properties embraced in the option were, with the assent of the parties in interest, consolidated under the name of the Crane's Nest Coal & Coke Company, and the railway properties (except the South & Western Railway of North Carolina) were consolidated under the name of the South & Western Railway. After Carter gave the option mentioned, he, with certain other persons, entered into a syndicate agreement with said Union Trust Company, by which they subscribed \$2,368,700 to be paid to said company for the purpose of acquiring the properties described therein, it being understood that the trust company was to act as syndicate manager. It may be well to note here that the property described in the option differed from the property which the Clinchfield Corporation sold to Carter in this respect: Between the date of the

giving of the option and the formation of the Clinchfield Corporation Carter built 26 miles of railroad, and acquired certain terminal property at Southport, N. C., and when the corporation was formed he conveyed said railroad property to the South & Western Railway and the Southport property to the Clinchfield Corporation. It appears that from the time the syndicate was formed until in June, 1904, many attempts to sell the properties mentioned were made, but without success; that negotiations were had with the Seaboard Air Line Railway, and that at one time strong hopes existed on the part of the syndicate that said company would purchase the properties; that efforts were made to sell them to the Southern Railway Company; that thereafter the properties at different times and places had been offered for sale, but that the syndicate had been unable to find a purchaser; that in the meantime the complainant, as syndicate manager, becoming involved, was placed in the hands of a receiver, the result being that some of its subscribers lost confidence in its ability to manage; that a new syndicate was suggested by those in interest, to which the properties should be conveyed, in the hopes that an advantageous sale might then be effected; that a consultation by Carter and those representing him with the syndicate management and those concerned with it took place, with the result that it was agreed that, instead of a new syndicate, a corporation should be formed with additional capital, and that then a further and united effort would be made to either sell or develop the properties. In furtherance of this understanding, the Clinchfield Corporation was incorporated on June 27, 1904, with a maximum authorized capital stock of 30,000 shares of the par value of \$100 each. The obligations of each member of the syndicate under the syndicate agreement were exchanged for pro rata subscriptions to the capital stock of said corporation, of which 23,500 shares were issued. To this corporation the properties mentioned formerly held by Carter and then by the Union Trust Company syndicate were conveyed.

The Clinchfield Corporation was organized under the laws of the state of Virginia, the charter thereof having been prepared under the direction of Carter and the subscribers to said syndicate. Among other provisions of the charter is this:

"The subscribers to and holders of the stock of the company, or any of them, * * * shall not, until January the 1st, 1910, be permitted to cast any vote, or participate in any way in the control and management of said corporation and its business, but the entire control and management of said corporation shall be until that date vested in the directors thereof, who shall be the parties whose names are signed thereto."

It was further provided in the charter that the directors "shall have the power to make by-laws, rules and regulations for the government of the corporation and management of its affairs, and to do any and all acts which the stockholders might do, were not their power in this regard vested in the directors." Each share of stock issued by said corporation contained therein this clause:

"By provision of the charter of the Clinchfield Corporation, the holders of the stock thereof have no right to vote in the management and control of its affairs until January the 1st, 1910, except through the action of the directors, as indicated in said provision."

Every subscriber to the stock of the Clinchfield Corporation, including the complainant, signed an agreement which contained these words:

"In accordance with the provisions of the charter authorizing the affairs of said corporation to be controlled and managed by the incorporators and their successors to be chosen by them, until January 1st, 1910, we respectively waive any right we may have to insist upon any organization, annual or other meetings of the stockholders until that day."

The charter also provides that:

"The said directors may at any time obtain the views of the stockholders upon any question, and for that reason may call a meeting of the said stockholders by mailing a notice of the time and place thereof to each person whose name appears on the books of the company as a stockholder, at his last known post-office address, at least ten days before the date of such meeting, which notice shall state the questions upon which it is desired to obtain the views of said stockholders. But the action of said stockholders' meeting shall be advisory merely, and the said directors shall not be bound to approve the same."

Of the stock of the Clinchfield Corporation, 1,300 shares were subscribed for by the Union Trust Company of Maryland, 7,360 shares by George L. Carter, the remaining shares having been taken either by other subscribers of the syndicate or by subsequent applicants. The incorporators and first board of directors were James Clark, Miles White, Jr., J. Southgate Lemmon, A. A. Phlegar, and George L. Carter. At a meeting of the directors on November 10, 1904, their number, under the terms of the charter, was increased from five to seven, Henry H. Kingston and F. J. Lisman then being elected members thereof.

In complainant's bill, it is alleged that on the 16th day of November, 1904, the Union Trust Company of Maryland was the owner of 1,587 shares of the capital stock of the Clinchfield Corporation; that the total number of shares of said corporation issued and outstanding was 23,500; that complainant then owned said shares absolutely in its own right, unincumbered, and unrestricted by any options, pledges, contracts, or agreements of sale; that the property of the Clinchfield Corporation and of its subsidiary corporations was of great value, and that when fully developed it would have an increased value far in excess of the amount of money necessary to develop it; that because of the present values of the properties, and of their great prospective value, that stock of the Clinchfield Corporation was in demand, and was worth more than par to persons who were able and willing to so develop it; that such value arose not only from the present intrinsic worth of the properties, but also because of their strategic position, and was inseparable from the right and power to control the disposition of said properties as an entirety; that the board of directors of said corporation, as it existed prior to the sale to Carter, claimed that its charter divested the stockholders of power to vote their stock, or to change said board, and conferred upon the directors the right to sell all the properties of that corporation without the concurrence of its stockholders, which claim complainant alleges is unwarranted and unfounded in law and in fact; that such powers

so claimed by the directors are contrary to and inconsistent with the statutes of the state of Virginia, and that, if the provisions of said certificate of incorporation have any force and effect whatever, it was that of constituting the board of directors trustees of all the property of the Clinchfield Corporation for the benefit of the stockholders thereof, and that thereby such board assumed extraordinary responsibilities beyond those usually attaching to the directors of corporations, which placed them in a purely fiduciary relation to the stockholders with respect to the property thereof; and that therefore the act of the board in attempting to sell the property of said corporation to one of their own number and in delivering the possession of said properties to Carter was in violation of their duties as directors and as trustees, and voidable at the election of the stockholders of said corporation.

The complainant further shows that said Carter did not, during the negotiations leading up to said contract, or at any time prior to the delivery of the properties to him, disclose to the board of directors all the information which he possessed concerning their great value; that he, knowing the real value of said properties to be greater than the price offered by him for them, entered into a scheme with other parties for the purpose of acquiring the ownership and control of the same, having the intent of combining them with other property, with the object of mining and conveying to market the coal contained therein, thereby making a profit at the expense of the other stockholders of the corporation; that Carter under said contract has obtained possession of the properties of the Clinchfield Corporation at a price far below what they are really worth, and that he, as a director and trustee of the stockholders, had no right to buy said properties for himself and gain any profit thereby, but that the stockholders, as their real owners, should be permitted to retain them and reap the profit themselves; that Carter at the time of said sale was president of the South & Western Railway Company and of the Crane's Nest Coal & Coke Company, and was vice president and general manager of the Clinchfield Corporation; that he had been interested in the properties owned by said companies for many years, and that a large proportion of the first mortgage bonds issued by those companies were held either by him personally or by his friends and business associates; that he possessed much fuller information concerning the values, present and prospective, of the properties of said companies, than did the other directors; that a large majority of the stockholders of the Clinchfield Corporation purchased their stock having reason to believe that a great profit would be realized therefrom, and that no facts or circumstances had come to their knowledge to change this belief, and that the sale to Carter, if allowed to stand, would result in the stockholders obtaining only the money invested by them with the interest thereon, they thereby being deprived of the profits which they had intended to secure to themselves.

The complainant further alleges that upon the execution and delivery of said contract to Carter it protested against the same, and served upon the directors of said Clinchfield Corporation on or

about the 24th day of December, 1904, certain resolutions, which had, on the 23d day of December, 1904, been duly passed by its executive committee, as follows:

"Whereas, there has been submitted to this committee by the directors of the Clinchfield Corporation what purports to be a contract of sale under date of December 19, 1904, from said corporation to George L. Carter, of the stock of the South & Western Railway Company and the Crane's Nest Coal & Coke Company; and whereas, said alleged sale is, in the judgment of this committee, an improvident and improper one: Resolved, that this committee, on behalf of the company, protests against the same; further resolved, that a copy of this resolution be at once sent to the directors of said corporation through its secretary."

Complainant then shows that the president of said trust company endeavored to associate with himself other stockholders of the Clinchfield Corporation, having the object in view of preventing said contract with Carter from being carried into execution, and that in furtherance of said object certain contracts were prepared and signed by some of the stockholders, whereby options upon their stock were given to said trust company, which then represented H. P. Hollins & Co., a firm of bankers doing business in New York, who agreed to act with said trust company in preventing the consummation of the Carter contract; that it became impracticable to carry out the plan so formed, and that then the complainant was relieved from any and all obligations to sell its stock to said firm, and that prior to the filing of its bill and at the time it was filed the complainant held its stock in the Clinchfield Corporation in its own right, unrestrained by any option, pledge, or contract of sale whatever; that the efforts of complainant to protect its interest in the stock of the Clinchfield Corporation resulted in obtaining the financial assistance of persons who were informed as to the worth of said properties, and who believed that the values thereof were in excess of the sum paid therefor by Carter; that, complainant being financially unable to purchase and hold the properties for the protection of its original holdings, the stockholders of the Clinchfield Corporation were, by the intervention of complainant's president, brought into negotiations with said H. B. Hollins & Co., which firm thereafter agreed to purchase 10,398 shares of the stock of said corporation, which shares, together with those owned by complainant and those of other stockholders acting in harmony with it, constituted a body of stockholders owning together 14,364 shares of the stock of the Clinchfield Corporation, who have renounced and avoided said contract, and who are seeking by means of this suit to protect their said interests; that when the certificates for the stock so purchased by H. B. Hollins & Co. were delivered proxies were obtained from all the former owners and holders of the same, except about 1,000 shares, which entitled the purchaser to vote on said stock at a stockholders' meeting to be held on the 23d day of January, 1905, and that each and all of the stockholders so selling their stock did so with the understanding that said proxies were to be voted at that meeting for a renunciation and avoidance of the Carter contract. Complainant also alleges that on or about the 9th day of January, 1905, and prior to

the delivery of the properties to Carter, the holders of a majority of the stock of the Clinchfield Corporation, acting through complainant, caused to be served upon the board of directors of that company a notice of the renunciation and avoidance of said contract, and shows that after the service of the notice of disaffirmance the Clinchfield Corporation, acting by its board of directors, in attempting to confirm said contract, turned over and delivered to Carter all of its property, and received in exchange therefor from him about the sum of \$2,448,333.33 in cash; that notice of the attempted completion of the sale of said properties and the delivery thereof to Carter was first given to complainant on the evening of the 11th day of January, 1905, after the preparation of the bill of complaint herein, and that prior to that time complainant had exhausted all means at its command to inform itself as to the said action of the directors of the Clinchfield Corporation relating to said contract with Carter.

Complainant alleged that a meeting of the stockholders of the Clinchfield Corporation had been called by the stockholders themselves, under the provisions of the Virginia statute in such case made and provided, to be held in Bristol, Va., on January 23, 1905, to take action on the approval or disapproval of said sale, and for the transaction of such other business as might properly come before it.

Complainant also shows that on or about January 12, 1905, a notice was issued to the stockholders of Clinchfield Corporation by James Clark, as president, and J. S. Lemmon, as secretary, as follows:

"January 12, 1905. The stockholders of Clinchfield Corporation are informed that Mr. George L. Carter, acting under his contract of December 19, 1904, referred to in our circular of December 24, 1904, has elected to pay for the property in cash, and has done so in full. Mr. Carter has, in accordance with the contracts, received possession of the properties."

Complainant further alleges that said trust company, on or about the 29th day of December, 1904, made an offer to the Clinchfield Corporation to purchase all of its properties for the sum of \$2,600,000 in cash, to be paid by said trust company at any time prior to January 1, 1907, the said purchase price to bear interest if not paid prior to January 1, 1906; that said offer was made in the interest of said trust company as a holder of a large amount of stock in the Clinchfield Corporation, and in the interest of other stockholders whom said trust company had at that time joined with itself in the effort to prevent the consummation of the Carter contract; that the answer of the Clinchfield Corporation to said offer in effect was that its properties had already been sold to Carter.

The prayer of the bill is that the contract purporting to be made between the Clinchfield Corporation and George L. Carter, dated December 19, 1904, may be annulled and set aside; that the defendant Clinchfield Corporation be adjudged to return to George L. Carter all moneys, assignments, contracts, and other things of value received by it as consideration for said contract; that the writ of injunction issue, addressed to said Clinchfield Corporation, its offi-

cers and agents, commanding them, and each of them, to refrain from delivering to the defendant Carter any of the property of the Clinchfield Corporation under or by color of authority of said contract, and also addressed to said Carter, and every person claiming by, through, or under him, commanding him and them to refrain from receiving or taking from said Clinchfield Corporation any of its property under or by color of said contract; that a receiver be appointed during the pendency of this action of all the property, real and personal, of the Clinchfield Corporation, such property to be held under the protection of this court, with the power and authority to said receiver to take possession of the stocks of said subsidiary corporations, and cause the same to be transferred to his name as receiver, and to vote thereon with all other power and authority of stockholders, and with the usual powers and duties of a receiver in such cases.

On consideration of the original bill in connection with the exhibits and affidavits filed therewith, the court, upon the 13th day of January, 1905, directed that a restraining order issue; that William F. Donovan and George Blakistone be appointed receivers of each and all of the shares of the South & Western Railway Company and of the Crane's Nest Coal & Coke Company; and it further ordered that the defendants Carter and Clinchfield Corporation show cause on the 30th day of January, 1905, why the writ of injunction should not issue as prayed for in the bill of complaint.

The answers of the Clinchfield Corporation and of George L. Carter were duly filed, together with a large number of affidavits tendered by the complainant and by the defendants. The argument of counsel was heard upon the order to show cause why an injunction should not issue. In connection therewith, the answers mentioned were considered by the court as affidavits, as was the amended and supplemental bill then tendered, which was filed and process ordered to issue thereon.

If, as the defendants claim, the contract between Carter and the Clinchfield Corporation was a fair one, honestly entered into; if Carter, as a director, could legally purchase the property from the board of which he was a member; if the corporation received for its property an adequate consideration; and if the directors, under the circumstances and the law applicable thereto, had the power to sell all of the property of the Clinchfield Corporation—then it will follow that the injunction should be denied, the restraining order be dissolved, and the receivers discharged. It seems that Carter, for a number of years prior to the formation of the syndicate mentioned, had been the owner of the properties in controversy, and that, he being financially unable to hold and develop them himself, sought the assistance of the Union Trust Company of Maryland in an effort to sell or develop them. From March 6, 1902, when his contract with the Union Trust Company was entered into, to June, 1904, repeated efforts had been made to sell the property—a sale of the same having been the main desire of all the parties—but all of such efforts had proven failures. The trust company, in its endeavor to manage the syndicate, had itself

become involved financially, and thereby the burdens of those interested in the property were the heavier because of their connection with that company. The subscribers to the stock of the Clinchfield Corporation, mindful of their recent failure in connection with the trust company syndicate, and desiring to profit, if possible, by that unfortunate experience, unanimously agreed that the charter of that company should contain certain provisions relating to the conduct of its business, the validity of which has been questioned by counsel for complainant; but still, nevertheless, I think that they were authorized by the law, and certainly they were justified by the circumstances then existing. The stockholders had all agreed that they should have no right to vote in the management and control of the affairs of the Clinchfield Corporation until January 1, 1910, except through the action of their directors, who were authorized to do any and all acts that the stockholders might do, were not their powers in that regard vested in the directors. "The Virginia statute under which the charter was obtained authorized the stockholders to insert any provision they might deem best for the regulation of the business and the conduct of the affairs of the company, and it also permitted them to insert any agreement they had made defining and regulating the powers of the corporation, as also of the directors and stockholders, provided such agreement was not inconsistent with the requirements of existing laws. The stockholders, by this grant of plenary power to the directors, bound themselves in advance to an affirmance of the acts of the directors; the intention being that the acts of the directors should bind the stockholders the same as if each stockholder had been present at the meeting of the directors and had voted as they did. The stockholders, in order to make this point clear beyond question, all of them, including the complainant, after the incorporation of the company, signed an agreement, the purport of which was to waive any right that they might have to insist upon an organization or to hold an annual or any other meeting until January 1, 1910.

The provisions of the charter referred to are not, in my opinion, in conflict with the legislation mentioned, entitled "An act concerning corporations," which has been in force in Virginia since May 21, 1903. I conclude that section 7, c. 5, p. 457, of that act (Acts Ex. Sess. 1902-04, p. 437, c. 270), which provides for annual meetings of the stockholders, and for meetings by them at any time upon the call of those who hold at least one-tenth of the stock, is intended to apply to those companies in whose charters there is no agreement to the contrary; and I think that section 10 of said chapter means that the board of directors shall be under the regulation of the stockholders if no consent has been given in the charter by the stockholders for the directors to have the exclusive management. If this is not the proper construction of that act, then the provision that the charter may contain the assent of the stockholders for the directors to do certain things exclusively would have no meaning, and would be ineffective.

I am impelled to the conclusion that complainant's insistence that the directors of the Clinchfield Corporation had no power to

dispose of the properties of that company is without merit. This conclusion is in harmony with the views held by and the advice given to the complainant down to the time of the sale to Carter, for complainant not only endeavored to sell all of the properties through the medium of the directors, but also sought to purchase them in a like way for purposes of its own. The complainant must, as must all the other stockholders, submit to and be governed by the charter of the Clinchfield Corporation, which it and they under the statute established as the law for the guidance of that company. So far as this case is concerned, the original stockholders—those who made the agreements mentioned, and who applied for and secured the charter referred to—are the stockholders who, through the directors of their choice, sold the properties of the company to Carter; and surely in a court of conscience they should not complain when required, at least as between themselves, to respect their own promises and observe the requirements of the law made by themselves.

The weight of the testimony is decidedly in favor of the fairness of the contract. When the properties were placed in the hands of the trust company as syndicate manager, it certainly was the intention of all the parties interested in them that they should be sold, and not held for development. That this was Carter's intention, that it was also the wish of the subscribers to the syndicate stock, as well as the desire of the complainant, is beyond question. That the failure of the syndicate management in this particular was a great disappointment to all of the parties is equally apparent. It appears from the report made by a committee appointed to investigate the syndicate that its management made no effort to operate the properties until after it had been ascertained that the prompt sale which was desired could not be accomplished. If it had been the intention of the syndicate to work and develop the property, a working capital would most undoubtedly have been provided, whereas the fact is that a sum sufficient only to pay the liens upon the property and the purchase money due for it was arranged for. I can reach no other conclusion from the evidence than that the idea of the syndicate subscribers was not to hold and operate the properties, but to make as early a sale thereof as might be practicable. That the syndicate was unfortunate, and that its management did not measure up to the expectations of those doing business with it, is not denied; and it is quite clear that it was because of the deplorable conditions existing from the syndicate's failure, and its inability to dispose of the property, that the suggestion was made for the organization of the Clinchfield Corporation for the purpose not only of selling the properties, but also to protect them, and, if necessary, develop them, until the opportunity to sell should come. The value placed upon the properties now by the complainant shows a marvelous increase over the estimate placed upon them by the trust company when, as syndicate manager, it was endeavoring to sell them to whoever could be induced to buy, during the time when the property was notoriously on the market, and when it was always found to be unsalable, although

then, as now, it was claimed that it had a great present and prospective value. The difficulties of the embarrassing situation were materially augmented soon after the organization of the Clinchfield Corporation, when the directors were faithfully attempting to dispose of the properties, by the unexpected and aggressive action of certain active and determined competitors, who were endeavoring to take and appropriate to their own use certain valuable and necessary rights of way which were absolutely essential to the successful operation of the railway portion of said properties. To meet this situation, and to provide for a floating debt, which was continuously increasing, the stockholders found to their dismay that a large sum of money would have to be provided for at once. The discouragement existing at this time among those interested in the properties was not only great, but was also universal, producing among the stockholders an earnest desire not only to sell, but to sell at once. It was about this time that the two new and additional members of the board of directors were elected—Mr. Kingston, of Philadelphia, and Mr. Lisman, of New York. At a meeting of the board held on December 9, 1904, a communication from the complainant was laid before it, from which it appears that the indebtedness of the syndicate calculated to December 15, 1904, amounted to \$788,386. At this meeting director Lisman made a proposition for the purchase of the railway properties, and director Carter submitted an offer for both the coal and railway properties. I am unable to find that Mr. Carter made any misstatement to the directors, or withheld from them any facts within his knowledge prior to the sale which he should have disclosed. That he always entertained and expressed a high appreciation of the value of the properties is conceded by all, and shown by his conduct in connection with them. He, as well as all those who subscribed to the syndicate stock, believed that the properties were valuable, but he and they knew that it would require the expenditure of a large sum of money to render them remunerative. He and they knew that, if this large sum of money was not secured, the properties would not only remain dormant, but that the money they had already paid for them would likely be lost. The reports of mining experts, and of parties who had been long acquainted with the properties, and who had carefully examined them, demonstrated the wonderful richness of the great coal beds found under the lands, if only a few millions of dollars could be expended in developing the wilderness where this wealth was entombed. It would be preposterous for any one connected with the syndicate or with the Clinchfield Corporation to insist that they were not fully advised as to the great prospective value of the Clinchfield properties. Mr. Carter, therefore, had he wished so to do, could not have concealed from any one associated with him any knowledge relative to the value of those properties, for had not all the world been told of their fabulous worth, in the efforts that had been made to induce mankind to go and take the treasures there to be found?

It seems that Mr. Carter had several conversations with Mr. Ritter and Mr. Mann about the sale of said properties, and as to

their ability to interest purchasers, among others Blair & Co.; but I am utterly unable to find that prior to the 19th day of December, 1904, when the contract of sale was made with him, he had any understanding with them, or with Blair & Co., or with any other person or company, concerning the purchase of said properties, or that he knew that Blair & Co. could be induced to purchase them, or that Ritter and Mann, or either of them, could render him any assistance in the matter. There is no evidence tending to show that Carter had any negotiations with Blair & Co., either directly or through Ritter or Mann, prior to the 19th day of December, 1904. On the contrary, it is quite plain that it was after the Christmas holidays of 1904 before Mr. Carter had any conversation with any member of the firm of Blair & Co., or with any one who afterwards became associated with him concerning said properties.

The suggestion of complainant that Carter, on December 19, 1904, had some understanding, directly or indirectly, with some of the parties to whom on the 11th day of January, 1905, he sold the property he had purchased from the Clinchfield Corporation, finds no support in the evidence. If I am to believe the testimony on that point—and I see no reason why I should not—then Mr. Carter never met until at least a week after the contract of December the 19th any one of those to whom he afterwards sold the properties. And from the same testimony it is equally as clear that it was not until about the 4th day of January, 1905, that he had the oral understanding with them from which came the contract of January 11, 1905.

The complainant contends that Carter should have advised the directors that previous to the 19th of December, 1904, he had talked with a number of gentlemen of financial character and ability concerning said properties, and that he knew that Ritter and Mann were trying to interest certain persons in their purchase, among others Blair & Co. I am not impressed with the benefit that would have accrued to the Clinchfield Corporation had Carter so advised it, or so told any of its directors. It would have been simply the repetition of an oft-told tale, for since March, 1902, the trust company syndicate and its successor had been negotiating with companies, corporations, and moneyed men of character and ability, and had been endeavoring to sell them said properties. The firm of Blair & Co. had known of the Clinchfield properties for over three years, and at least they had not lacked an opportunity to purchase them. The directors of the Clinchfield Corporation knew that members of the firm of Blair & Co. were directors of the Seaboard Air Line Railway, and it was fair for them to presume that Blair & Co. were well aware of the value of said properties, for they had been offered to and rejected by that railway company. Besides, it does not follow that because Blair & Co. were willing to deal with Carter, and purchase said properties from him, that they would also have dealt with the Clinchfield Corporation. It is not unlikely that they would invest their money in said properties, with Carter largely interested with them, and still have declined to invest when advised that they were not to have the benefit of his

experience and of his management. It was certainly plain to every director of the Clinchfield Corporation, when Carter submitted to them his offer to purchase, that he would be compelled to procure the assistance of men of wealth in order to hold and develop the properties, for had they not known for some time that it was because of his inability to provide the money himself that he had first sought the aid of the syndicate, and then of the Clinchfield Corporation. They could not presume that he individually would provide the \$2,500,000 with which to purchase the property, and then furnish the \$6,000,000 stated in their expert's report as necessary to develop it. The directors of the Clinchfield Corporation, as also the stockholders whom they represented, seemed more anxious to accomplish a sale, and thereby secure the return of their money, than to consider and discover the source from which Mr. Carter expected to obtain the pecuniary assistance he needed.

But is not this discussion of matters that transpired after the 19th day of December, 1904, entirely immaterial to a proper understanding and just decision of this controversy? Can it be possible that either the directors or the stockholders of the Clinchfield Corporation could, because of any matter presented by the testimony in this case, have canceled the contract of sale made with Carter? If, when it was executed, it was a valid contract, then its cancellation was possible only with Carter's assent. After the contract of the 19th of December I think that Carter was justified in concluding that neither the directors nor the stockholders of the Clinchfield Corporation had any right to know from him either his intentions regarding said properties or the names of the parties with whom he conversed or negotiated concerning them. It was his duty to comply with the terms of the contract, and it was the duty of the directors to require him to do so.

I consider now the argument submitted by complainant, founded on the affidavits relating thereto, that the consideration received by Carter for the properties he had purchased from the Clinchfield Corporation, as set forth in the contract of January 11, 1905, with Ryan, Blair, and others, is evidence that the price paid by him was inadequate and unfair. I am unable to find from this contract that the properties were of greater value than Carter paid for them. As I understand it, he virtually sold them at the same price he gave for them. The parties to whom he sold agreed to pay in cash for the properties the amount that he had obligated himself to pay the Clinchfield Corporation for them, and yet they were receiving from him other property and additional interests than Carter had purchased under his contract of December 19th. It is true that the contract provided that the properties were to be mortgaged and pledged to secure an issue of \$6,000,000 of bonds or notes. But that, in effect, was what the purchasers of the properties had always been expected to do, in order that a working capital might be provided with which to develop the mines and complete the railroads. The purchasers from Carter were not to advance the money on the bonds or notes at the time the properties were turned over to them, but only at such times as the corporation afterwards to

be formed should need the proceeds thereof for its corporate purposes. From the proceeds of the bonds, amounting to say \$6,000,000, was to be deducted say approximately \$2,500,000, which was to be paid to the Clinchfield Corporation in discharge of Carter's obligations to it, and the residue, \$3,500,000, was then to be expended in improving and developing the properties. The actual sum of \$6,000,000 would then really be invested in the property, which, under such circumstances, it seems to me, as it doubtless did to Carter's vendees, would be ample security for the payment of the bonds or notes so issued; especially so if the properties were to have the careful management that would come from cautious and capable owners.

The Union Trust Company, as syndicate manager, had during the time the properties were under its control received no offer for the same approximating in value the price paid by Carter, and as I understand the proposition submitted by that company on December 29, 1904, its terms were not near so favorable to the stockholders of the Clinchfield Corporation as were those contained in the proposition of Carter, on which the sale of December 19th was based. The directors of the Clinchfield Corporation, all men of high character, of business experience, and of financial responsibility, six in number, who were familiar with all of the properties involved, and fully acquainted with their values, both present and prospective, and also thoroughly informed as to the condition and necessities of the Clinchfield Corporation, after due consideration, and after full consultation with their stockholders, accepted Carter's proposition, selling and delivering the properties to him. The case made by the complainant does not justify me in decreeing that they have acted either improvidently or improperly, but, as I see and understand it, requires me to say that they have done exceedingly well under embarrassing circumstances, and that they are entitled to the commendation of those whose interests they represented and protected.

Under ordinary circumstances there would be force in the argument of counsel for complainant that a board of directors cannot sell all of the property of a corporation. There are, I think, two reasons why the directors of the Clinchfield Corporation could sell all of the property of that company: First, by the provisions of the charter of that company, and with the assent of all the stockholders, the directors were authorized to sell all of its property; second, while it is true that under the law applicable to such matters a corporation during the time it is a going concern, sound financially and able to carry on the business for which it was organized, cannot ordinarily, through its board of directors, dispose of all of its property, still nevertheless it is well settled that a corporation, when in financial distress, and unable to meet its obligations, may, with the consent of a majority of its stockholders, sell all of its property. That the Clinchfield Corporation was at the time of the sale to Carter greatly involved, and unable to meet its liabilities, let alone provide for the expenditures necessary to

keep it a going concern, is fully demonstrated by the affidavits and exhibits filed in this case. All of the stockholders, speaking through the directors by virtue of the charter, recognized this condition of affairs, and not only consented to, but directed, a sale of all the properties of the company. The effect of the provision of the charter thus referred to was to ratify by the stockholders every act of the board of directors not fraudulent in character, such ratification having the same effect as is given to the action of stockholders of companies whose charters have not such provisions, when they meet after the action of the directors and confirm the same.

While Carter, as a director, in one sense occupied a fiduciary relation to the stockholders, he was not a trustee in the technical meaning of that word, and he was not prohibited from purchasing the property of the Clinchfield Corporation, as a trustee is from purchasing at a sale made by him. As a director he was not prohibited by the law from purchasing the property of the Clinchfield Corporation, if the sale to him was authorized by the other six directors of that company, and the transaction was fair, made in good faith, and for an adequate consideration. A court will closely scrutinize such a sale, and the burden of proving good faith and adequate compensation will be placed on the party purchasing under such circumstances. That rule I have not overlooked in the consideration of this case. So far as the acceptance of Carter's offer to purchase was concerned, the Clinchfield Corporation was represented by the other six directors, no one of whom has ever had any interest in the contract made with him. The courts of the United States and many of the courts of the states hold that a contract made between a corporation and a director thereof, under the circumstances shown to have existed in this case, will be upheld, except in instances where actual fraud is proven. I find no evidence of fraud in this case. The stockholders were fully advised as to all material points affecting their interests, and a large majority of them not only approved of the sale to Carter, but insisted that it be made. The remonstrance made by complainant against the sale represented relatively a small number of the shares of stock (stock that had constructively, at least, already consented), and was not mainly because of unfairness and inadequacy of price, for virtually its offer, so far as the amount thereof was concerned, differed but little from the one made by Carter, but was really because its interests would be best subserved by the taking over of the Clinchfield properties by those who now insist that the sale to Carter should be declared void.

In the view that I have taken of the law of this case, it follows that the meeting purporting to be of the stockholders of the Clinchfield Corporation held at Bristol, Va., on the 23d day of January, 1905, was not a legal meeting of said stockholders, and that the parties claiming to be then elected as directors and officers of said company are not the legal representatives of the same, but that the officials thereof acting and in charge of the properties, assets, and

books of said company immediately prior to said 23d day of January, 1905, are still the officers thereof, and should be recognized as such. Therefore the motion made by complainant to strike from the files of this case the answer of the Clinchfield Corporation, verified by James Clark as the president of said company—he being designated as such official in the charter of said corporation—is refused, and the same will remain as the answer of the Clinchfield Corporation to complainant's bill. It follows that the motion to substitute the names of other counsel in the place of those filing said answer will also be denied.

Reaching the conclusion on both the law and the facts that I have indicated, I find myself compelled to direct that the restraining order issued in this cause on the 13th day of January, 1905, be dissolved, that the receivers appointed at the same time be discharged, and that the injunction asked for be refused.

The court at this time does not dispose of the questions raised by the defendants relating to the good faith of the complainant, the Union Trust Company of Maryland, in instituting and prosecuting this suit.

LEA v. NEW HOME SEWING MACH. CO.

(Circuit Court, E. D. New York. June 8, 1905.)

TRADE-MARKS—LICENSE TO USE—VALIDITY.

A contract purporting to license the use of a trade mark or name for a sewing machine is invalid, and will not support an action to recover royalties reserved thereby, where the only thing granted is the right to sell machines made by defendant, with which plaintiff has, and has had, no connection, under a name previously used by him in connection with different machines.

At Law. On motion for judgment on pleadings.

Bushby & Berkeley, for plaintiff.

Charles F. Dane, for defendant.

THOMAS, District Judge. The complaint, among other things, shows: (1) That plaintiff, for many years prior to 1882, sold in foreign countries dry-thread sewing machines labeled "National"; (2) that plaintiff, by his long experience and great care in his sale of said machines, and the expenditure of large sums of money, established a market for said machines bearing such label; (3) that the machines so labeled became widely known as reliable, valuable, and useful articles, and acquired a high reputation as such, and commanded an extensive sale; (4) that such machines so labeled were and are known to the public and to buyers and users by the name of "National," with or without prefix or suffix; (5) that in 1882 the plaintiff licensed the defendant to sell to plaintiff's customers, and all others, said sewing machines, under said name or names and label, and defendant agreed, in consideration thereof, to manufacture and sell said sewing machines to plaintiff's said cus-

tomers and others, with said name, names, or label applied thereto, and to pay plaintiff the sum of 50 cents for each sewing machine bearing said name or label so manufactured and sold by defendant; (6) that from and since 1892 defendant has manufactured and sold machines, under said agreement, to the number of 15,000 annually, but, although often requested to pay the plaintiff pursuant to the agreement, has refused, etc.

It will be observed, so far as the complaint discloses, (1) that the plaintiff never manufactured a machine; (2) that he sold no machines made by a particularized person or at a specified factory; (3) that he sold to defendant no machines, no place of business, nor does it appear that he ever had any; (4) that he granted no exclusive or irrevocable right to sell to plaintiff's customers; (5) that the plaintiff did not agree to forbear selling to such customers, or elsewhere, for a limited time or otherwise; (6) that the plaintiff did not agree to inspect, select, or approve the machines sold; (7) that he did not agree to aid the sale in any manner.

What, then, did he attempt to confer on the defendant? He said in effect to the defendant, "You make machines, stamp them 'National,' sell to persons to whom I am selling and have sold dry-thread machines labeled 'National,' and give me 50 cents on each machine," and to this the defendant agreed. The defendant already had the right to make dry-thread machines; it had the right to sell them to plaintiff's customers. Hence the plaintiff by license attempted only to allow defendant to stamp the word "National" on machines it made and sold. But what did the word "National" stamped on such a machine say to purchasers from the defendant? It assured purchasers that the machines so sold by defendant had been made, selected, or inspected by the plaintiff, or that the plaintiff had some other relation to them that was of value to the purchasers, or that the machines were made or sold by a person or concern with which the plaintiff had to do, or had had to do, or assured that the plaintiff had or had had some similar relation to the machines. In fact, the plaintiff had not, and never had, anything to do with the machines so offered and sold by defendant. The assurance that was given to purchasers when the plaintiff sold to them was intended to be continued, but, as to machines sold under the license, such an assurance would be a falsehood. Neither as to the origin of the article, the place of manufacture, the concern, corporation, firm, or person by whom manufactured, or the transferee thereof, or the connection of the plaintiff therewith, did the label state to purchasers, when used under the license, what it was capable of stating when used by the plaintiff. It was a license to use a stamp, dissociated and stripped of truth and of its former significance, for the purpose of falsely inducing purchasers to believe that what it meant when used by the plaintiff it meant when used by the defendant. At the earlier time the stamp meant that the plaintiff had contributed something of value to the article; at the later time it purported to mean the same thing, but spoke falsely. It is considered that the facts alleged in the complaint do not

show a valid license to use a trade-mark. *Falk v. American West Indies Trading Co.*, 180 N. Y. 445, 73 N. E. 239; *Hoxie v. Chaney*, 143 Mass. 592, 593, 10 N. E. 713, 58 Am. Rep. 149; *Kidd v. Johnson*, 100 U. S. 620, 25 L. Ed. 769; *Matter of Swezey* (N. Y.) 62 How. Prac. 215.

It is understood that the motion for judgment was regarded by counsel upon the argument as properly bringing up the sufficiency of the complaint. The motion is granted, and it becomes unnecessary to consider the demurrer to the affirmative defenses set up in the answer.

HUTTON v. HOLDROOK, CABOT & DALY CONTRACTING CO.

(Circuit Court, S. D. New York. June 9, 1905.)

MASTER AND SERVANT—INJURY TO SERVANT—LIABILITY FOR UNSAFE SCAFFOLD UNDER NEW YORK STATUTE.

The provisions of the New York labor law (Laws 1897, p. 467, c. 415, §§ 18, 19, as amended by Laws 1899, p. 350, c. 192) relating to scaffolding, which prohibit an employer from furnishing to workmen engaged in the erection of a building or structure any scaffolding, ladder, or other mechanical structure which is unsafe, unsuitable, or improper, impose an imperative obligation on an employer, when it is his duty to furnish a scaffold, to furnish a safe one, without exception on account of the carelessness of his servants; but they do not mean that his obligation shall be imperative, when he has furnished a safe one to his workmen, to see that they use proper care in moving it and in re-erecting it from time to time as the nature of their work requires, nor that when he has furnished proper materials for a safe scaffold to workmen, who, in the usual course of their employment, are to build it, he shall be liable to them in the event that, by their neglect or misconduct in its erection, it proves unsafe, and an injury results. In such case the general rule as to the negligence of fellow servants applies.

At Law. On motion for new trial.

Arthur C. Palmer, for plaintiff.

Benj. Patterson, for defendant.

WALLACE, Circuit Judge. This is a motion by the plaintiff for a new trial, a verdict having been directed upon the trial for the defendant.

The plaintiff was one of a gang of five men employed by the defendant in doing mason work in the subway in the course of construction at New York City in November, 1901. He and two others of the five were masons, and the other two were helpers. The masons worked upon a scaffold, which, from time to time, as the work was finished by them at the place where it had been put up, was taken down by the helpers, and put up again by them at an adjacent place, when the masons again mounted the scaffold and resumed their work. It was the duty of the helpers to assist the masons generally in the work, and they were under the directions of the masons. The plaintiff's action was brought to recover for injuries received by him by the falling of the scaffold, and the

verdict was directed for the defendant upon the ground that the injuries were caused solely by the negligence of the fellow servants of the plaintiff. In directing the verdict the court said:

"There is in this case no element of negligence, except that which consists of the omissions of some of the helpers in the plaintiff's gang of workmen in erecting the scaffolding in a proper way. The defendant furnished a proper and suitable scaffolding, but, in adjusting it, as was required from time to time, to a new location, the helpers did so improperly, and in consequence it fell when the plaintiff was using it."

There is no dispute about the facts, and that they were as stated by the court is conceded; but it is insisted for the plaintiff that because of the provisions of the labor law of New York (chapter 415, p. 461, Laws 1897, as amended by chapter 192, p. 350, Laws 1899), contained in sections 18 and 19 (page 467), the defendant was liable, notwithstanding the scaffold became unsafe solely by the negligence of the plaintiff's fellow servants. The sections read as follows:

"Sec. 18. Scaffolding for Use of Employees. A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged.

"Sec. 19. All swinging and stationary scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon, when in use," etc.

There is no doubt that these sections contain "a positive prohibition laid upon the master, without exception on account of the carelessness of his servant." *Stewart v. Ferguson*, 164 N. Y. 553, 556, 58 N. E. 662, 663. The question is, however, whether they refer to a scaffolding which when furnished and erected is safe and suitable, but becomes unsafe merely because of the careless way in which it is adjusted by the men who are to use it in the course of their work.

If it had been the purpose of the statute to make the master liable to his servant for all the negligent acts of his other servants in the same employment, including the fellow servants of the servant injured, that intention could have been, and doubtless would have been, expressed in a few words, and so plainly as to be unmistakable. Such a rule of liability would be so radical a departure from existing law, and introduce into the large industries of the country such incalculable hazards of loss to the employers of labor, that the purpose to adopt it is not to be attributed to the Legislature in the absence of plain language to that effect.

According to the law of New York, as declared by its highest court, a scaffold is not a place, within the meaning of the rule that it is incumbent upon the master to furnish a servant with a safe place in which to work, but is an appliance. *Butler v. Townsend*,

126 N. Y. 105, 26 N. E. 1017. Previous to the statutory changes in the law the master was bound only to use due care to make the scaffold safe, and was held to have exercised due care if he had furnished proper materials, and employed a skillful and experienced builder to erect it. *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311. It was doubtless the purpose of the provisions of the labor law to substitute for this rule of liability one making his obligation absolute to furnish and erect a safe structure. The language of the two sections is satisfied by giving them a construction accordingly, and without imposing upon the master a liability that was never supposed to exist. The provisions mean that his obligation shall be imperative, when it is his duty to furnish or erect a scaffold, to furnish a safe one; but they do not mean that his obligation shall be imperative, when he has furnished a safe one to his workmen, to see that they use proper care in moving it and adjusting it from time to time as the nature of their work requires. Nor do they mean that, when he has furnished the proper materials for a safe scaffold to workmen who in the usual course of their employment are to make the scaffold, he shall be liable to them in the event that, by their neglect or misconduct in making it safe for their use, it proves unsafe. The decision of the Supreme Court of New York in *Rotondo v. Smyth*, 92 App. Div. 153, 86 N. Y. Supp. 1103, seems to give support to these views.

The motion is denied.

NORTHERN PAC. RY. CO. V. DIXON.

(Circuit Court of Appeals, Eighth Circuit. August 4, 1905.)

No. 1,775.

1. MASTER AND SERVANT—TELEGRAPH OPERATOR FELLOW SERVANT OF MEMBERS OF TRAIN CREW.

A local telegraph operator, whose duty it is to gather and give information to the train dispatcher relative to the arrival of a train at his station, to enable the dispatcher to formulate orders for the movement of other trains, is a fellow servant of the train operatives in giving such information, so that the master is not liable to them for injuries caused by an erroneous order of the dispatcher, induced by false information given by the local operator.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 495, 498.

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

2. SAME—NEGLIGENCE—RES IPSA LOQUITUR INAPPLICABLE.

The doctrine, "Res ipsa loquitur," is inapplicable to negligence cases arising between master and servant, because the possible causes of accidents during service are many, for some of which the master, and for others of which the servant, is responsible, and the happening of an accident does not indicate to which class its cause belongs. The burden in such cases is always on him who alleges that the master was guilty of causal negligence to establish that fact. A finding that an accident happened and that the servant injured was not at fault does not sustain this burden, because the accident may have been unavoidable, or may have resulted from the negligence of fellow servants or from other causes for which the master is not liable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 879-893.]

3. SAME—MEETING ORDERS—RULES OF COMPANY CONSTRUED.

The rules of a railroad company, that meeting orders must not be sent for delivery to trains of superior right at the points of execution if this can be avoided, and that there should be, if possible, at least one telegraph office between those at which opposing trains meet, do not constitute a peremptory prohibition and command, but except cases in which an ordinarily prudent man would deem it reasonably safe, in the light of the knowledge which the dispatcher has, to send a meeting order for delivery to a train of superior right at the point of execution, or to send meeting orders to opposing trains at points between which there is no telegraph station, and there is no other practical way to reasonably operate the railroad.

4. SAME—TRAIN DISPATCHER MAY RELY ON LOCAL OPERATOR'S STATEMENT THAT TRAIN IS LATE.

The movement of freight trains by telegraphic orders, based on information relative to the location of the trains upon a railroad gathered and telegraphed by local operators or station agents to the train dispatcher, is a rational, careful, and approved method of operating a railroad. It is not a lack of ordinary care for a train dispatcher to believe, rely, and act upon such information, although it shows that an extra freight train has not reached a given station several hours after it was due to pass it.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

The defendant in error, as administratrix of the estate of Chauncey A. Dixon, brought this action against the Northern Pacific Railway Company, as she was authorized to do by the statutes of the state of Montana, to re-

cover damages for the death of her son, Chauncey, which she alleged was caused by the negligence of the plaintiff in error. The parties waived a jury and made an agreed statement of facts, upon which the court rendered the judgment against the company which is here challenged. The facts material to the determination of the questions now presented are these: Dixon was a fireman employed by the company in operating extra freight train No. 162, and he was killed on December 25, 1899, by means of a head-end collision of that train with extra freight train No. 159. The railway company was operating its railroad in Montana. It had made and promulgated time-tables for its regular trains, and had adopted reasonable rules for the operation of all its trains. The time-tables did not and could not provide for the running of extra trains. The railway company had in its employment a train dispatcher at Missoula, in the state of Montana, who had general power and sole authority to make and promulgate orders for the running of those trains which were not governed by the time-tables on the division of its railroad on which this collision occurred. A large proportion of its trains on this division were run as extra trains, and the times of their arrival and departure were not shown on the regular time-tables, but their movements were made upon telegraphic orders issued by the train dispatcher upon information furnished by telegraph to the train dispatcher by its station agents and operators along the line of the railroad. All these facts were well known to the intestate, Chauncey A. Dixon. The main line of the railroad extends from Missoula east to Helena, through Bonita, 26 miles east of Missoula, Carlan, 33 miles east of Missoula, Drummond, 53 miles east of Missoula, and Garrison, 74 miles east of Missoula. It has but a single track. This railroad has a branch, which extends in a southeasterly direction from Garrison to Butte. On the night of December 24, 1899, No. 162 was running east on the main line from Missoula to Helena, and No. 159 was running northwest on the branch line from Butte to Garrison. These trains were running under special schedules not included in the time-tables, and under the telegraphic orders of the train dispatcher at Missoula, in accordance with the rules of the company. No. 162 left Missoula for Helena at 10:20 p. m. on December 24, 1899. It arrived at Bonita at 12:35 a. m. on December 25, 1899, and left there at 12:50 a. m. on that day. It was the duty of the telegraph operator and station agent at Bonita to observe the movement of trains passing through this station, and to advise the train dispatcher at Missoula of their movements. But he was asleep when this train passed his station, and he did not know of or report its passage. The only telegraph offices open during the night between Missoula and Garrison were those at Bonita and Drummond. When No. 162 left Missoula, and when it left Bonita, No. 159 was still on the branch line between Butte and Garrison, where it arrived at 1:05 a. m., and "until said train No. 159 reached Garrison it had not been nor could it be determined whether said train No. 159 would run beyond Garrison or would stop at that point." The rules of the company provide, among other things, that "meeting order or orders, conferring rights to the point where placed, must not be sent for delivery to the trains of superior right at the point of execution, if it can be avoided. When it cannot be avoided, special precaution must be taken by the train dispatcher and operators to insure safety, and the following notice will be incorporated in the order, viz.: Train — gets this order at —. There should be, if possible, at least one telegraph office between those at which opposing trains receive meeting orders." Upon the arrival of No. 159 at Garrison, at 1:05 a. m. on December 25, 1899, the train dispatcher asked the telegraph operator and station agent at Bonita by telegram whether or not train No. 162 had arrived there, and he promptly answered that it had not. The train dispatcher then ordered the train crew of No. 159 to run extra from Garrison to Missoula, and to meet No. 162 at Carlan, and this order was received by that crew at Garrison. At the same time he ordered the crew of No. 162 to meet No. 159 at Carlan, and sent this order to the operator and station agent at Bonita to deliver to them. He ordered a red signal displayed at Drummond to stop No. 159, so that the meeting point could be changed on its arrival at that station if necessary. These orders were complete at 1:18 a. m. At 1:20 a. m. No. 159 left Garrison, and it arrived at Drummond at 1:57 a. m., and the train dispatcher was immediately in-

formed of this fact. He then inquired of the operator and station agent at Bonita whether or not extra freight No. 162 had arrived at Bonita yet, and the latter promptly replied, "No sign of them yet." He then asked him if he was sure No. 162 had not passed, and he replied, "Yes." The train dispatcher then repeated his inquiry, and the operator and station agent at Bonita answered, "Yes, I am sure freight 162 has not passed." Thereupon the train dispatcher issued an order to the crew of No. 159 to meet No. 162 at Bonita, and an order to the crew of No. 162 to meet No. 159 at Bonita, and sent the former order to Drummond and the latter to Bonita. The crew of No. 159 received their order and proceeded with their train. It collided with No. 162, and the intestate, Dixon, was killed by the collision, about four miles west of Drummond, at 2:15 a. m.

James B. Kerr (Emerson Hadley and C. W. Bunn, on the brief), for plaintiff in error.

A. M. Antrobus (D. J. O'Connell and R. J. Burtlehaus, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the first hearing of this case the negligence of the local operator at Bonita, who slept at his post and falsely informed the train dispatcher that extra freight No. 162 had not passed his station, was conceded to have been the cause of the collision and of the death of the intestate, and the only question argued was whether or not this operator was a fellow servant of the deceased, who was a fireman on that train. The Supreme Court decided that he was (*Northern Pacific Ry. Co. v. Dixon*, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006), and thus disposed of the only issue that was then presented in this court. Since that decision was rendered counsel for the defendant in error has prepared another brief and argument, in which he contends that, although the negligence of the local operator may have been one of the causes of the accident, the negligence of the train dispatcher was either the proximate cause of or contributed to cause it. This contention presents two questions: (1) Was the train dispatcher guilty of negligence which either caused or contributed to cause the injury? and (2) was the train dispatcher the fellow servant of the fireman, or the vice principal of the railway company? The contention that the lack of care of the train dispatcher contributed to cause the injury is (1) that the accident itself and the finding of the court below that the fireman was not guilty of contributory negligence raise the legal presumption that the accident was caused by the negligence of the railway company; (2) that the failure of the train dispatcher to notify the crew of extra freight No. 162 that they would meet extra freight No. 159 was causal negligence; and (3) that the sending of the final order to the crew of No. 162 at Bonita to meet No. 159 at that place was a violation of the rules of the railway company and a negligent act of the train dispatcher which contributed to the injury.

But the doctrine, "*res ipsa loquitur*," is inapplicable to cases between master and servant brought to recover damages for negligence, because there are many possible causes of accidents during service, the risk of some of which, such as the negligence of fellow servants and the other ordinary dangers of the work, the servant assumes, while for the risk of others, such as the lack of ordinary care to construct or keep in repair the machinery or place of work, the master is responsible. The mere happening of an accident which injures a servant fails to indicate whether it resulted from one of the causes the risk of which is the servant's, or from one of those the risk of which is the master's; and for this reason it raises no presumption that it was caused by the negligence of the latter. In such cases the burden of proof is always upon him who avers that the negligence of the master caused the accident to establish that fact, and a naked finding, as in this case, that the accident occurred and that the servant was guilty of no negligence which contributed to cause his injury, is insufficient to sustain this burden, for there are many other causes than the negligence of the master and that of the servant, such as the negligence of fellow servants and latent and undiscoverable defects in place or machinery, which may have produced it. *Chicago & N. W. Ry. Co. v. O'Brien*, 132 Fed. 593, 596, 598, 67 C. C. A. 421; *Westland v. Gold Coin Mines Co.*, 41 C. C. A. 199, 200, 101 Fed. 65; *Texas & Pac. Ry. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *O'Connor v. Ry. Co.*, 83 Iowa, 105, 48 N. W. 1002; *Brownfield v. Ry. Co.*, 107 Iowa, 254, 77 N. W. 1038; *Brymer v. Ry. Co.*, 90 Cal. 497, 27 Pac. 371; *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613; *Wormell v. Railroad Co.*, 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321; *Grant v. Railroad Co.*, 133 N. Y. 659, 31 N. E. 220. The happening of the accident and the absence of contributory negligence of the servant constitute no substantial evidence of the causal negligence of the master, and are insufficient to support a finding or judgment against him for the injury which resulted from it.

In *Northern Pac. Ry. Co. v. Mix*, 121 Fed. 476, 57 C. C. A. 592, the Circuit Court of Appeals of the Ninth Circuit sustained a judgment against the plaintiff in error in this case for injuries to the head brakeman of extra freight No. 162, caused by the collision under consideration here, upon the ground that the train dispatcher was guilty of negligence because he did not notify or endeavor to notify the crew of that train at or before it passed Bonita that they were to meet freight train No. 159 on their way to Helena, and that case is cited and urged upon our consideration to secure a like conclusion in this case. In the case in hand, however, the parties have agreed that prior to 1:05 a. m. of December 25, 1899, No. 159 was not running upon the main line between Missoula and Helena, which No. 162 was to traverse, but was upon a branch railroad between Butte and Garrison; that No. 162 left Bonita going east at 12:50 a. m., 15 minutes before No. 159 arrived at Garrison; that "until said train No. 159 reached Garrison it had not been nor could

it be determined whether said train No. 159 would run beyond Garrison or would stop at that point," a fact which does not appear in the report of, and which doubtless was not proved in, the Mix Case; and that there was no telegraph station open on the night of the accident between Bonita and the place of the collision. The absence from the Mix Case of the controlling fact which appears in this case, that the train dispatcher did not know and could not learn whether or not No. 159 would ever come upon the main line of railroad over which No. 162 was to run until after the latter train had left Bonita, distinguishes that case from the one we have in hand and renders farther consideration of it useless. Inasmuch as, prior to the departure of No. 162 from Bonita on its way east, No. 159 was not upon the line of railroad which No. 162 was to traverse, and it was not known and could not be determined before 1:05 a. m., when it arrived at Garrison, whether or not it would ever go upon that line of railroad, the train dispatcher was guilty of no negligence in that he failed to notify, or try to notify, the crew of No. 162, before they left Bonita, that they would meet No. 159, a fact which he did not know and could not know until 15 minutes after they had left that station.

Counsel for the defendant in error insists that the train dispatcher failed to exercise ordinary care, because he sent his last meeting order for delivery to No. 162, a train of superior right, at Bonita, the point of execution, in violation of the rules that such orders must not be sent for delivery to the points of execution if that course can be avoided, and that there should be, if possible, at least one telegraph office between those at which opposing trains receive meeting orders. There are two reasons why this position seems to be untenable. In the first place, these rules do not imperatively require a telegraph office between those at which opposing trains receive meeting orders, nor peremptorily forbid the delivery of a meeting order to a train of superior right at the point of execution. The requirement is conditioned by the words "if possible," and the prohibition by the phrase "if it can be avoided," and the true interpretation of these rules is that the command and inhibition are to be obeyed, if this may be done consistently with a rational and practical operation of the railroad. They do not mean that the train dispatcher must stop the operation of the railroad, or that trains must be sent back toward their starting points, until meeting orders can be delivered to trains of superior right at points other than those of their execution and a telegraph office can be interposed between the stations at which opposing trains receive their meeting orders, when an ordinarily careful and prudent man would deem it reasonably safe, in the light of the knowledge which the dispatcher has, to send a meeting order for delivery to a train of superior right at the point of execution, or to deliver such orders to opposing trains when there is no telegraph office between them, and there is no other practical and rational manner of keeping the railroad in operation. In the case at bar the first meeting order issued was not sent for delivery to the train of superior right at the point

of execution, and there was a telegraph office between those at which the opposing trains were to receive their first orders. In those orders the meeting place was Carlan. The order was sent for delivery to No. 162 at Bonita and to No. 159 at Garrison, and the telegraph office at Drummond was between them. The order was not delivered to the crew of No. 162, because the false statement of the operator that it had not passed Bonita misled the dispatcher. No. 159, however, received its order and advanced to Drummond. There was then no telegraph office between Drummond and Bonita, and it was not possible to interpose one between the places where the opposing trains must receive subsequent orders, or to send a meeting order for delivery to No. 162 at a place other than the point of execution, without sending one or both of the trains back, or holding No. 159 at Drummond until No. 162, which appeared to the dispatcher to have been delayed west of Bonita, should reach Drummond. The adoption of such a course would not have been the adoption of ordinary, but of extraordinary, care, and this the law did not require. When No. 159 arrived at Drummond, the dispatcher asked the operator at Bonita a second time if No. 162 had arrived there, and he replied, "No sign of them yet." He asked if he was sure that No. 162 had not passed, and he answered, "Yes." He repeated the inquiry, and the operator replied, "Yes, I am sure freight 162 has not passed." Then it was that the dispatcher ordered the trains to meet at Bonita, and sent the order for the crew of No. 162 to that place for delivery, and the order for the crew of No. 159 to Drummond. The railway company did not become liable for injuries caused by the collision, and the train dispatcher displayed no lack of ordinary care and violated no rule of the company by this action, because it was not then possible, within the true meaning of the rules, to have a telegraph office between those at which these trains were to receive their meeting orders, and the sending of the meeting order to the train of superior right at the point of execution could not be avoided.

In the second place, if the last meeting orders were in violation of the rules of the company, they did not contribute to cause the accident, and consequently they were not actionable. The collision would, in all probability, have happened if no change had been made in the place of meeting. In that event No. 159 would have proceeded from Drummond toward Carlan, the appointed place for the trains to meet, and before it had arrived at that place it would inevitably have met and collided with No. 162, exactly as it did under the orders which changed the place of meeting. The judgment against the company cannot be sustained on account of the last meeting orders, because the dispatcher violated no rule of the company and was guilty of no negligence in issuing them, and because they contributed in no way to cause the collision.

When the final orders were made, 3 hours and 37 minutes had elapsed after No. 162 had left Missoula, and a reasonable time for it to reach Bonita was not more than 1 hour and 30 minutes. Counsel argues that the dispatcher was negligent, because he did not assume that

the repeated statement of the operator at Bonita that this train had not passed that station was false, and because he did not operate the railroad on that theory, or stop its operation until he could send a messenger over the road, or could in some other way ascertain what the fact was. But this contention is unworthy of serious consideration. The delay of a freight train a few hours beyond its regular time is not so extraordinary an occurrence that a man of ordinary caution would be led to believe or to suspect the falsity of the statement of a local operator on the railroad, whose duty it is to know the fact and to communicate it, that it had not reached or passed his station. Many adequate possible causes of such delays at once suggest themselves to the mind, such as pulled drawbars, hot boxes, broken rails, other possible defects of the road and machinery, and the negligence and mistakes of the trainmen. If the statement of the operator had been true, and the dispatcher had sent another train from Missoula to Bonita on the theory that it was false, and it had crashed into No. 162 and injured its crew, his negligence would have been patent. The truth is that the movement of extra freight trains by telegraphic orders, based upon the information of the location of the trains upon the railroad gathered and communicated by local telegraph operators is a rational, careful, and approved method of the operation of railroads. This railroad had been and was operated in this way, and the fireman, Dixon, knew it. The risk of this method of the movement of trains was one of the ordinary hazards of his service, which he assumed when he accepted his employment, and as long as the train dispatcher directed the movement of the trains by that method with ordinary care he could not be successfully charged with actionable negligence, while if he had disregarded the information furnished by the local operators, and had operated the railroad upon his own surmise or estimate of the respective locations of the trains upon it, his lack of ordinary care would have been clear and undeniable. The fact is that it is clear beyond all reasonable doubt that the proximate cause of this accident was the negligence of the local operator, who slept at his post and falsely informed the dispatcher that No. 162 had not passed his station. That untrue statement was the sole cause of the meeting orders issued by the dispatcher, and of the accident which resulted from them. In the light of that statement, upon which it was his right and his duty to rely and to act, the acts of the train dispatcher were rational, prudent, and free from any lack of ordinary care, and no judgment against the company can be sustained on account of them.

The conclusion that the train dispatcher was guilty of no negligence renders it unnecessary to consider or to determine the question whether or not he was a fellow servant of the fireman, and that issue is reserved for consideration at some future time, when its determination shall become necessary to the decision of some living issue. The judgment of the Circuit Court must be reversed, and the case must be remanded, with instructions to render a judgment upon the agreed statement of facts in favor of the defendant in the court below; and it is so ordered.

FRANK v. DICKEY et al.

(Circuit Court of Appeals, Eighth Circuit. July 24, 1905.)

No. 2,191.

BANKRUPTCY—ATTORNEYS' FEES—ATTORNEY FOR PETITIONING CREDITORS.

After a petition in involuntary bankruptcy had been filed by certain creditors, an attorney filed a second petition against the debtor in behalf of other creditors, and also demurred to the first. The demurrer was sustained, but on leave given the first petition was amended, and an adjudication made thereon; the second petition being ignored. *Held*, that such attorney did not render services to the "petitioning creditors," within the meaning of Bankr. Act July 1, 1898, c. 541, § 64b (3), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], and was not entitled to the allowance of a fee from the estate thereunder.

Appeal from the District Court of the United States for the Eastern District of Missouri.

On November 13, 1903, Dugald Crawford and John F. Crawford, partners as D. Crawford & Co., merchants in St. Louis, Mo., being insolvent, made a voluntary assignment for the benefit of their creditors; and on November 14, 1903, certain creditors of D. Crawford & Co., by the appellees, their attorneys, filed in the District Court of the United States for the Eastern Division of the Eastern District of Missouri a petition in involuntary bankruptcy, praying that said Dugald Crawford and John F. Crawford be adjudged to be bankrupts. On November 25, 1903, certain other creditors of D. Crawford & Co., by appellant, their attorney, filed in the same court another petition in involuntary bankruptcy, praying that said Dugald Crawford, John F. Crawford, and D. Crawford & Co. be adjudged bankrupts. On November 28, 1903, the creditors last referred to, by appellant, their attorney, filed in said court a demurrer to said first petition on the alleged ground that such petition did not state such a case as entitled the court to take jurisdiction and adjudicate the respondents bankrupts. The court, upon argument, sustained the demurrer, but granted leave to amend the petition. Such amended petition by the creditors represented by the appellees was filed by appellees December 24, 1903, and upon that amended petition the court on December 29, 1903, adjudged that Dugald Crawford and John F. Crawford, partners as D. Crawford & Co., and as individuals, were bankrupts within the true intent and meaning of the acts of Congress relating to bankruptcy, and thereupon the administration in bankruptcy of the estate of the bankrupts, which amounted to more than \$600,000, was carried on under that adjudication. Nothing was done under the creditors' petition filed by the appellant as aforesaid.

On March 24, 1904, the appellant, Nathan Frank, filed with Walter D. Coles, the referee in bankruptcy, his petition, reciting the said proceedings and asking that an attorney's fee of \$1,500 be allowed for the filing of said petitions in bankruptcy, and that one half thereof be paid to the firm of Finkelnburg, Nagel & Kirby, and the other half paid to the said Nathan Frank. On May 17, 1904, the appellees filed with said referee their petition, praying that they be allowed a reasonable fee for services rendered by them as attorneys for the petitioning creditors. These two petitions were heard by the referee July 13, 1904, pursuant to notice to the petitioners and to the trustee, and said referee on the same day made and entered his orders allowing the appellees the sum of \$1,000 for services rendered by them as attorneys for the petitioning creditors, and directing the trustee to pay the same, and denying the prayer of the petition of the appellant, Nathan Frank. Afterwards, on July 28, 1904, the creditors who had made the petition in bankruptcy filed by the appellant as aforesaid filed with the referee their petition for a review by the judge of said orders so made by the referee. The referee duly certified and transmitted to the judge all the evidence, papers, and proceedings, including his findings and orders in the matter. And the judge upon due consideration on November 15, 1904, made and entered his order approving

and confirming the said orders of the referee, and allowing the appellees the sum of \$1,000 for their services as attorneys for the petitioning creditors, and disallowing the appellant's petition for allowance. From this order this appeal is taken.

David W. Voyles (Nathan Frank, on the brief), for appellant.

Daniel N. Kirby (Finkelnburg, Nagel & Kirby and George C. Hitchcock, on the brief), for appellees.

Before VAN DEVANTER and HOOK, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

The last assignment of error objects to the amount allowed the appellees for services as attorneys for the petitioning creditors as excessive, taking into consideration a previous very large allowance made to the same attorneys for services rendered by them to the receiver in the matter of the same bankrupt estate. But that allowance was for entirely distinct and different services, of the nature and character of which we are not advised. That allowance for legal services rendered to the receiver, not having been questioned when made, must be presumed to have been proper and just, and can have no bearing on the consideration of the amount which should be allowed for the services rendered to the petitioning creditors. One thousand dollars seems a large allowance for such services, even in view of the unusually large estate of the bankrupts. But the appellees left the amount to be fixed by the referee on his judgment. With his knowledge of all that was done and of all the circumstances, he fixed upon that sum as the proper allowance, and this was approved by the judge. It is, besides, only two-thirds of what was named by the appellant as the value of the same services when he hoped to share in the allowance, and even now he does not assert that is too much, but only that it should be diminished because the same attorneys have obtained a large allowance for other and entirely different services. No one else objects to the allowance, and we will not under these circumstances attempt to revise it.

The remaining question is whether the appellant is entitled to share in this allowance. By Bankr. Act July 1, 1898, c. 541, § 64 (3), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], among the debts which have priority is:

"One reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases."

The services of the attorneys for the petitioning creditors in instituting bankruptcy proceedings in any case and carrying them forward to the adjudication benefit equally, in proportion to what is owing to them, all the unsecured creditors of the bankrupt; hence the payment of their reasonable fee from the estate makes this expense fall equitably in the same proportion upon all such creditors. The jurisdiction of the court in any case is invoked by the filing of the first petition which is sufficient, or which can

be made so by amendment. It brings within the jurisdiction of the court, not only the bankrupt on the service of process, but also all his creditors. No additional petition by other creditors is useful or contemplated by the act of Congress. In this case the second petition, which was filed by the appellant for other creditors than those who had first petitioned, was ignored, and no action ever taken upon it. It was a useless paper. The adjudication was had alone upon the petition first filed by the creditors represented by the appellees, after it was by leave of court amended. Those creditors were, therefore, the only creditors on whose petition the court acted and made the adjudication, and they were the only petitioning creditors in the case within the meaning of the act. The petition filed by the appellant was a disregarded nullity. The appellant certainly did not become one of the attorneys for the petitioning creditors by demurring to their petition. That was an adversary proceeding, taken with the apparent intent of defeating their petition, and would have been successful but for the permitted amendment. The claim of the appellant is that, because by his demurrer he called the attention of the court and also of the appellees to the defects of the petition they had filed, resulting in its amendment on leave, he performed a meritorious service for the petitioning creditors, so that, although never retained or employed by them, and seeking in all that he did to defeat them and overthrow their petition, he should still, for the purpose of sharing in the fee which the statute allows to their attorneys, be held to be one of their attorneys in the proceeding. The relation of attorney and client rests upon contract of employment, and these petitioning creditors never employed the appellant. In litigation, counsel often receive valuable suggestions from opposing counsel, which, as in this case, were not intended, when given, to be helpful; and they do not, because of such suggestions, feel bound to share their fees with such opposing counsel.

The order and judgment are affirmed.

BATES MACH. CO. v. WM. A. FORCE & CO.

(Circuit Court, S. D. New York. May 31, 1905.)

No. 9,001.

ABATEMENT—ANOTHER ACTION PENDING—SEPARATE SUITS ON SAME PATENT.

The pendency of a suit for infringement of certain claims of a patent specifically named by number in the bill is not a bar to a second suit in the same court by the same complainant against the same defendant, for the infringement of different claims of the same patent, also specified in the bill, where the two sets of claims cover distinct and different devices, although in the same machine. In such case the causes of action in the two suits are not the same.

In Equity. On motion to strike out plea.

Complainant brought a suit against defendant in this court for infringement of claims 9 and 10 of letters patent No. 759,656, for

an automatic numbering machine, granted to Edwin G. Bates, May 10, 1904. Pending said suit complainant brought the present suit, alleging a subsequent infringement of claims 6 and 7 of the same patent, which cover different devices relating to the machine from those claimed in claims 9 and 10, and which are capable of separate use. Defendant filed a plea setting up the pendency of the prior suit, which complainant moved to strike out.

Alfred B. Carhart, for complainant.

William E. Warland, for defendant.

LACOMBE, Circuit Judge. The plea should be stricken from the files, defendant being given 20 days to answer.

THE MAUCH CHUNK.

THE NORTHFIELD.

(District Court, S. D. New York. July 5, 1905.)

1. COLLISION—DAMAGES—FUNERAL EXPENSES OF PERSONS KILLED.

The funeral expenses of persons whose death was caused by collision are recoverable as part of the damages against the vessel in fault, where the law imposes liability for the same on the relatives for whose benefit the suit is brought.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 110.]

2. SAME—OBSTRUCTION OF DOCK.

The sinking of a ferryboat in collision near the end of a pier, where she remained for some days before being raised, *held* on the evidence not to have prevented the use of the pier, so as to entitle the owner to damages.

3. SHIPPING—PROCEEDINGS FOR LIMITATION OF LIABILITY.

In proceedings brought by two separate vessels to limit liability for a collision, and in which both are found in fault, the cost of raising one which was sunk in the collision in a place where it was an obstruction to navigation is a proper claim against the fund for distribution although it exceeds the value of the raised vessel.

[Ed. Note.—Limitation of shipowner's liability, see *The Longfellow*, 45 C. C. A. 387.]

4. SAME—PRIORITY BETWEEN DAMAGE CLAIMANTS.

Under Rev. St. § 4236 [U. S. Comp. St. 1901, p. 2944], relating to proceedings for limitation of liability, which provides that for the purpose of such proceedings a charterer who is required to man, victual, and navigate a vessel at his own expense shall be deemed the owner, and that a vessel under such a charter "shall be liable in the same manner as if navigated by the owner thereof," where in proceedings by such a charterer both vessels have been found in fault for a collision, and each condemned to pay half the damages, and the charterer has been required to contribute the value of his vessel and pending freight, and also the cause of action against the other vessel, the claims of third party claimants arising out of the collision are entitled to priority of payment from the fund over the claim of the owner for loss or damage to his vessel.

In Admiralty. On exceptions to commissioner's report.

De Forest Bros. and George Holmes, for Central Railroad Co.

Butler, Notman & Mynderse, for Rapid Transit Ferry Co.

Thomas D. Rambaut, J. Parker Kirlin, Convers & Kirlin, William C. Wolf, and Nathan Burkan, for various claimants.

ADAMS, District Judge. These actions were decided on the merits June 17, 1903—124 Fed. 786—and referred to a commissioner to examine the claims, &c. He now reports that there were 53 claims filed and testimony presented in 39 of them. Exceptions to his report have been filed in a number of the cases, mainly directed to the amounts reported. I have examined the matters involved carefully and conclude that the commissioner has been very conservative in his estimates of the losses and as he had the witnesses before him, I do not think it would be proper for me to take up anew the questions of amounts.

There are a few questions, however, which require attention at my hands.

In the cases of deaths resulting from the collision, the commissioner has allowed funeral expenses, in addition to damages. It is claimed that the statute does not cover such items and reference is made to *Dalton v. South Eastern Ry. Co.*, 4 C. B. (N. S.) 296; *Boulter v. Webster*, 13 Weekly Repr. 289; *Holland v. Brown* (D. C.) 35 Fed. 43, 49, and *Consolidated Traction Co. v. Hone*, 60 N. J. Law, 444, 38 Atl. 759.

A matter of the same kind has, however, been passed upon in this court and such expenditures allowed. The *Catskill* (D. C.) 95 Fed. 700, 701. And in *Murphy v. N. Y. Cent. & Hudson R. R. Co.*, 88 N. Y. 445, the question was considered in connection with the law of England, referred to in *Dalton v. South Eastern Ry. Co.* and *Boulter v. Webster*, supra, and it was held that in this state and country, such expenses can be recovered if the law imposes upon the relatives for whose benefit the suit is brought the obligation to bear them. In the *Catskill*, supra, which was an action resulting from a collision between two vessels and limitation of liability on the part of the owners being sought, as here, the funeral expenses of the deceased were specifically allowed. Judge Brown there said (702, 703):

"3. It is further contended, inasmuch as by the law of the states of New York and New Jersey no liens are given for death claims, while a maritime lien does exist for the damages received by the *Catskill*, that this entitles the *Catskill* to a priority for her claim over the death claims. I cannot sustain this contention. Section 4284 of the Revised Statutes [U. S. Comp. St. 1901, p. 2943], providing for the distribution of the proceeds upon a surrender of the vessel, declares that the proceeds shall be distributed among the claimants 'in proportion to their respective losses'; and no distinction is made between the different kinds of damage, whether to property or person. Injuries to person and loss of life are held to be claims within the scope of the statute (In re Long Island North Shore Passenger & Freight Transp. Co., 5 Fed. 599, 624; *Butler v. Steamship Co.*, 130 U. S. 527, 552, 9 Sup. Ct. 612 [32 L. Ed. 1017]), and recovery in personam against the owners of the vessel for loss of life is restrained upon the surrender of the vessel in proceedings under the statute (section 4285 [U. S. Comp. St. 1901, p. 2944]). It is evident, therefore, that the statute not only makes the fund derived from the sale of the vessel a fund applicable to all claims pro rata (see, also, rule 55 in admiralty), but that it bars all other remedy. The necessary effect of this is to make every admissible claim a statutory lien upon the fund. The fund must be distributed, therefore, according to the statute itself, i. e., pro rata among the claims arising from the collision (*Butler v. Steamship Co.*, supra; *The Maria and Elizabeth*, 12 Fed. 627), saving any special equitable rights as between the parties."

Another question arises out of the claim of the Compania Transatlantica for damages caused by the alleged obstruction of that company's pier, 10 East River, by the sinking of the Northfield across the end of the pier.

The commissioner says in connection with this claim:

"Claim of Compania Transatlantica.

This claimant, which operates a line of steamships between New York and Ports in Spain, the Philippines and Mexico, was the lessee of pier 10, East River, and had the right to use one-half of the slip on each side of the pier. The claim is in the nature of wharfage, the statement filed alleging that the Northfield sank at the end of pier 10, where she remained several days, during which time the hawsers were run from her to the end of pier 10, and the pier was otherwise used by the owners of the sunken ferryboat and by men engaged in raising her, and their lighters, barges and other craft made use of both sides of pier 10, whereby access to and use of the pier and slip were rendered impossible, and the claimant suffered a loss of \$1,500.

When the berths were unoccupied by the claimant's steamships, it let them out to such vessels as applied for them. The Northfield lay sunk a little distance off pier 10, from about 6 o'clock in the evening of June 14 until about 9 o'clock in the morning of June 20, 1901, when she was raised and removed. During this interval her upriver end was further off than the downriver, which was some 15 or 20 feet away from the lower corner of the pier. The downriver end extended across the mouth of the slip between piers 9 and 10 for a good part of its width, while the upriver end was about on a line with the upper side of pier 10. The testimony satisfies me that the Northfield would have prevented the use of the claimant's berth on the lower side of pier 10, but not the berth on the upper side, although the presence of the wrecking outfit would have embarrassed the use of the upper berth if a vessel had attempted to dock there. None of the claimant's vessels were in port during the period in question, but an attempt was made to prove that the berths had been let to other vessels which would have used them, and that these engagements had to be cancelled because of the obstructions. The only distinct testimony to that effect was from a Mr. Palmer, in the employment of claimant's agents. He had charge of the making of arrangements for docking, and says that there were two vessels, a steamship and a bark, that would have occupied the berths, but were unable to come there because the slips were blocked; they were each to pay \$50 per day. The value of this testimony was, however, so much impaired on cross-examination that I do not think that I would be justified in finding the facts in accordance with the direct testimony of the witness, especially as time and opportunity were afforded for corroborative testimony and none was furnished. The testimony shows, however, that use was made of the pier in the wrecking operations, lines being run from the ferryboat to the end of the pier, on which were also landed carts, wagons, benches and other articles taken from the ferryboat. There is testimony that about one-fourth of the pier was thus used, but it also appears that the lines were run and the pier used by the Merritt & Chapman Wrecking Company, which raised the Northfield. The petitioner did not employ the wrecking company, and does not appear to have participated in its operations. Indeed, there is nothing to show that this use of the pier was without the consent of claimant. If consent was given, the claim would be on an implied contract against the wrecking company. If it was not given, and the use of the pier was tortious, the tort would be an independent one on the part of the wrecking company, and not one springing naturally and directly from the collision.

I therefore report that this claim should be disallowed."

It does not seem necessary to add to what the commissioner has said, which meets with my approval and is adopted. The sole testimony tending to support the claim being discredited, there was

nothing upon which action towards the allowance of compensation could be based.

The claim of the Staten Island Railway is strongly pressed for allowance, notwithstanding the relations of that company to the Northfield. The matter has apparently been thoroughly investigated by the commissioner, who says:

"Claim of Staten Island Railway Company,

—and—

Claim of The Rapid Transit Ferry Company.

The first of these claims was made not only on behalf of the claimant as sole owner of the Northfield, but on behalf of the Rapid Transit Ferry Company, the charterer thereof, and of the British & Foreign Marine Insurance Company, Limited, and the American & Foreign Marine Insurance Company, the underwriters of the Northfield. The claim alleges that at the time of the collision, the Northfield was operated, navigated and controlled by the charterer, and that the first mentioned of the two insurance companies had insured her in the sum of \$25,000, and the other in the sum of \$5,000, and that her value was \$30,000. The amount claimed was \$36,865.42, consisting of the alleged value of the Northfield before the collision, and \$8,365.42 alleged to have been expended, or caused to be expended, by the claimant in good faith 'for salving, raising, surveying, docking, making temporary repairs and otherwise,' less \$1,500, a sum which, it is alleged, the value of the Northfield did not exceed after these expenses had been incurred. I find from the testimony that the Staten Island Railway Company was the enrolled owner of the Northfield, and that the Northfield was worth \$30,000 before the collision. She realized \$1,500 after being raised, but more than that amount was spent in preserving her up to the time of the sale. The Merritt & Chapman Company, which raised the vessel, received \$5,925 for its services under an agreement with the underwriters which was ratified in writing by the charterer. This ratification also provided that the bill should be a lien on the ferryboat. The bill was paid by the underwriters, which deducted the amount from the insurance money when they settled as for a total loss. Although the Northfield was of no value when raised (in view of the cost of preserving her), I find that the wrecking bill was a proper item of expense, because the Northfield was a menace to navigation as she lay sunk and it was proper to raise her for that reason, and because her true condition and value could not be ascertained until she had been raised.

Prior to the filing of the owner's claim, a claim was filed by the charterer, for \$30,000, 'on behalf of the charterers and owners,' for the total loss of the Northfield. The interlocutory decree in the limited liability proceeding of the charterer, however, provided that in addition to the value of the Northfield and pending freight, the charterer should contribute 'the amount or value, if any, of the cause of action against the ferryboat Mauch Chunk and her owners for the loss of the ferryboat Northfield by the said collision.' Under this provision, counsel representing Eliza E. Wrenn and other third party claimants presented testimony relating to the claim of the charterer, after serving notice on the proctor for the charterer that proof of that claim would be made by them if the charterer itself did not make such proof, and after such proctor had, in substance, refused to state whether he would or would not make the proof. At the close of the testimony, however, the proctor for the charterer stated that all the proofs which he could have offered as to his client's claim had been introduced by either the owner or the counsel for third party claimants, and he now contends that the claim of his client is the only claim for the Northfield which should be recognized.

By the terms of the demise, the charterer was required to keep the Northfield in good condition and repair, and at the expiration of the agreement, restore her in as good condition as when received. With other demised boats, she was covered by insurance policies of which the premiums were paid by the charterer. The policies were in favor of the owner, the charterer and a third company, closely allied with them, as interest might appear. The

counsel who presents the claim of the owner concedes that the three companies had the same offices, that some of the officers of one were officers of the other, 'and that every act of the one binds the other in so far as he has authority to bind it.' The owner and the charterer had the same general manager, the same paymaster and assistant treasurer, who was also the owner's auditor, and the same general counsel. The latter filed the charterer's petition for limitation of liability, and says that the general manager's position in each company was such that he was authorized to act in all matters connected with the sinking of the Northfield, and with her insurance, and that he was frequently consulted by the general manager from the time of the disaster up to the time the insurance was paid, the consultations including matters relating to the insurance. The receipts of the three companies were intermingled each day, handled by the same man, and by him assigned according to the interests of the respective parties. When the insurance money was paid, the particular average of \$150 was deducted by the underwriters in addition to the wrecking bill already referred to, a check was given to the order of the three companies, and the receipt taken was given on behalf of all three companies by Edward Curry, who signed as secretary and treasurer of the owner and as assistant treasurer of the charterer and the third company. In settling among themselves, the amount of the wrecking bill was charged against the owner, \$500 of the amount received was credited to the charterer for legal and other expenses incurred by it in the collection of the insurance, and the balance, \$22,958.49, went to the credit of the owner. These credits were thus made in accordance with an agreement previously reached among the three companies. As part of this settlement, the owner gave the charterer a general release, purporting to have been executed in consideration of one dollar and other valuable considerations. This release was dated January 13, 1902, prior to the filing of the charterer's claim, and it specifically included 'any matter, cause or thing whatsoever connected with or arising from damage to or loss of the steam ferryboat Northfield.' The testimony of Mr. Clark, who was counsel for both companies at the time, is to the effect that the release of the charterer from any liability it may have incurred to the owner by reason of the collision was the consideration for the charterer's consent that the insurance money should go to the owner. It further appears that in the proceeding of the charterer to limit its liability a motion was made by third party claimants for an order directing the petitioner to surrender its claim to them, and that the counsel for the charterer, in the brief submitted by him on that motion, stated that the charterer, having collected from its underwriters the amount of the loss, was not interested in the litigation further than to establish its right to limit. On this and other testimony showing the close relations between the owner and the charterer, counsel for third party claimants contends that the owner and the charterer were in effect one, that the owner is estopped from alleging that the claim for the loss of the Northfield does not belong to the charterer, and that the settlement of the questions arising out of the disaster, resulting in the release, amounted to an equitable assignment of the owner's claim to the charterer; and he also maintains, on the authority of *O'Brien v. Miller*, 168 U. S. 287 [18 Sup. Ct. 140, 42 L. Ed. 469], that the charterer was in no position to maintain its limited liability proceeding unless it could surrender the cause of action against the Mauch Chunk. But I do not consider that it is necessary to determine these questions, or whether the insurers' right of subrogation could, without their consent, be extinguished or impaired by the manner in which the owner and the charterer transacted their business as between themselves and adjusted the liabilities arising out of the collision, since my conclusion is that any claim which the owner or the underwriters, as well as the charterer, might have should be postponed to the claims which have been hereinbefore allowed.

The claim of the owner alleges that the collision occurred without fault on its part, or on the part of the charterer or of the navigators of the Northfield, but was due solely to the negligence of the Mauch Chunk. Although the court has since found that both vessels were at fault, and the charterer has limited its liability as owner pro hac vice of the Northfield to the value of that vessel, her pending freight, and the cause of action against the Mauch Chunk for her loss, and the enrolled owner's claim admits that the charterer

was owner *pro hac vice*, nevertheless counsel for the enrolled owner maintains that his client is entitled to assert a claim for the Northfield's value against the proceeds of the Mauch Chunk on the same basis with third party claimants, and should share *pro rata* with them in the distribution. His argument is that the rule which prevails in courts of admiralty in this country, by which a vessel demised by charter is subject to a maritime lien for negligent navigation by the charterer's servants, is contrary to natural justice, and should not be extended further than policy and expediency require, and that where the owner, who is in fact innocent, comes into court asking redress from the guilty persons, there is no reason why a fiction of law should be created under which he is to be regarded as guilty. Counsel says that if the owner and other injured parties were suing the charterer in the absence of limited liability statutes, the property of the charterer, if insufficient to satisfy all judgments, would be applied *pro rata*, without discrimination against the owner, and that this result cannot be affected by the fact that Congress has seen fit to exonerate the charterer from the greater part of its liability. But I think that counsel fails to distinguish between actions in *rem* and actions in *personam*, and ignores the language and the purpose of the limited liability statutes. If the owner of the Northfield had brought an action in *rem* against the Mauch Chunk for the value of the Northfield, at the same time suing on behalf of those who had lost property aboard the Northfield, and a bond had been given for the value of the Mauch Chunk which proved to be far less than the total claims established in the action, the court, having found both vessels in fault, would have decreed that the owner should recover only half its damages, notwithstanding its personal innocence, and that the property claimants should recover their full damages; and the decree would also have provided that the latter claims be paid in full before any payment should be made to the owner of the Northfield. Again, if the third party claimants had libeled the Northfield, and she had been of sufficient value to satisfy such claims, the owner would, in effect, have been required to pay them, his rights as owner being thus subordinated to the rights of such claimants. The mere fact that the Northfield was of no value after the collision, and claims must be collected, if at all, out of the proceeds of the Mauch Chunk, cannot have the effect of destroying this priority. Furthermore, § 4286 of the Revised Statutes, which provides that for the purpose of a limited liability proceeding a charterer shall be deemed to be the owner of the chartered vessel in case he shall man, victual and navigate her at his own expense, also provides that when so chartered the vessel 'shall be liable in the same manner as if navigated by the owner thereof.' This indicates that so far as third party claimants are concerned, Congress intended that the situation should not be changed by the mere fact that the vessel was operated by a charterer. The language of Judge Brown in *The Catskill*, 95 Fed. 700, appears to be quite as applicable to the case of a charter-operated vessel as to that of a vessel operated by the owner. He says:

'The *Catskill*, having been held in fault in this proceeding, as well as the *St. Johns*, is bound jointly with the latter to make good all damage claims; and any amount recoverable from the *St. Johns* which might otherwise be apportionable to her, on account of her own damage, must be held applicable to make good all outside claims for which she is bound equally with the *St. Johns*. As between these different claimants the owners of the *Catskill* are equitably estopped from withdrawing in this proceeding any part of the fund whereby the other damage claimants might lose any part of their demands. *The Erinagh*, 7 Fed. 235; *The Olga*, 32 Fed. 329, 331; *The Eleanora*, 17 Blatchf. 88, Fed. Cas. No. 4335. This is a priority which falls within the scope of rule 55 of the supreme court in admiralty. The insurers stand by subrogation in the shoes of the owners of the *Catskill*, and can claim no more than her owners could claim.'

And in *The St. Johns*, 101 Fed. 469 (477), Judge Brown refers to the complex and apparently conflicting relations produced by the right of the insured owner, upon surrender of his vessel, to retain insurance moneys for his own benefit, his obligation to surrender any claim he may have for damages to

his vessel, and, on the other hand, the insurers' right of subrogation to the same claim; and he then says:

'But in the case of *The City of Norwich*, 118 U. S. 468, 506, 6 Sup. Ct. 1150, 30 L. Ed. 134, it is in effect stated that the insurers' right of subrogation is subordinate to the rights of the damage claimants, who must first be paid in full (*The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751); so that the insurers, with the rights only of the assured, take what is left of the indemnity fund after the damage claims are satisfied.'

Judge Brown also held in *The Catskill*, *supra*, that claims for personal injuries and loss of life are within sections 4284 and 4285 of the Revised Statutes, which require the proceeds of the offending vessel, when surrendered, to be distributed among the claimants in proportion to their respective losses, and bar the claimants of other remedy; and that the effect of those provisions is to make every admissible claim a statutory lien on the fund, and entitled to share therein *pro rata*, except as affected by equitable rights between the parties.

My conclusion is that any claim which the owner or the charterer, or either of them on behalf of the underwriters, may have against the Mauch Chunk, is subordinate to the claims hereinbefore allowed, and that no part of the same is payable out of the fund in court until the other claimants have been paid in full."

The commissioner's report seems to cover the ground and to render further discussion unnecessary.

All exceptions overruled and the report confirmed.

THE NELLIE.

(District Court, E. D. New York. June 6, 1905.)

COLLISION—YACHT DRAGGING ANCHOR—NEGLIGENT ANCHORAGE.

A heavy yacht, 46 feet long, was made fast by her owner to a spar buoy having an anchor of 250 pounds weight, near a shipyard, under an agreement with the owner of the shipyard that he would pull her out and store her for the winter. About the middle of November, when she had been there two weeks with no one on board, she dragged the anchor in the night during a heavy wind, and came into collision with and sank libelant's yacht, which was moored near by. The wind had been high the day previous, attaining a velocity toward night of 46 miles, but no attention had been given to the yacht by the owner of the shipyard. *Held*, that he was the agent of her owner, and his negligence in not removing her or seeing that she was safely anchored in view of the condition of the weather rendered her liable for the damage to libelant's yacht.

In Admiralty. Suit for collision.

David Carll, for libelant.

Wing, Putnam & Burlingham, for claimant.

THOMAS, District Judge. On the east shore of City Island, N. Y., there is a shipyard owned by one Robertson, and opposite the same, and about 300 feet from the shore, is a spar buoy moored to an anchor of the mushroom form, weighing 250 pounds. Some distance below the libelant has a shipyard, and in the adjacent water; on November 13, 1904, was the *Miss Swift*, an open automobile launch. At the same time, at Robertson's mooring, the yacht *Nellie* was made fast by the loose end of the anchor chain, which was run out some 30 or 35 feet. On November 13th there was a heavy wind,

which continued during the night. The weather records in New York City show a northeasterly and northerly wind during the afternoon of November 13th reaching a velocity of 38 miles between 5 and 6 o'clock, changing to northwest between 8 and 9 o'clock, and decreasing to not less than 30 miles before midnight, and then increasing to 43 miles before 6 a. m. of November 14th, and to 56 miles between 6 and 7 o'clock. On the 13th the highest velocity was 46 miles at 5:40 p. m., for five minutes. It was evidently a severe wind, but, as the evidence shows, not more than was expectable at that time of year and in that locality. During the night of November 13th the Nellie dragged her anchor, so that on the morning of the 14th, at about 6 o'clock, she was found afloat on the starboard side of the Swift, with her bobstay broken, some marring of her starboard side, her chain extended forward over the line of the Swift, and still connected with the mushroom anchor, which lay forward and to the starboard of the Swift, and, as the witness Mulligan states, such chain was wound around the Swift's painter. The Swift herself was sunk, still attached to her mooring, and there was injury on her port side as if a vessel had scraped along the same, and near her port quarter her side was broken in so as to allow the water to enter and sink her. Notwithstanding this conjunction of the vessels, the claimant urges that the Nellie did not injure and sink the Swift. But the situation of the vessels and the evidence of the injury borne by each leaves no room for doubt that the Nellie did collide with the Swift, injure her, and cause her to sink. The Nellie had been made fast to Robertson's buoy about two weeks before the accident, with the consent of Robertson, by her owner, and had been left in charge of one Hansen, who had a shipyard immediately below Robertson, and had entered into an agreement to draw out the Nellie and store her for the winter. The evidence does not show that the Nellie was improperly moored at the outset, although the libellant urges that the chain which held her to the Robertson buoy was somewhat too short for holding her securely. There was no person on the Nellie, as the owner had agreed with Hansen to pull her out before the accident happened. It further appears that the mushroom anchor had been in place for two years and a half, and had been often used for holding vessels of the size of the Nellie, the length of which was 46 feet over all. The Nellie, for her size, was a very heavy boat, with a tall mast. The question is whether anybody who owed the duty of taking care of the Nellie was guilty of such neglect as to make the yacht liable for injury. The fact is that the claimant, after having properly moored his boat in anticipation of her early withdrawal and storage for the winter, left her in charge of Hansen, who, so far as appears, gave her no attention whatever. The claimant, so far as his individual action is concerned, is exculpated; but Hansen was his agent, and his culpable fault is chargeable to the vessel. The yacht dragged down upon the Swift and sank her. That requires explanation. None is given, save that a heavy wind blew, and made her drag her anchor. But what attention did Hansen pay to the wind?

There was no one aboard the *Nellie*, and this emphasized his duty to give her some supervision. There is no evidence that he gave her any. When the wind blew, even for five minutes, at 46 miles per hour at 5:40 o'clock, November 13th, and was blowing during the afternoon of that day at the velocities indicated, Hansen had full notice of serious weather conditions present and promised, and it was his duty to bestir himself, and make provision for the safety of the yacht; at least to examine whether any further security was needed. The nautical habit of laying up untenanted vessels and trusting to the forbearance of the elements for escape from injury is too often disclosed in court. Care, diligence, observance of the rights of others, are demanded of the owners of vessels at docks and at anchor. Hansen, with the storm at his very door, should have shown some vigorous oversight of property committed to him. One burdened with such a duty may not be idle while an increasing storm makes his charge a menace to the property of another.

The libelant should have a decree.

THE D. HARVEY.

ERIE BOATMEN'S TRANSP. CO., Limited, v. GENERAL SUPPLY & CONSTRUCTION CO.

(District Court, S. D. New York. June 15, 1905.)

1. SHIPPING—DAMAGE TO CARGO—NOTICE OF CLAIM.

A provision of a bill of lading that the vessel should not be liable for damage to the cargo unless written claim for the loss should be made within 30 days is sufficiently complied with by a letter sent to the carrier within 30 days by the proctor for the cargo owner, stating that he held a claim for damage to the cargo for collection, where both parties had actual knowledge of the damage at the time of discharge.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 496.]

2. SAME—BREAKAGE IN LOADING.

Where a cargo of cement in bags, which were in fairly good condition, was loaded by the vessel, she is liable for damage arising from the breaking of the bags, due to the negligent manner in which they were handled.

3. SAME—DAMAGE TO CEMENT CARGO BY WETTING.

A vessel is liable for damage to a cargo of cement which was received in good condition, but was lumpy and set when delivered, due to its having been wet, in the absence of explanation of the manner in which it became wet.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 452-454, 479-483.]

In Admiralty. Suit for freight and cross-suit for damage to cargo.

Hyland & Zabriskie, for Erie Boatmen's Transp. Co. and the D. Harvey.

James J. Macklin and La Roy S. Gove, for General Supply & Construction Co.

ADAMS, District Judge. An action was brought by the Erie Boatmen's Transportation Company, Limited, against The General

Supply Company to recover the freight amounting to \$114.50 on 3000 bags of cement transported by the canal boat D. Harvey from Jersey City to Schenectady, New York, in July 1903. There was also a charge of \$4 for insurance procured by the libellant for the Supply Company and a further charge of \$20 for 4 days demurrage @ \$5 each for detention in loading and discharging, making a total claim of \$138.50, no part of which is seriously disputed.

The controversy in the matter arises out of a claim on the part of the Supply Company against the canal boat to recover certain damages said to have arisen from an injury to the cargo of cement during the voyage, amounting to \$650. It is alleged that the cement was delivered in good order but when it was discharged it was found to be hard, lumpy and badly set as a result of water taken aboard or leakage of the boat so that 468 bags were injured in that way and all of the bags were more or less damaged or torn, 45 being entirely empty.

There is some testimony to show that the bags were roughly handled in loading, which would account in some measure for their bad condition, but there seems to be no way of explaining a hard lumpy or badly set condition except from contact with water.

The bill of lading contains the following, which is pleaded and expressly relied upon by the Boatmen's Company and by the boat:

"The said Company shall not, nor shall any carrier, person, or party, vessel, or her master aforesaid, be liable in any case or event, unless written claim for the loss or damage shall be made to the person or party sought to be made liable, within thirty days, and the action in which said claim shall be sought to be enforced, shall be brought within three months after the said loss or damage occurs."

The testimony does not show that any such claim on the boat as the bill of lading required was made in season. The boat finished loading on the 15th day of July and the bill of lading was then executed. It contained a receipt for 3,000 bags of cement, "3 bags empty." Schenectady was reached the 20th of July, discharging commenced the 21st and finished the 23rd. Many of the bags came out of the boat broken. The loose cement which came out of them was shovelled into other bags excepting 4 or 5, which apparently was called "sweepings" and put into 3 barrels, but no written claim was made for that or any other reason. There is nothing to show that any definite claim was made in writing until the action was commenced on the 2d of September, 1903. Even if there was damage to the cargo, I do not see how recovery can be had for it, in view of the explicit language of the contract above quoted. The *St. Hubert*, 107 Fed. 727, 46 C. C. A. 603; The *Westminster*, 127 Fed. 680, 62 C. C. A. 406.

After the foregoing was prepared, but before it was filed or became the opinion of the court, I called the attention of the proctor for the General Supply and Construction Company to the apparent technical defect in its case, whereupon an affidavit was made to the effect that, by an oversight, a letter from him, dated August 18th, 1903, giving notice of the claim against the Harvey, was omitted to be put in evidence, and he asked to have the case re-opened upon

this point. An order to show cause was thereupon granted, which resulted in a stipulation between the parties providing that no other cargo was carried on the boat than that of the General Supply and Construction Company, and that the following letter was received by the Erie Boatmen's Transportation Company on the 19th of August, 1903, viz.:

"New York, August 18th 1903

To Erie Boatmens Transportation Co. L'td
17 South St. N. Y.

Gentlemen:—

A claim has been placed in my hands for collection against the barge 'D. Harvey' by the General Supply & Construction Co. for damages to cargo. I would be pleased to see you in regard to the same.

Yours respectfully,

(signed) James J. Macklin."

The proctors for the claimant in making the admission and stipulation, expressly objected to the opening of the case for the purpose of introducing the letter and noted an exception in advance to the court's anticipated ruling, allowing the proof to be made.

The evidence should, in my judgment, be received and I grant the motion.

It seems that the notice, in connection with an almost immediate actual knowledge on the boat's and claimant's part of the claimed damage was sufficient to comply with the terms of the bill of lading. The technical objection being thus overcome, I proceed to consider the case upon its merits.

It appears that the cargo was damaged in two ways, viz.: (1) by the breaking of the bags containing the cement and (2) by a portion of it being set by its becoming wet.

1. The cargo was loaded by the boat and it was responsible for the adoption of a proper method. Instead, however, of providing for a careful manner of receiving the cargo, it was loaded from the cars by means of a simple plank, which permitted a drop of several feet into the boat, with the result of a number of the bags being broken. They were in reasonably good order before they were taken by the boat from the cars to load and the boat should respond for the damages in this respect.

2. Three of the bags were receipted for as being "lumpy" but the remainder were in apparent good order. As stated above, there seems to be no way of accounting for the bad condition of the remainder, except by contact with water. There was nothing in the weather during the voyage to explain the wetting and it is probable that there was some defect in the boat, although it was not discernible just prior to the discharge, when greater portions of the loose and other cement seemed to be dry. The fact remains, however, that the cargo was delivered to the boat in good order and delivered by it damaged and in a set condition, which it is testified by a credible expert was the necessary result of wetting.

The set condition was not the subject of consideration until after the delivery of the cargo at Schenectady. The breakage damage was at once noticed and the cargo refused by the consignee upon that ground but it was not until the cargo was piled up after de-

livery, that the set condition of a number of bags was observed and the damage in this respect discovered. Subsequently the full claim now presented was made.

There will be a decree for Erie Boatmen's Transportation Company for \$138.50 with interest; also one for The General Supply and Construction Company, with an order of reference for such damages as it may be able to prove. The final disposition of the cases and questions of costs will await the coming in and consideration of the commissioner's report.

STATE OF NEW JERSEY v. CORRIGAN et al.

(Circuit Court, D. New Jersey. July 28, 1905.)

1. CRIMINAL LAW—REMOVAL OF CAUSES—MOTION TO REMAND—TIME OF MAKING.

A motion to remand to the state court an indictment found therein, and removed to this court, can be made prior to the first day of the then next term of the federal court, upon the production by the state of copies of the proceedings in the state court; and this notwithstanding Rev. St. § 641 [U. S. Comp. St. 1901, p. 520], gives the petitioners until the first day of the next term in which to produce and file a copy of said proceedings in the federal court. The act does not prevent the nonpetitioning party from filing such copy before the next term, and if this be done, and a motion to remand be thereupon made upon notice, such motion will be entertained.

2. SAME—QUALIFICATION OF GRAND JURORS—EQUAL CIVIL RIGHTS.

The statute of the state of New Jersey relative to the qualifications of grand jurors considered, and *held*, that neither the statute itself, nor any decision of the highest court of that state, has denied to or prevented the enforcement of any rights secured to the petitioners by any law providing for the equal civil rights of citizens of the United States. *Held*, further, that under the facts disclosed by the petition the petitioners have adequate remedy for their alleged grievances in the state courts, and, failing therein, can obtain such relief by a writ of error to the United States Supreme Court.

(Syllabus by the Court.)

On Indictment. On motion to remand to the state court.

Robert H. McCarter, Atty. Gen., for the motion.

Alan Strong, opposed.

CROSS, District Judge. Application is made by the Attorney General of this state, upon notice to the petitioners, to remand to the state court for trial an indictment found against them in the Middlesex county court of oyer and terminer, which has been removed to this court. The record was brought into this court during the present term. Counsel for the defendants raises the point that the motion to remand is premature, for the reason that the petitioners have until the first day of the next term in which to file the record in this court, and that until that time this court has no jurisdiction. The act under which the case was removed is section 641, Rev. St. [U. S. Comp. St. 1901, p. 520], which provides for the removal of any criminal prosecution commenced in any state court "against any person who is denied or cannot

enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction of the United States," etc. It further provides the procedure to be followed for the removal of such cause for trial into the next Circuit Court to be held in the district where it is pending. The act makes it the duty of the state court to furnish the petitioner with copies of all proceedings in the case, and provides that, if such copies are filed by the petitioner in the Circuit Court on the first day of the next session, the cause shall proceed in the same manner as if instituted in that court by original process, but, if the clerk fails to furnish such copies, the suit may be docketed by the petitioner in the Circuit Court, which court shall then have jurisdiction therein, and may take steps to require the plaintiff to file a complaint in the cause upon pain of dismissal. It then provides that if, without refusal of the clerk to furnish such copies, the petitioner fails to file the same, a certificate under the seal of the Circuit Court stating such failure shall be given, and upon its production in the state court the cause shall proceed as if no petition for removal had been filed.

It clearly appears by the act that, upon a proper petition being filed in the state court, that court at once loses its jurisdiction, although any bail given therein is continued in force. The petitioners now contend that this court does not acquire jurisdiction until after they have filed a copy of the proceedings, which they are not required to do until the first day of the next term. If this be so, the cause is in the air for a period of possibly six months. Such a condition of affairs would certainly be most prejudicial to the interests of justice, as witnesses might die or become scattered, or questions arise requiring immediate solution. Some court should have constant jurisdiction of the case. There should be no hiatus of jurisdiction. Indeed, it is impossible to conceive of a court case which is not continuously and at all times subject to the jurisdiction of some court. A construction of the statute which would compel such an anomalous situation ought not to be adopted, if there is any reasonable way of escaping it. The statute puts the duty upon the petitioners of producing the record and filing it within a fixed time, upon pain of dismissal, but there is nothing in the act which prohibits the state from anticipating such action of the petitioners. As already indicated, it is in the interests of justice that, once the state court loses jurisdiction, the federal court should forthwith acquire it. By such a construction the petitioners lose none of their rights. It is true, an opposite construction would afford them some delay, but to this they have no claim. On the contrary, their only right in the premises is that accorded them by the Constitution—of a speedy trial.

The language of section 641, under consideration, varies somewhat from the sections which provide for the removal of civil causes, although in the latter case the burden is likewise cast upon

the petitioning party of producing a transcript of the record in the Circuit Court on or before the first day of the next term. Civil causes are, however, being constantly remanded to the state courts from whence they were removed by the nonpetitioning party, without waiting until the next term. The nonpetitioning party produces the record, and the motion to remand is thereupon at once made. This practice has become settled, and the reasons given therefor may be found in the following among other cases: *Delbanco v. Singletary et al.* (C. C.) 40 Fed. 177; *Mills v. Newell* (C. C.) 41 Fed. 529; *Hartford, etc., Co. v. Montague* (C. C.) 94 Fed. 227; *Consolidated Trac. Co. v. Guarantors' Liability Co.* (C. C.) 78 Fed. 657; *Thompson v. Chicago, etc.* (C. C.) 60 Fed. 773; *Anderson v. Appleton et al.* (C. C.) 32 Fed. 855, 857. These cases all proceed upon the theory that, once the state court loses its jurisdiction, the Circuit Court acquires it, upon the production of the record therein, no matter by whom it is produced. We think this reasoning is applicable to the present case, and we adopt it in the absence of any authority directly bearing upon the point under consideration. In the case of *Mills v. Newell*, 41 Fed. 530, the court said:

"When a transcript is entered in the Circuit Court by the nonpetitioning party, and the attention of the court is called to it, and the record on its face shows the case is one of which the federal court cannot take jurisdiction, it will entertain a motion to remand the cause, in order to prevent delay and secure justice. The court would certainly remand this cause if the record was filed on the first day of the then next session, and its attention was called to it at that time; and as stated by the judge in the case of *Delbanco v. Singletary* (C. C.) 40 Fed. 181: 'Why should a court hesitate or decline to look fully into the record in the first instance, and determine whether or not it has any jurisdiction of the case, when months afterwards it must make this examination, and, failing to find jurisdictional facts, must vacate all orders theretofore made, and remand the case to the state court?'"

In the case of *Delbanco v. Singletary* there was a rule of the Circuit Court which permitted the nonpetitioning party to at once produce the record and make a motion to remand, but it is obvious that the rule would have been nugatory if it ran contrary to the express provisions of the statute. The fact that the statute was silent in the matter made the rule possible, and so, in the case at bar, as the statute is silent, and the interests of speedy justice demand that the motion to remand be made with as little delay as possible, we think it should be entertained.

Furthermore, it is at least an open question whether section 5 of the act of March 3, 1875, c. 137, 18 Stat. 472, section 629, Rev. St. U. S. [U. S. Comp. St. 1901, p. 511], does not, in all cases of removal, confer upon the Circuit Court the right to remand so soon as its want of jurisdiction is made apparent; but, be that as it may, we hold—reasoning by analogy from the practice adopted in civil causes—that the motion to remand is properly made at this time. We have to consider, then, whether the case at bar was removable from the state court to the Circuit Court under section 641.

Section 47 of an act entitled "An act concerning juries" (2 Gen. St. N. J. p. 1853) provides that every person summoned as a grand juror shall be, among other things, above the age of 21 years and under the age of 65 years, and, if any person who is not so qualified shall be summoned as a grand juror, it shall be good cause of challenge to any juror, provided that no exception to any such juror on account of his age shall be allowed after he has been sworn or affirmed. The petitioners were indicted for an alleged offense committed after the grand jury which indicted them had been sworn. Consequently they claim they had no right, under the above statute, to challenge a grand juror before he was sworn, who, it is admitted, exceeded the age limit thereby fixed; and, as a motion to quash and a plea in abatement based on such incapacity were both overruled by the state court, they claim a right of removal under the provisions of section 641 of the United States Statutes.

Before taking up this question specifically, it may be well to consider the construction which has been placed by the courts upon that section. The two leading cases which illustrate when the act is and when it is not applicable to the removal of a cause are *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664, and *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667. The latter case holds that:

"The denial or inability to enforce in the judicial tribunals of a state rights secured to a defendant by any law providing for the equal right of all persons, citizens of the United States, of which section 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or the laws of the state, rather than a denial made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it."

Section 641, it has been repeatedly held, is not so broad in its terms as the fourteenth amendment to the Constitution: and it has no reference, as we think, to judgments or opinions of inferior courts, however erroneous or subversive of individual rights they may be, or to improper or irregular administration of a valid law by the officers of the state.

In the case of *Williams v. Mississippi*, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012, the court says, on page 219 of 170 U. S., page 585 of 18 Sup. Ct. (42 L. Ed. 1012), it has been held, in a very recent case, to justify a removal from a state court to a federal court of a cause in which such rights are alleged to be denied, that such denial must be the result of the Constitution or laws of the state, and not of the administration of them. The cases of *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567, *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075, and *Charley Smith v. Mississippi*, 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082, also illustrate the circumstances under which a removal of a cause is warranted by the provisions of section 641.

Does the New Jersey statute segregate a class of people, and impose upon them burdensome conditions of defense, or deny them defenses in a criminal prosecution not imposed upon or denied to

others similarly situated? If not, then it seems to us the provisions of section 641 do not apply. The provisions of the statute above quoted have existed in substantially the same form since November 10, 1797, and during all that period have borne alike upon all the citizens of the state. The act creates no distinction between them. It does not say that persons of one sect, race, or color shall have the right of challenge, while others, of a different sect or color, shall not. The right of challenge is given to all, the only condition imposed being that it shall be exercised before the juror is sworn.

Counsel for the petitioners claims, however, that the act does establish an illegal classification among the citizens of the state, and asks:

"May one be denied the right, which others enjoy, to exclude disqualified persons from the grand jury by which he is to be indicted, merely because the matter for which he is indicted occurred after the grand jury was sworn?"

It is an all-sufficient answer to say, as has already been said, that there is no classification established by the act as counsel suggests. The inability to challenge does not arise from the statute, but, if it did, and an equally effective remedy were still reserved to him by the act, or by the courts in their interpretation of the act, the petitioners would not be aggrieved.

The question as to a defendant's rights in the premises has been before the state courts at different times, and in different forms. It has been held in the trial courts that every citizen has a right to attend at the impaneling of the grand jury, and make known to the court his reasons, if any he has, why the grand jury, or any member or members of it, should not be sworn. In such a case he would appear as *amicus curiæ*, and, if he does not so appear, his subsequent right of challenge is gone. *Magie, J.* (now chancellor), 3 N. J. Law J. 153. In *People v. Jewett*, 3 Wend. 314, 321, Chief Justice Savage says:

"There are causes of challenge to grand jurors, and these may be urged by those accused, whether in prison or out on recognizance; and it is even said that a person wholly disinterested may, as *amicus curiæ*, suggest that a grand juror is disqualified. But such objection, to be availing, must be made previous to the juror being impaneled and sworn. It has been urged upon us that the defendant, not having been apprised of any intended proceeding against him, not having been arrested on a criminal charge, or required to enter into recognizance to appear at the court where the bill of indictment was found, had not an opportunity to make his challenge; that now is his earliest day in court; and that he ought, therefore, to be permitted to avail himself of this defense. Although the force of this appeal is felt, I cannot yield to it, and consent that, after an indictment found, the party charged may urge an objection of this kind in avoidance of the indictment. The books are silent on the subject of such exception after indictment found, and, in the absence of authority, I am inclined to say, in consideration of the inconvenience and delay which would unavoidably ensue in the administration of criminal justice, was a challenge to a grand juror permitted to be made after he was sworn and impaneled, that the objection comes too late. I am therefore of opinion that on neither of the grounds urged by the defendant ought this motion to be granted."

Marcy, J., concurred in the above opinion. These rulings may not establish the law, but they show the tendency of the courts to treat all fairly and alike under the statute.

In the case of *State v. Rockafellow*, 6 N. J. Law, 332, the Supreme Court held that a plea in abatement setting up that one of the grand jurors who found the bill of indictment under consideration in that case was not a freeholder, as required by the statute, was good. While in the case of *State v. Rickey*, 10 N. J. Law, 83, a plea in abatement to an indictment for embezzling money from a bank, which set up that one of the grand jurors was a stockholder in the bank, was held bad on demurrer, as was also a further plea in abatement to the same indictment, setting up that two of the grand jurors had, before they were sworn, expressed opinions prejudicial to the defendant. The same question was again before the court in the case of *Gibbs and Stanton v. State*, 45 N. J. Law, 379, 46 Am. Rep. 782. In this case the plea alleged malice and ill will on the part of the grand jurors who found the indictment, as well as misconduct on the part of the sheriff in selecting the grand jury. In an elaborate opinion by Beasley, C. J., he says:

"The remedies which the law afforded these defendants, situated as they were, were these: First, they had the right to challenge this grand jury, either as a whole or in part, on the grounds now stated in their pleas; or, second, if an opportunity for doing this was not afforded to them, by reason of their ignorance that they would be proceeded against, or that the objections to the proceedings in question existed, then their right was to apply to the court, in the exercise of its discretion, to quash the entire procedure against them. Nor, in abstract speculation, would an argument of any force arise from these premises that the remedies thus provided are so utterly insufficient and unreasonable that it must be presumed that a further remedy exists. For my part, I can see no force whatever in such a suggestion. In the first place, we are to remember that the right in question, and which, in some measure, the law should assuredly secure to the party, is not one that can be called an essential or fundamental right. It is not one necessary for the security of the person, life, or property. The requisite that an accusation of this nature shall proceed from a grand inquest is the provision which the law makes against frivolous or malicious public criminations. The safeguards to such provisions, as I have said, consist in the right to challenge the grand jury, and the right to move the court to set aside the proceedings. Are such safeguards unreasonably deficient? I am at a loss to see how any one can so consider. If a man is tried for his life and is convicted, and he then discovers that by the malice of the summoning officer the jury has been packed, and the trial has been a scheme to take his life, what remedy does the law give him in such extremity? Absolutely none but an application to the discretion of the court to set the proceedings aside, and yet it is argued that this same remedy is inadequate in its application to a similar proceeding on the part of a grand inquest. I must repeat that I cannot concede that a right to put in the plea in question belongs to the defendants *ex debito justitiæ*. If it be a right, it must be one inherent in the established modes of legal procedure. And this I regard as the real question to be disposed of on this branch of the case."

It will be seen from the foregoing extract that that eminent jurist believed that if a defendant did not have the right to challenge the grand jury before he was sworn, because of his ignorance that he was to be proceeded against, he might still apply to the court to quash the entire procedure against him. This case was subsequently affirmed upon the opinion of the chief justice by the court of Errors and Appeals in 46 N. J. Law, 353; and while what the chief justice said in reference to the right of the defendant to move to quash the indictment, under the circumstances mentioned, was in the nature of a dictum, it nevertheless is entitled to great weight.

In *State v. Turner*, 60 Atl. 1112, the Supreme Court, in denying a motion to quash an indictment, refers to the foregoing opinion of the chief justice, and distinguishes the case then under consideration by stating that it was noticeable that the chief justice was speaking of a cause of principal challenge proper affectum, but it does not in any way attempt to overrule or gainsay his opinion. In the case of *State v. Hoffman*, 70 N. J. Law, 629, 57 Atl. 263, affirmed by the Court of Errors and Appeals in 58 Atl. 1012, the chancellor, in delivering the opinion of the highest court, refers to that part of the opinion of Chief Justice Beasley above quoted, and says:

"The judgment in that case was affirmed in this court upon the opinion in the Supreme Court. It does not appear that it was intended to approve the doctrine that ground for a challenge of a grand juror could be presented and considered on a motion to quash an indictment. The question was not argued in this case, and no opinion need be expressed thereon."

It should be also noticed that, while *State v. Hoffman* holds that an objection to a grand juror because he was over the statutory age cannot be allowed when made after he was sworn by a motion to quash the indictment upon proof of the fact, it nowhere appears in the case whether the defendant had or had not an opportunity to challenge the juror before he was sworn, although the strong inference is that he had, for, if otherwise, the fact would undoubtedly have been adverted to upon the argument, and necessarily passed upon by the court. On the other hand, in the case of *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839, the court held that, when the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury upon this ground may be taken either by plea in abatement, or by motion to quash the indictment before pleading in bar. *United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857, is to the same effect.

It is apparent, therefore, that there is a variance between the decisions of the state courts, so far as they have gone, and the decisions of the Supreme Court of the United States, as to the proper procedure to be taken by a defendant in a case like the one under consideration. It is also equally apparent that there is no absolutely controlling decision of the highest state court adverse to the petitioners, since the decisions in that court do not in any case certainly reveal the same conditions that are here presented. The petitioners have undoubtedly sought a remedy in some of the inferior state courts, and have been denied it, but it by no means appears that they would be remediless in the highest court; but, if they were, it does not follow that they would be thereby brought within the provisions of section 641 of the United States Statutes. It may be the state courts have misconceived the law. There may be errors in the conclusions they have reached. The question is one of interpretation of the law, rather than of any hardship or injustice in the law itself; and, if the state courts are wrong in their construction, the defendants are not without remedy, since they can have such errors reviewed by the Supreme Court of the United States. In the case of *Gibbs & Stanton*, supra, the highest state

court has indirectly, and by implication at least, held that a defendant has the right to submit the question of a proper constitution of a grand jury to the court after he was indicted, provided he had no opportunity to do so before the grand jury was sworn. In *Gibson v. Mississippi*, 162 U. S., at page 583, 16 Sup. Ct., at page 907 (40 L. Ed. 1075), Mr. Justice Harlan, in delivering the opinion of the court, says:

"If any right, privilege, or immunity of the accused, secured or guaranteed by the Constitution or laws of the United States, has been denied by a refusal of the state court to set aside either that indictment or the panel of petit jurors, or by any erroneous rulings in the progress of the trial, his remedy would have been through the revisory power of the highest court of the state, and ultimately through that of this court."

And again, on page 585 of 162 U. S., page 908 of 16 Sup. Ct. (40 L. Ed. 1075):

"It is not every denial by a state enactment of rights secured by the Constitution or laws of the United States that is embraced by section 641 of the Revised Statute. The right of removal given by that section exists only in the special cases mentioned in it. Whether a particular statute, which does not discriminate against a class of citizens in respect of their civil rights, is applicable to a pending criminal prosecution in the state court, is a question in the first instance for the determination of that court; and its right and duty to finally determine such question cannot be interfered with by removing the prosecution from the state court, except in those cases which by express enactment of Congress may be removed for trial into the courts of the United States."

In *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542, the court, in speaking of the duties and obligations resting upon the state judges to guard, enforce, and protect every right secured by the Constitution and laws of the United States, said:

"If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination."

To the same effect are *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567, and *Strauder v. West Virginia*, *supra*.

Under the authorities, therefore, we fail to see how the defendants have put themselves within the provisions of section 641. There is no injustice in the law itself. It is a provision which may be found in very many statutes pertaining to juries in the different states of the United States; and, since the grand juries are usually sworn at the beginning of a term of court, cases are bound to arise under these laws whenever and so often as crimes are committed during the term. If, under the provisions of section 641, such cases are removable to the federal courts, it is obvious that where, as in this state, grand juries are not infrequently held in session from the beginning until the end of the term, all indictments found by such grand juries, in case of the disqualification of a grand juror, would be removable to the federal courts. This, of course, affords no ground for denying the petitioners their rights, if rights they have in the premises, but it is a reason why their rights should be clearly manifested. We think the petitioners' ground of complaint, if any, is not against the law, but against its possible interpreta-

tion, with respect to which they have ample remedy, irrespective of a removal of the cause to the federal court. I think the case was improperly removed into this court, but if it were even a doubtful case, it would be the duty of the court to remand it. *Groel v. United Electric Co. (C. C.)* 132 Fed. 252, 265, and cases cited.

An order remanding the cause to the state court will be made.

In re REMINGTON AUTOMOBILE & MOTOR CO.

(District Court, N. D. New York. July 29, 1905.)

No. 1,232.

1. CORPORATIONS—COLLECTION OF UNPAID STOCK SUBSCRIPTIONS.

AN agreement between a corporation and a person to whom it issues stock that only a certain per cent. of its par value shall be paid therefor, and that no more shall be called for or paid, is in fraud of creditors of the corporation, and may be set aside, and an assessment made upon the holders of the stock for the difference between the amount paid and its par value by a court of bankruptcy on application by the trustee in bankruptcy of the corporation.

2. SAME—NEW JERSEY STATUTE.

Under the corporation law of New Jersey (Laws 1896, c. 185, pp. 284, 293, §§ 21, 49), which provides that stockholders who have not paid full par value for their stock shall be liable for the remainder or so much thereof as may be necessary to pay the debts of the corporation, but which permits the issuance of stock in payment for property necessary to the business of the corporation, on the bankruptcy of a corporation stockholders who purchased their stock for less than par or received it in payment for property at an agreed price which was less than par may be assessed for the benefit of creditors by the court of bankruptcy for the difference between the amount paid or agreed upon and the par value of the stock held by them, notwithstanding the facts that the stock purported to be full paid and nonassessable, that the transactions were in good faith, and that the money or property paid was of greater actual value than the stock.

3. SAME—PAYMENT IN PROPERTY.

The corporation law of New Jersey (Laws 1896, c. 185, p. 293, § 49) provides that a corporation may issue full-paid stock in payment for property necessary in its business, and that, in the absence of fraud, the judgment of the directors as to the value of the property shall be conclusive. A manufacturing corporation organized under such statute made a contract with the board of trade of a city by which the latter agreed to purchase a stated number of shares of the company's stock at a price less than par, and also to furnish the company a free site for its buildings. Certificates of stock purporting to be full paid were issued to the board of trade, which sold the same to subscribers at the same price which it paid on the strength of circulars setting out the contract and the advantages to the city of the location of the factory. It also procured and conveyed to the company a site which was accepted in fulfillment of the contract. *Held*, that the site must be regarded as having been conveyed and received in full payment of the difference between the selling price and par value of the stock, and that neither the board of trade nor purchasers from it were liable to further assessments thereon in favor of creditors of the corporation after its bankruptcy.

In Bankruptcy. This is a proceeding to levy an assessment and call in all shares of stock of the above-named bankrupt corporation, Remington Automobile & Motor Company, which have been issued

at less than their par value, or on which the full par value has not heretofore been paid.

See 119 Fed. 441.

Geo. E. Dennison, for trustee.

F. G. Fincke, for Consolidated Water Co.

Charles H. Searle, for certain defendants.

Fuller & Miller, for certain defendants.

Matteson, Deangelis & Coxe, for Celia Algage.

RAY, District Judge. For about one year prior to August, 1900, S. C. Burch, P. H. Stubblebein, William A. Schmidt, Philo Remington, George H. Stone, and James S. Holmes, Jr., were copartners in business at Ilion, N. Y., and were conducting such business under the name of "Ilion Motor and Vehicle Company." August 3, 1900, the Remington Automobile & Motor Company, above-named bankrupt, was duly incorporated under and pursuant to the provisions of an act of the Legislature of the state of New Jersey entitled "An act concerning corporations (Revision of 1896)," approved April 21, 1896. It had its principal office in New Jersey, at No. 252 Maine street, city of Orange, in that state, but it had in fact its principal place of business first at Ilion, N. Y., and then at Utica, N. Y. The certificate of incorporation says:

"The objects for which this corporation is formed are to manufacture and sell gasoline, steam, electric and other motors, * * * have power to conduct its business in all its branches, * * * and ultimately to hold, purchase, mortgage, sell and convey real and personal property outside of the state of New Jersey * * * and especially in the state of New York. * * * The total authorized capital stock of this corporation is two hundred and fifty thousand dollars (\$250,000.00) divided into twenty-five hundred (2,500) shares of the par value of one hundred (\$100.00) dollars each."

Philo E. Remington, Charles B. Storrs, and William A. Lord were the original incorporators. August 6, 1900, these incorporators, waiving all formality and notice, designated a time and place of meeting of the directors, and one was held that day, at which Philo E. Remington was chosen president, S. C. Burch treasurer, and P. A. Stubblebein secretary. The making of a certificate to enable the company to do business in New York was authorized; also the issuing of stock to the full amount of \$250,000. Resolutions were also adopted to purchase all the property, etc., of the Ilion Motor & Vehicle Company for \$52,000, to be paid for with that amount of the capital stock of the company issued at par. It was also resolved that the office of the company outside of the state of New Jersey should be at Ilion, in the state of New York, and that meetings of the board of directors might be held outside of the state of New Jersey. By-laws were also adopted. The property, patent rights, machinery, stock, and other assets of said Ilion Motor & Vehicle Company were not worth the sum of \$52,000, or the sum of \$5,000, but, whatever such property or its value was, it, and all of it, was turned over to the said Remington Automobile & Motor Company, and its officers duly authorized thereto issued and delivered such 520 shares of the stock of such company in return therefor, marked

"Full Paid Stock." Sixty-five shares of the capital stock of said corporation was also issued and delivered to Philo E. Remington as consideration for the use of his name in the said corporation. The stock in question here and sought to be assessed may be divided into "Ilion Stock," the "Quick Stock," the "Advertising Stock," the "Chamber of Commerce Stock," and "Miscellaneous Sales Stock."

The facts in regard to the Ilion stock are substantially as follows: September 11, 1900, the board of directors adopted the following resolution:

"That for the purpose of securing a local interest in the Remington Automobile and Motor Company on the part of the citizens of Ilion that two hundred (200) shares of stock be issued to be sold at twenty-five dollars (\$25.00) per share, and that the proceeds of such sale be placed in the treasury to be used for regular expenses."

At the same meeting the manager was directed to take necessary steps for locating (the corporation) in Ilion permanently, etc. Measures were taken by the citizens of Ilion generally to secure the location of the company at that place permanently. As an inducement to the manager to sell this stock at \$25 per share to the citizens of Ilion, he was to be paid extra compensation if he sold to them 100 shares. Subscription papers to raise money to purchase a site for the company were circulated, and considerable sums subscribed. It was discovered that the company was also negotiating with Herkimer and Utica for the purpose of locating there. The subscription papers were called in. About this time the resolution to sell stock at \$25 per share to the citizens of Ilion was rescinded, but not until what is known as the Ilion stock had been sold and paid for at \$25 per share. The evidence is sufficient to sustain a finding, and I find that all of the purchasers of the Ilion stock took it with the understanding and expectation that the company would locate there permanently, that they would not have taken the stock but for that expectation, and that the said action of the directors caused them so to believe. When this stock was purchased by these Ilion subscribers, it was substantially worthless. It was not worth what the subscribers or purchasers of same actually paid. But they took it directly from the company at \$25 per share, knowing its par value was \$100 per share. There was no other contract between them and the company. There was no agreement by which the purchasers of this stock, with other citizens who might become purchasers, were to be permitted to pay the balance, or \$75 per share, by purchasing and giving to the company a site. I do not doubt that the equities are all with the owners of this stock as between them and the company.

The facts in regard to the Quick stock are as follows: The Quick Manufacturing Company was a corporation of the state of New Jersey. On the 1st day of October, 1900, the directors of the Quick Manufacturing Company adopted the following resolution:

"Resolved, that the president, F. A. Phelps, Jr., and the treasurer, E. M. Rodrock, be and they hereby are authorized and empowered to execute, acknowledge and deliver to the Remington Automobile and Motor Company, a corporation of said state, a proper bill or bills of sale transferring to said

Remington Automobile and Motor Company all of the rights, assets, plant, supplies, patents and property of every kind and description, including good will, etc., of the said Quick Manufacturing Company, in consideration of six thousand (\$6,000) dollars of the capital stock of said Remington Automobile and Motor Company, and the assumption by said Remington Automobile and Motor Company of the outstanding liabilities of the said Quick Manufacturing Company, amounting to five hundred and twenty-nine dollars and one cent (\$529.01)."

On the 2d day of October, 1900, the board of directors of the Remington Automobile & Motor Company passed the following resolutions, viz.:

"Resolved, that this company do purchase of the Quick Manufacturing Company, a corporation of the state of New Jersey, all its rights, assets, plant, material supplies, patents and property of every kind and description including good will, etc., and that it pay in consideration thereof the sum of six thousand (\$6,000) dollars of the capital stock of this company, said stock to be taken in part payment of the purchase price, at the rate of seventy-five (\$75.00) dollars per share, and said stock to be issued as full-paid nonassessable stock for the purchase of the property aforesaid and to be designated as stock issued for property purchased.

"Further resolved that this company assume the outstanding liabilities of the said Quick Manufacturing Company, which amount, according to the certificate of the treasurer thereof, to five hundred and twenty-nine dollars and one cent (\$529.01), and that it pay to the several creditors of said Quick Manufacturing Company the sums of money due to said creditors by its own checks and take due receipts therefor.

"Further resolved that this company also assume the lease of said Quick Manufacturing Company on its property, 3 and 5 Oliver street, in the city of Newark, Essex county, New Jersey, which said lease is to run to the first day of May, 1901, and the rent to be at the rate of thirty-one dollars and twenty-five cents (\$31.25) monthly; which resolution was after discussion adopted."

Thereupon the Quick Manufacturing Company executed and delivered a bill of sale of said property and delivered such property, and received \$8,000 of the capital stock of the Remington Company in payment. This stock was divided between the stockholders of the Quick Company. This bill of sale described the property, and recited as the consideration "for and in consideration of the sum of five hundred dollars and other good and valuable considerations." The property received was worth as much as the stock issued and delivered in return therefor.

The facts in relation to the advertising stock are as follows: At a meeting of the board of directors held February 11, 1901, at least eight resolutions were adopted, which provided for the issue of stock in consideration for advertising "upon the basis of seventy-five dollars (\$75) per share." Each resolution gave the name of the person to whom the stock was to issue and the number of shares. The stock was issued accordingly. I find that advertising done was worth as much or more than the stock issued and delivered.

The Utica Chamber of Commerce, of Utica, N. Y., was incorporated September 2, 1896, with a large membership, by-laws, and officers duly elected. Its general object and business was and is to promote the business, growth, and prosperity of the city of Utica. Early in 1901 the Remington Automobile & Motor Company entered into negotiations with it with a view of transferring its business to and

locating permanently in the city of Utica. It adopted a resolution at a special meeting held February 1, 1901, as follows:

"A special meeting of the board of directors was held at the office of the company and the following resolutions were adopted:

"That an option be given to the Utica Chamber of Commerce until February twenty-third for the securing of the permanent location of this company in the city of Utica, upon condition that they supply us with thirty thousand dollars (\$30,000.00) in cash through the sale of our stock at \$30.00 per share, and upon further condition that they supply us with a factory site of from three to four acres to our satisfaction, the same to be deeded to the company free and clear of all incumbrances.

"The above conditions being complied with, one thousand (1,000) shares of our capital stock is to be issued in the name of whoever the Utica Chamber of Commerce specifies at \$30.00 per share, each share full paid and nonassessable."

On the same day an agreement was executed between the Remington Automobile and Motor Company and the Utica Chamber of Commerce, as follows:

"Utica, N. Y. Feb. 11, 1901.

"Remington Automobile & Motor Co., James S. Holmes, Manager, Ilion, N. Y.—My dear Sir: The Utica Chamber of Commerce will obtain a free site of from three to four acres adjoining a railroad switch, and if possible on the canal, and also endeavor to raise \$30,000 for the Remington Automobile & Motor Company on the following conditions:

"First. That the facts mentioned in a circular letter submitted to J. S. Holmes, Jr., and to be signed by the directors of the Utica Chamber of Commerce, are correct, the principal points of which are that the Company will come to Utica with debts not to exceed approximately \$1,500, \$1,000 of which is to be extinguished by taking stock at \$30 per share; that it will erect a building at a cost of approximately \$5,000, buy additional machinery and equip itself to deliver automobiles. That in addition thereto the Company will have the service of James S. Holmes, Jr., as manager, at a salary of \$1,500 a year until the Company is well on its feet; that it will also have the services of William A. Schmidt at a salary of not to exceed \$1,500 per annum, and car fare expenses Ilion to Utica, until the Company is well on its feet, and that James S. Holmes, Jr., is to give his full time and attention to the management of the Company. Further that the treasurer'ship, if desired, shall be at the disposal of a Utica man and the resignation of at least three directors, (if it be thought advisable,) shall be obtained and their places taken by Utica men if the best interests of the Company require. Further that the Utica Chamber of Commerce is hereby granted an option until the 23rd day of February to sell and deliver 1,000 shares of the treasury stock of the Remington Automobile & Motor Company at \$30 per share. The proceeds to be placed in the treasury of the Company for the development of the business and the location of the plant in Utica.

"And I remain,

"Very truly yours,

Utica Chamber of Commerce,

"By Caryl Humphrey, Secretary.

"We, the undersigned, the Remington Automobile & Motor Company, James S. Holmes, Jr., and William A. Schmidt, each for himself and for and in consideration of one dollar to each of us in hand paid by the Utica Chamber of Commerce, hereby consent and agree to the terms in the above letter.

"Ilion, February 11, 1901.

Remington Automobile & Motor Co.

"By James S. Holmes, Jr. Secy.

"James S. Holmes, Jr.,

"Wm. A. Schmidt.

"It is hereby mutually understood and agreed that the foregoing proposition be and the same is hereby modified in the following particulars:

"That the option therein granted to the Utica Chamber of Commerce be extended to April 25th, 1901, for the purpose of enabling them to collect the

first installment on subscriptions to the stock of the Remington Automobile & Motor Company.

"That the number of the shares of the Treasury Stock of the Remington Automobile & Motor Company which may be taken by the Chamber of Commerce shall be one thousand (1,000) shares, but the Remington Automobile & Motor Company agrees to permanently locate in the City of Utica upon the sale by the Chamber of Commerce of five hundred (500) shares, which the Utica Chamber of Commerce agrees to do.

"That the said Company comes to Utica with debts approximating \$2,500.00, one thousand dollars (\$1,000) of which is to be extinguished by taking stock at thirty dollars (\$30.00) per share.

"That the said Company is not bounden to secure the services of William A. Schmidt.

"That upon the due performance of the terms of said agreed proposition by the said Chamber of Commerce, said Company agrees after erecting said factory building to give daily employment to, at least, an average of twenty-five (25) men for a period of, at least, five years.

"Dated and signed this tenth day of April, 1901.

"Utica Chamber of Commerce,
"George I. Dana, President.
"Remington Automobile & Motor Co.
"By James S. Holmes, Jr. Secy."

It will be noted that the agreement of February 11th was modified April 10, 1901, by the agreement above set forth. The board of trade then put out circulars, which stated, amongst other things:

"The directors of the Utica Chamber of Commerce, after a careful investigation, have entered into a contract with the Remington Automobile and Motor Company to permanently locate in the City of Utica, and bring with them in the executive management of their company James S. Holmes, Jr., and in their shop management William A. Schmidt on condition that the citizens of Utica raise \$30,000 cash, all to go to the treasury of the company for the development of the business, the money being obtained through the sale of 1,000 shares of the treasury stock at \$30 per share. Each share to be full paid and nonassessable."

At the time this circular was issued Philo E. Remington was president, S. C. Burch treasurer, and James S. Holmes, Jr., secretary and general manager. This circular contained many statements as to the history and assets of the company and the purposes for which it was proposed to expend the \$30,000 to be derived from the sale of the 1,000 shares at \$30 per share "full paid and nonassessable." This last was stated as follows:

"The Remington Automobile and Motor Company desire to obtain a free site, of between three and four acres, on a railroad switch, and erect thereon a one story building, which is to be of brick and iron construction, 60 feet wide and 180 feet long, similar to the General Electric Company construction at Schenectady. It is estimated that this building will cost \$5,000, the plans for which are already prepared and rough estimates made. In this building will be placed the machinery which the company already has in its temporary factory at Ilion, and about \$5,000 of additional machinery will be purchased. The total machinery being able to produce four complete motors per day, and the balance of the building used so that four complete automobiles can be delivered per day, giving a maximum capacity to the plant of 1,200 complete automobiles per annum. These will be sold at approximately \$850 each, cash on delivery as is the present custom of the business. Twenty per cent. of the selling price to be allowed to the agents, and the present gross cost is estimated at \$400 per carriage. On the above basis the company will have \$20,000 of working capital to conduct its business and have 799 shares of treasury stock for future development."

Attention was called to the "advantages of the industry to Utica" in the following language:

"Utica needs industries employing men. The Remington Automobile and Motor Company will employ from the start at least fifty men, and it is in a line of business which should permit a very large development and the gradual disbursement of a continually increasing pay roll."

As to "assets of the company" the circular stated:

"The Remington Automobile and Motor Company absorbed by purchase the Phelps motor, owned by the Quick Manufacturing Company, of Newark, N. J., which was the result of two years of experimental development, and cost, to reach its present perfection, about \$6,000. Of the twelve Phelps motors built, those in operation are reported as comparing most favorably with the De Dion motor, which is of French construction, and the best gasoline motor on the market. The company also possesses the Schmidt motor, which is still in an experimental condition, with every possibility of its being successfully developed. The condition of the automobile market to-day does not require protection by patents any more than the bicycle business did at its inception.

"Under these conditions the commercial success comes to those first in the field, who develop through the experience gained from the use of their machines by the public.

"The motors in process, carriages being built, patterns, drawings and machinery in the temporary plant at Ilion are roughly worth 5,000 dollars."

From the evidence it is evident that the Utica Board of Trade was deceived by the officers of the company as to the assets and condition of the company. Nevertheless the agreement was made, and thereafter subscriptions were taken by Mr. Humphrey, secretary of the chamber of commerce, and by James S. Holmes, Jr., secretary of the Remington Company. These subscriptions were mostly, if not wholly, made by a letter (the blanks being filled by the subscriber) of which the following is a sample, viz.:

"Subscription Letter.

"Remington Automobile and Motor Company.

"1,000 Shares Treasury stock at \$30 per share.

"Utica Chamber of Commerce, Caryl Humphrey, Secretary—Dear Sir: I hereby subscribe for five shares of the Remington Automobile and Motor Company, at \$30 per share, according to the term of a circular issued by you, dated February 13, 1901, and its modifications, and engage to accept said stock, or any less number of shares that you may allot to me in case of oversubscription, and to pay for the same in conformity with the circular.

"Yours very truly,

Geo. H. Torney, Jr.,

"Address, State Hospital, Utica, N. Y.

"Dated, March 25, 1901."

An additional subscription was made, viz.:

We, the undersigned, being Utica Stock-holders of the Remington Automobile & Motor Company, agree to subscribe for additional shares of such company to the amount set opposite our respective names, with the express understanding that payments are to be made by us, twenty per cent. (20%) on or before the fifth day of each month, commencing the 5th day of November. The certificates of stock to be issued upon the basis of thirty dollars (\$30.00) per share, and to be full paid, non-assessable, and to apply on account of the block of stock allotted for sale to the Utica Chamber of Commerce.

O. S. Foster.....	20
Wm. J. Foster.....	10
John B. Wild.....	10
G. A. Spalding.....	25
John L. Mahr.....	5
T. R. Proctor.....	10

I find that the subscriptions to this "Chamber of Commerce stock" were made by each subscriber on the strength of the statements of the circular and on statements made in corroboration by those taking the subscriptions, with the expectation and belief that the 70 per cent. was to be paid and would be paid by the Utica Board of Trade procuring and transferring to said company a site in Utica such as is described in the resolutions, etc., quoted and referred to. The stock was not issued direct by the Remington Automobile & Motor Company to the subscribers, but was issued in blank, and delivered to the Utica Trust & Deposit Company, which received payments and delivered the stock. The company moved to Utica, and was doing some business on leased premises. About 554 shares were subscribed for at \$30 per share, and of these about 539 were taken. The other 80 shares mentioned were taken at \$50 per share; also some other shares on same terms, making about 96 in all. Forty more shares at \$50 per share were issued to certain parties at \$50 per share. The evidence shows that the chamber of commerce did its best to comply with the agreement. It, by agents and its officers, spent much time in its efforts to secure a proper site. The agreement, it will be noted, was so changed that only 500 shares of stock were to be disposed of. Only one acceptable site was found, and that could not be obtained by reason of difficulties as to title. Subsequently a site was found which the company agreed to accept and did accept, and which the chamber of commerce purchased and paid for and turned over to the company. The company duly accepted it as a compliance with the agreement in connection with other good and valuable considerations, \$1,000 cash, duly paid. No value was fixed on the property to be obtained and turned over to the company by the board of trade, unless it was the difference between the par value of the 500 shares of stock, \$50,000, and the \$30,000 paid in in cash by the subscribers, or \$20,000; and, as the company finally accepted what was offered and \$1,000 cash, and released the board of trade, that transaction would seem to have been satisfactorily closed. This was done pursuant to resolutions duly adopted, and the satisfaction executed pursuant thereto reads as follows:

"This is to certify that the Remington Automobile & Motor Company has received from The Utica Chamber of Commerce, the sum of one thousand dollars (\$1,000.00) in cash in full satisfaction of the agreement of said Chamber of Commerce, dated February 11th, 1901, to furnish a site for the Remington Automobile & Motor Company, in the City of Utica, and of the modification of said agreement dated April 10th, 1901; and in full satisfaction of all claims against said Chamber of Commerce.

"Remington Automobile & Motor Co.,
"Philo E. Remington, Prest.

"Utica, N. Y., May 22nd, 1902.

"Attest

"James S. Holmes, Jr., Secy."

I find and hold that all the so-called "Chamber of Commerce stock," including that sold and issued at \$50 per share on the subscriptions when the subscribers placed themselves within the terms of the circular and the agreement therein mentioned, was

issued and delivered to the various subscribers therefor by the Utica Board of Trade in pursuance of its contract and agreement with the Remington Automobile & Motor Company to sell same or procure its sale and pay over to said company the \$30 per share (and \$50 per share as to some, by implication), and procure for it a site as mentioned; that the 70 per cent. of the par value of such stock not paid by the subscribers to said board of trade and by it to the company (50 per cent. as to some of same) was to be paid for by the site before mentioned, which, or its equivalent, was subsequently furnished; and that under the terms and spirit of the agreement and understanding between the Remington Company and board of trade and both said parties and the said subscribers to such stock all such stock was paid for in full in cash and property which the Remington Automobile & Motor Company agreed to accept and did accept in full payment therefor. I also find that the cash and property procured by the board of trade and turned over to said company for such stock was of greater value than the stock itself. I find that as to such stock there was no privity of contract between the subscribers and such company. I also find that the property procured and turned over to the company by the board of trade was necessary to its business. The said stock was issued as full-paid stock, and so stated on its face. There is an utter absence of any fraud on the part of the Utica Board of Trade in the transaction, and no fraud on the part of any subscriber or taker of any share of such stock. The Utica Board of Trade put out the circular referred to and quoted from in perfect innocence and good faith, and in the full belief that every statement therein was true. The takers of the stock we are now considering took it relying on those representations and on the further understanding that they were taking it from the Utica Board of Trade, which board was to pay or had paid what they, the subscribers, respectively did not. No one of them had any idea he or she was contracting, agreeing, or becoming liable to pay anything more on the stock, and the officers of the Remington Company had no such idea. It is not necessary here to consider the complication as to legal and equitable rights that would have arisen had the board of trade failed to comply with its agreement, but probably it would have been liable for the seventy per cent.

The liability of these stockholders to the trustee in bankruptcy for the unpaid amount of their subscription is governed by the statutes of the state of New Jersey, the decisions of the highest courts of that state and of the Supreme Court of the United States, in connection with the charter of the bankrupt corporation. This is too well settled to require a citation of authority. Section 21, c. 185, p. 284, Laws N. J. 1896 (see Dill on Corporations, New Jersey, p. 49), reads:

"Where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy such debts and obligations."

The meaning and legal effect of this is plain enough. When the property of a corporation proves insufficient in value to satisfy its debts and obligations, each stockholder is liable for the amount of his unpaid subscription, or such proportion thereof as may be required or necessary to satisfy the debts of the corporation and the legitimate expenses of winding up its affairs, but no more. *Hood v. McNaughton*, 54 N. J. Law, 425-427, 24 Atl. 497; *Cumberland Lumber Co. v. Clinton Hill Co.*, 57 N. J. Eq. 627, 42 Atl. 585. The unpaid subscriptions constitute a trust fund for the satisfaction of creditors, and a trustee in bankruptcy may recover for the benefit of the estate. *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968. If an agreement has been made between the company issuing the stock and the person to whom issued that only a certain per cent. of the par value shall be paid, and that no more shall be called for or paid, such agreement is in fraud of creditors, and may be set aside. *Scovill v. Thayer*, supra. The court of bankruptcy may do all this, for it is a court of equity.

Section 48 of the corporation law of New Jersey (same statute before quoted) provides:

"Nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this act, except as hereinafter provided in case of the purchase of property," etc.

Section 49, p. 293 provides:

"Any corporation formed under this act may purchase mines, manufactories or other property necessary for its business, or the stock of any company or companies owning, mining, manufacturing or producing materials, or other property necessary for its business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full-paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation to be published or filed this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the fact."

There is no difficulty in understanding these sections of the corporation law of New Jersey as applied to this case. Where there was an agreement, express or implied, as in the case of the Ilion subscribers to this stock, that only \$25 per share was to be paid by them, in contemplation of law it is fraudulent and void as to creditors, and may be set aside on application of the trustee in bankruptcy; and, so far as necessary to pay creditors, the \$75 unpaid on each share may be collected. The same rule applies as to the stock issued for advertising where it was issued at less than par, and the same as to the Quick stock. I see no escape from this conclusion, however inequitable it may seem as between the Remington Company as a corporation and the Ilion stockholders. There was no pretense that the Quick stock, or the stock issued in that deal, was paid for at its par value in cash or property. Where property is given in payment for stock, and the value is not expressly agreed

upon, or the question of its value left for subsequent determination, the fair implication is that its value is the same as the par value of the stock. Of course, in a proper case evidence might be permitted to show such a gross overvaluation as to show fraud, and hence vitiate the transaction, even in cases where the value of the property was agreed upon. We have no occasion to apply the rule here. We cannot vary the rules laid down where the rights of creditors are involved, because the real value of the stock sold was far less than its par value. In regard to the Chamber of Commerce stock, it was paid for in full in cash and property, and there was no fraud in the transaction. This includes the stock issued to the Consolidated Water Company, and hence I need not consider the question of the power of the officer who took the stock, or of the water company itself to take it.

In *Handley v. Stutz*, 139 U. S., at page 427, 11 Sup. Ct., at page 534 (35 L. Ed. 227), the court said:

"Ever since the case of *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation that the stock shall be treated as fully paid and nonassessable, or otherwise limiting their liability therefor, is void as against creditors. The decisions of this court upon this subject have been frequent and uniform, and no relaxation of the general principle has been admitted. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *County of Morgan v. Allen*, 103 U. S. 498, 26 L. Ed. 498; *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Graham v. Railroad Co.*, 102 U. S. 148, 161, 26 L. Ed. 106; *Richardson v. Green*, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516."

In that case—*Handley v. Stutz*—the court decided:

"An active corporation, finding its original capital impaired by loss or misfortune, may, for the purpose of recuperating itself, and of producing new conditions for the successful prosecution of its business, issue new stock, and put it upon the market, and sell it for the best price that can be obtained: and in such case no such trust in favor of a creditor arises against the purchaser who, in good faith, buys for less than par."

But that is not this case. Here we have subscriptions to the original capital stock. Those who took it knew they were giving "currency" standing to the corporation, and as between them and creditors the equities of the latter prevail when there was no pretense of full payment in any way.

Findings of fact and conclusions of law must be prepared in accordance herewith embraced in the order to be signed, and the holders of the stock to be assessed must be carefully specified by name, etc. If any disagreement arises as to the persons within this decision, it may be settled with the order.

BALTIMORE STEAM PACKET CO. v. COASTWISE TRANSP. CO.
COASTWISE TRANSP. CO. v. BALTIMORE STEAM PACKET CO.

(District Court, E. D. Virginia. July 17, 1905.)

1. COLLISION—VIOLATION OF RULES—EVIDENCE TO EXONERATE FROM LIABILITY.

Where one vessel has been found guilty of a palpable violation of the rules of navigation sufficient in itself to account for a collision, she cannot escape liability merely by casting doubt upon the conduct of the other vessel.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 16, 17.]

2. SAME—STEAMER AND ANCHORED SCHOONER IN FOG—FAILURE TO SOUND FOG SIGNALS.

Conflicting evidence considered, and *held* to establish by a preponderance that there was a thick fog at the time of a collision in the early morning between a steamer and a schooner lying at anchor in Hampton Roads, which made it the duty of the schooner, under article 15d of the navigation rules (30 Stat. p. 99, c. 4 [U. S. Comp. St. 1901, p. 2880]), to sound fog signals, and to render her solely in fault for the collision because of her violation of such rule.

In Admiralty. Cross-suits for collision.

Hughes & Little, for Baltimore Steam Packet Co.

Carver & Blodgett and Whitehurst & Hughes, for Coastwise Transportation Co.

WADDILL, District Judge. These are cross-libels filed by the Baltimore Steam Packet Company, owner of the steamer Georgia, against the Coastwise Transportation Company, owner of the schooner Henry W. Cramp, and by the latter company against the former.

About 6:15 o'clock in the morning of the 31st of January, 1904, the steamer Georgia, on her regular trip from Baltimore to Norfolk, a few minutes after leaving Old Point Wharf, and at a point from about a mile and a half to two miles from said wharf, in Hampton Roads, came into collision with the schooner Henry W. Cramp, then lying at anchor in the Roads. As is usual in this class of cases, each vessel in collision insists that the occurrence was solely the fault of the other; the charges on the part of the Georgia briefly being that there existed at the time a dense fog, and that the schooner Cramp was anchored directly in the path of incoming and outgoing steamers, and was without proper anchor watch, and was not ringing her bell or giving any other notice of her location, and that she was taking no precaution to avoid collision with passing vessels; and on the part of the Henry W. Cramp that the weather was clear, sea smooth, and lights could be seen a distance of two miles, and that the Georgia was without a proper lookout or a competent master and crew, and was proceeding at too great a speed, and failed to keep clear of the customary anchorage grounds, and of the Henry W. Cramp while lying there at anchor. It is not deemed necessary to enter into a lengthy discussion of the several faults assigned by the vessels against each other, further than to say that the case turns entirely upon the condition

of the weather at the time of the collision, and whether or not there existed a fog, or other weather conditions such as imposed upon the anchored vessel the obligation to give proper fog signals; the Georgia's contention being that the fog at the time was so dense that it was impossible to see more than about a ship's length away, and that fog signals should have been given, whereas the Cramp's contention is that the weather was clear, or comparatively so, and that fog signals were unnecessary, and none given. Upon this question a great mass of evidence was taken, particularly in behalf of the Georgia, mostly before the court; and without attempting to review the same at great length, or to reconcile all of the apparent conflicts therein, further than to say that the same has been fully considered, the conclusion reached by the court is that there did exist at the time of the collision such weather conditions as made it obligatory upon the Henry W. Cramp, lying at anchor, to give the required fog signal (30 Stat. p. 99, c. 4, art. 15d [U. S. Comp. St. 1901, p. 2880]: "A vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds"), and her failure so to do was the cause of the collision in this case. The evidence in behalf of the Georgia clearly establishes the existence of a thick fog, certainly from 4 o'clock on the morning of the collision until some time after the collision; and this is shown not only by the officers and crew of the ship itself, but by others in a position to know and judge of the weather, particularly in the immediate vicinity of the collision, and at Old Point Comfort; a large number of persons being examined at length on this point, among them the lighthouse keeper at Old Point, the officers of the pilot boat Relief, lying at Old Point, employes upon the wharf at Old Point, the picket on duty at the time from the army post, the anchor watch on the hospital ship Jamestown, lying between the wharf and the scene of collision, the members of the crews of other steamers passing out of the Roads at the time, and a passenger on the Georgia at the time of the collision. These witnesses, some 19 in number, with singular unanimity concur in the fact that from and after about 4 or 4:30 o'clock that morning, there existed a dense fog; that the Georgia could not be seen in making the landing at Old Point but 200 or 300 feet away; that she approached the wharf, and left, sounding her fog signals; and that other steamers going out, and the hospital ship Jamestown, and an oil steamer lying at anchor near Old Point at the time were also ringing bells; and that it was utterly impossible to see any distance, comparatively, in the fog. The lighthouse keeper at Old Point, who produced his official records made at the time, testified that the weather was thick all night; that it was his custom, when Thimble Light and the Newport News and Wiltoughby Spit lights "shut in," to start his fog bell; that on the morning in question at 4:30 o'clock, on account of this condition, he put on his bells, and rang them until 8 o'clock; that he remembered the morning particularly partly because of two Baltimore steamers passing at the same time, going in opposite directions, and that he heard the steamer going out sound fog whistles regu-

larly, and the one going in several times after she left the wharf; that he was outside continuously that morning, and that there was no lightening of the fog during the hours mentioned. This statement is supported by the witnesses above referred to, all of whom were out in, and in a position to see and judge of the condition of, the weather, including the passenger referred to, a man of evident intelligence and reliability, who also saw and observed the weather, and fully concurs with the ship's officers that at the very moment of the collision it was impossible to see more than a ship's length ahead. In behalf of the schooner Cramp quite a number of witnesses were examined, consisting of her officers and crew and some of the officers and crews of other vessels, also lying at anchor in the vicinity of the collision; and it by no means follows from their evidence that the weather conditions were not such as to require fog signals. The rules of navigation require the giving of signals not only in a fog, but in "mist, falling snow, or heavy rainstorms, whether by day or night." Several of the witnesses examined on behalf of the Cramp, including her master, speak of the existence of a drizzle or mist; the master of the Cramp referring to it as "what you call a 'Scotch mist.'" Suffice to say, however, that, in so far as their testimony tends to show that the weather conditions at the time of the collision did not require the fog signal, the overwhelming preponderance of the evidence is to the contrary; and the conflict may be accounted for from the fact that the Cramp's witnesses may have observed the weather hurriedly, and at times that did not necessarily bear on the weather at the time of the collision; and as to the Cramp's witnesses from the other vessels it may be said that, if there did exist such weather conditions as the evidence conclusively shows, they were themselves guilty of negligence, as their respective vessels were confessedly not giving fog signals.

The schooner Cramp insists that the collision did not come about because of her failure to give proper fog signals, but because the Georgia was proceeding at too high a rate of speed in the fog, in violation of the statutory provisions of the act of June 9, 1897, art. 15, 30 Stat. p. 99, c. 4 [U. S. Comp. St. 1901, p. 2880]. This defense will not avail to relieve the Cramp, unless the same is clearly and conclusively established, since the Cramp has been found guilty of a palpable violation of the statutory requirement relative to navigation, sufficient within itself to account for the disaster, and which, in the judgment of the court, caused the same; and it will not do, therefore, for her merely to throw doubt upon the conduct of the Georgia in order to escape liability herself. *The Pennsylvania*, 19 Wall. 125, 136, 22 L. Ed. 148; *The Martello*, 153 U. S. 64, 74, 14 Sup. Ct. 723, 38 L. Ed. 637; *The Georgetown* (D. C.) 135 Fed. 854, 857.

Neither do the facts in this case support the Cramp's contention that the speed of the Georgia entered into the cause of the disaster. While it is quite clear from the evidence that the Georgia had been violating the rules of navigation in respect to her speed, still this

condition did not prevail at the time of the collision. It may be said to be providentially so, as far as the Georgia is concerned, but nevertheless it serves to relieve her from fault. The Ludvig Holberg, 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620. It appears that shortly preceding the collision the navigators of the Georgia observed the lights of the schooner Elwell on her port bow, just in time, by stopping and reversing and swinging to starboard, to avoid a collision with her; and it was after this occurrence, and as the Georgia was swinging back to port to regain her course, and before any headway of consequence had been gained, that she collided with the Cramp on her starboard side, then lying immediately across her course. Had the Cramp given the proper fog signal, the collision with her would easily have been avoided after the Georgia had passed the Elwell and practically come to a standstill.

It follows from what has been said that this collision was caused solely by the fault of the schooner Henry W. Cramp, and a decree may be entered so determining.

PITTSBURGH DREDGING & CONSTRUCTION CO. v. MONONGAHELA & WESTERN DREDGING CO.

(Circuit Court, W. D. Pennsylvania. July 21, 1905.)

No. 19.

CONTRACTS—CONSPIRACY TO DEFRAUD—PUBLIC POLICY—VALIDITY.

Where, prior to bidding on certain private work, plaintiff and defendant contracted that defendant should bid \$1.60 and plaintiff \$1.70 per cubic yard for the work required, and whichever party received the contract was to give the other one-half of the work, and, after both bids were rejected, and a change made in the requirements, defendant filed an additional bid of \$1.25, which was accepted, and, though plaintiff tendered performance of one-half of the contract, defendant did the work at a cost of 9 cents per cubic yard, the contract between plaintiff and defendant constituted a conspiracy to defraud the person letting the contract, and was void between the parties, as against public policy.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 661.]

Sur Motion for Judgment on Questions Reserved.

Seymour, Patterson & Seibeneck, for plaintiff.

Reed, Smith, Shaw & Beal, for defendant.

BUFFINGTON, District Judge. This is a motion to enter judgment on reserved points in a suit by the Pittsburgh Dredging & Construction Company against the Monongahela & Western Dredging Company, brought to recover one-half the profits earned by defendant on certain dredging done by it. The facts established by the verdict or uncontroverted in the proofs are these: In June, 1904, the Jones & Laughlin Steel Company were required by the United States engineer in charge of the Monongahela river to remove a large body of slag from the shore bed of that stream. In pursuance of this requirement the steel company requested bids from the plaintiff and defendant dredging companies. Thereupon these

companies entered into an agreement, followed by a written contract, whereby defendant was to bid \$1.60 and plaintiff \$1.70 per cubic yard for the dredging required by the government, and, whichever party received the contract, each was to have one-half the work. Bids were made accordingly, the plaintiff's netting from \$4,500 to \$5,000 in excess of defendant's. The defendant alleged these bids were rejected, that the requirements of the government engineer were changed, and thereupon it bid \$1.25 on the changed requirements. It contended this bid was for another and different requirement from that contemplated by the contract, and its bid was not covered by such contract. The finding of the jury, however, established the fact that the bid of the defendant and the work awarded were embraced by the contract referred to, and that the plaintiff tendered performance of one-half thereof. The proofs show the work was actually done by defendant at a cost of 9 cents per cubic yard. The Jones & Laughlin Company knew nothing of the contract between these parties until the work was finished. On the trial a verdict was rendered in favor of the plaintiff for \$3,439.50, subject to the questions involved in the defendant's fifth and sixth points, which were, respectively: "That the agreement of June 16, 1904, constituted a conspiracy to defraud the Jones & Laughlin Steel Company, and was illegal and void, and no action can be maintained thereon, and the verdict must be for the defendant;" and "that the agreement of June 16, 1904, constituted a combination in restraint of trade, and was illegal and void, and no action can be maintained thereon, and the verdict must be for the defendant." The defendant now moves for judgment thereon.

From the terms of the contract, the fact that it was not disclosed to the Jones & Laughlin Company, and the uncontradicted testimony proved on the part of the plaintiff by Smoot, one of the defendant's officers, who says, "Well, the defendant and the plaintiff—we had a meeting, and we decided we could fix this thing up and make some money out of it, and get a pretty good price, and we made prices on it," it is clear that the purpose of the contract was to mislead the steel company into the belief there was competitive bidding between the two companies, and by this collusive bidding secure the contract for their joint benefit. The plaintiff, then, being driven to the necessity of showing such a contract as the foundation of its right to recover, will the law lend its aid to enforce such an agreement? The answer to this turns on the question whether this is an illegal contract, for, as Lord Kenyon said, "It is a maxim in our law that a plaintiff must show he stands on fair ground when he calls a court of justice to administer relief to him," and to the same effect is the holding of the Supreme Court in *McMullen v. Hoffman*, 174 U. S. 654, 19 Sup. Ct. 845, 43 L. Ed. 1117, namely: "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged right directly springing from such contract." It will be observed that when the law refuses to be used to en-

force an unlawful contract it is not done to benefit or aid the party who has profited by the wrong, and who is in possession of the fruits of the fraud, but on the higher ground of public policy. This may result in a wrongdoer profiting by his own wrong, but to transfer the money to the other wrongdoer would equally enable that other to profit by his unlawful act. But assuredly the party who is thus left remediless cannot justly complain, for if, for the purposes of legal relief, the parties are without remedy, they have outlawed themselves, and the law wisely holds aloof, and leaves without its aid those whose deliberate purpose was to transgress its provisions. Nor is it necessary that the objectionable contract actually perpetrate a fraud, or that any wrong should have been done to any one. It is the nature and object of the contract, apart from the fact, whether wrong actually from it results, that bars its enforcement. "The law looks to the general tendency of such contracts. The vice is in the nature of the contract, and it is condemned as belonging to a class which the law will not tolerate. * * * The vice is inherent in contracts of this kind, and its existence does not in the least depend upon the success which attends the execution of any particular agreement." *McMullen v. Hoffman*, *supra*.

Such being the attitude of the law toward the enforcement of illegal contracts generally, we next inquire whether the one here involved was against public policy, and therefore illegal. The purpose of this contract, as stated above, being to create a false appearance of competitive bidding, and by collusive tenders to secure a contract for the joint benefit of the participants, is such a contract against public policy? How such collusive bids stand in the estimate of the Supreme Court is clear. In *McMullen v. Hoffman*, *supra*—an agreement for collusive bidding by two bidders for their joint benefit—it was said:

"Upon these facts the question arising is whether a contract between the parties themselves, such as is above set forth, is illegal. In order to answer the question, we would first naturally ask what is its direct and necessary tendency? Most clearly that it tends to induce the belief that there is really competition between the parties making the different bids, although the truth is that there is no such competition, and that they are in fact united in interest. It would also tend to the belief on the part of the committee receiving the bids that a bona fide bidder, seeking to obtain the contract, regarded the price he named, although much higher than the lowest bid, as a fair one for the purpose of enabling him to realize reasonable profits from its performance. A bid thus made amounts to a representation that the sum bid is not in truth an unreasonable or too great a sum for the work to be done. We do not mean it is a warranty to that effect, or anything of the kind, but simply that a committee receiving such a bid and assuming it to be a bona fide bid would naturally regard it as a representation that the work to be done, with a fair profit, would, in the opinion of the bidder, cost the amount bid. Hence it would almost certainly tend to the belief that the lower bid was not an unreasonably high one, and that it would be unnecessary and improper to reject all the bids and advertise for a new letting. * * * It might readily be surmised that, if these parties had bid in competition, one or both of the bids would have been lower than their combined bid. It was not necessary, however, to prove so difficult a fact. The inference would be natural. * * * But in this case there is more, even, than concealment. There is the active fraud in the putting in of these, in substance fictitious, bids, in their different names, but in truth forming no competitive bids, and put in for the purpose

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already stated. It is not too much to say that the most perfect good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interest. The making of fictitious bids under the circumstances detailed herein is, in its essence, an illegal and most improper act; indeed, it is a plain fraud, perpetrated in the effort to obtain the desired result."

And in *Hyer v. Richmond Traction Company*, 168 U. S. 471, 18 Sup. Ct. 114, 42 L. Ed. 547, referring to the agreement in that case, which was for two rival parties to unite (with the full knowledge of the municipal authorities) in procuring the grant of a franchise for their joint benefit, it was said:

"The vice which is so frequently detected in contracts and agreements of a similar nature lies in the fact of secrecy, concealment, and deception. The one applicant, though apparently antagonizing the other, is really supporting the latter's application; and the public authorities are misled by statements and representations coming from a supposed adverse but in fact friendly source."

Now, such being the declared law of the land, why should it not be extended to the case in hand? Because, it is argued, the letting involved in the case cited, and in others that might be, were of public works, and the rule does not apply in private lettings. In the absence of any adjudged case binding on this court compelling us to restrict this wholesome principle of public policy to any such narrow limit, we are unwilling to do so. That such secret, collusive biddings tend, or may tend, to mislead public officials, is conceded. But are they resorted to in private lettings for any other than a like purpose to deceive, or are they any less harmful in effect? It is true the personal interest of the individual, as contrasted with the impersonal interest of the public official, may lead the former to detect more readily the collusive character of the bid; but, as we will see, the vice of the device consists not in the success of the plan, but in the character of the contract; and in both lettings, whether they be public or private, that vice is the purpose to mislead and deceive. "In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression, or corruption. The law looks to the general tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate." *Richardson v. Crandall*, 48 N. Y. 348, cited approvingly in *McMullen v. Hoffman*, *supra*. Indeed, the case in hand illustrates that there may be cases where the private letting requires the protective shield of the law equally, if not, indeed, more than the public one. If, for example, the government had in this case called for bids to remove this slag, and the two dredging companies here concerned had entered into this agreement to make collusive bids and for a division of profits, and the contract had been awarded one of them, it is clear the law would not enforce rights based on such a contract. If, however, the government, instead of itself removing the slag, required the company that placed it there to do so, and that company is met by the same collusive contract by the same bidders, we see

no ground for alleging the combination was a whit different in purpose or effect in the two cases. Indeed, if anything, it would seem the obligation to protect was even greater in the private letting; for while in the letting by the government it was under no pressure to remove, and could therefore refrain from accepting any bid, the private letter was under stress to act, and by reason of that fact the bidders, by their combination, had a correspondingly greater lever to accomplish their purpose to exact any price they saw fit to collusively bid. In *Ray v. Mackin*, 100 Ill. 246, we find the protection of public policy was afforded a private letting. While the bidding in that case was for paving a public street, the work was done by the property owners; the entire transaction was with them, and not with the municipality. The facts were that seven-eighths of the lot owners along a street could, by virtue of the provisions of an ordinance, make a private contract to pave it. A number of the lot owners had signed an agreement with Ray & Whitney, a contracting firm. That firm then agreed with Mackin, another contractor, to assist him in getting the contract, turn over their signers to him, and bid on the work at a higher price. Mackin agreed to pay them a part of the profits. A committee of the lot owners having been appointed to receive bids, bids were made by Mackin, and a higher one by Ray & Whitney. The former was awarded the contract. When Ray & Whitney brought suit for their share of the profits on their contract with Mackin, which provided for payment of \$1,500 of profits "under a private contract made with the property owners on the said avenue, they agreeing to assist me in obtaining the work, to the best of their ability; the money to be paid to Ray & Whitney from time to time as the profit on the work is collected," it was held the contract "was clearly against public policy, and a fraud upon the persons who were to pay for the improvement of the street." Put into plain language, the purpose of the contract sued on in this case was to make collusive bids, to mislead the letter into a belief that there were competitive bids, and induce an award of the work on that false assumption. That was the purpose and spirit of the contract—the end sought. If the law approves of such an object, it should enforce it; if it disapproves, it should refuse to lend itself to be used to enforce measures it disapproves. When the law which now avails itself of public policy to protect public lettings from collusive biddings finds like obnoxious practices with like deceptive ends in view threaten the integrity of private lettings, we think it would be lacking in virility and progress did it not keep abreast of conditions, and apply this salutary principle, where the mischief exists, to all lettings alike. Viewed from the standpoint of morals, square dealing, and commercial integrity, combinations for collusive, misleading biddings, wherever made, cannot be approved; yet to enforce rights based on an agreement to make such bids is to make the law an active agent to accomplish such deceptive purposes. In view of this result, we think the law should adjudge such agreements void on the broad ground of public policy, and accordingly, on the question reserved,

viz., "that the agreement of June 16, 1904, constituted a conspiracy to defraud the Jones & Laughlin Steel Company, and was illegal and void, and no action can be maintained thereon, and the verdict must be for the defendant," we direct the entry of judgment for the defendant. This view renders needless a discussion of the other reserved point.

INTERNATIONAL REGISTER CO. v. RECORDING FARE REGISTER
CO. et al.

(Circuit Court, D. Connecticut, July 21, 1905.)

No. 1,121.

1. GOOD WILL—SALE—WRONGFUL DIVERSION OF CONTRACT—IMPROPER USE OF PROPERTY.

Defendants, who had been employes of a manufacturing company which had sold its business and good will to complainant, found a sketch and a pattern necessary to be used in filling certain orders given to the selling company and transferred to complainant, and, with knowledge that they had been left by an officer of complainant through mistake, attempted to use the same, to divert such orders to a company formed by themselves, having knowledge of the orders through their connection with the former company. *Held*, that complainant was entitled to an injunction to restrain defendants from such use of its property to deprive it of its contracts.

2. SAME—WRONGFUL USE OF INFORMATION OBTAINED BY EMPLOYE.

Defendants were employes of a manufacturing company which sold its business, good will, and contracts on hand to complainant. Prior to the sale the company had been negotiating for a certain contract through one of defendants as its agent, and on the day of the sale it received a letter asking that a man be sent to close the contract. This letter was turned over to complainant, which asked such defendant to go as its representative to complete the contract. Without refusing to go, said defendant delayed, and in the meantime secured the contract for a company formed by himself and his codefendants by means of the information secured while in the employ of the former company, and from the letter to it. *Held*, that the information so obtained was property of the complainant, which it had purchased, and which defendants had no right to use for their own benefit and to its detriment, and that under the facts shown complainant was entitled to recover the profits made by defendants on the contract.

In Equity.

Walter Carroll Low and Newton, Church & Hewitt, for complainant.

White, Daggett & Tilson, for defendants.

PLATT, District Judge. The substance of the bill is as follows: That the New Haven Car Register Company since 1891, had made and sold fare registers and street railway supplies at New Haven under various secret inventions, drawings, sketches, and United States patents. That on March 14, 1903, said company sold to the complainant its business, good will, outstanding contracts, and other property. That the defendants, Littlejohn, Kennedy, Yates, and Hayes, had been employed by the New Haven Car Register Company, and upon said sale conspired together fraudulently to appropriate the good will of said company. That in pursuance of such

conspiracy they took patterns, sketches, drawings, and orders which had been given to said company. That with wicked intent they notified the customers of said company that they were the successors in business of said company, and had secured 70 per cent. of the business formerly enjoyed by that company. That they were using and intended to use the property by them wrongfully taken to fill and complete orders which had been given to said company. That for these purposes they hurriedly formed a copartnership, and later the corporation defendant, with which the other defendants became associated. That, to deceive, they falsely stated to customers that they had taken over the accounts of various companies, and were selling agents for their goods in the same way that the former New Haven Company had been. That they notified customers that they were in position to make prompt shipments under the orders, patterns, and sketches of the New Haven Company, and were seeking to do so, and wrongfully sought to destroy the good will and property which complainant purchased from said New Haven Company. That on or about March 14th complainant requested defendant Hayes to attend to a certain order for equipping cars of the Boston Suburban Electric Companies. That he, conspiring with the other members of the company, took the order in their name, and for their use. That after March 14, 1903, the defendants have fraudulently sought to destroy the good will and property of said company, purchased by complainant as aforesaid, for their own profit. That they have in their possession orders, sketches, patterns, and property surreptitiously taken and withheld from the complainant, and are strenuously seeking to get complainant's business for their own use. The relief sought is: (1) An injunction; (2) the return of the property wrongfully taken and withheld; (3) an accounting for all work done under contracts secured entirely by or through information secured by them while in the employ of the New Haven Car Register Company.

The defense denies all allegations of fraud, hedges a little on the Porter & Berg sketch, and as to the Boston & Suburban order says that Hayes got that order first hand, after a full disclosure of all the facts, and especially after disclosing that he was no longer in the employ of the New Haven Car Register Company; and denies generally that defendants ever had in their possession any property belonging to the New Haven Car Register Company, or attempted to acquire its good will in any way.

Three questions present themselves: (1) Did the defendants, at or before the time the bill was filed, have in their possession any property belonging to the complainant which they undertook to get the benefit of in their business? (2) Did the complainant have a property right in the Boston & Suburban order, which was invaded by the defendants? (3) (And this grows out of and in connection with the second.) Did the defendants make a wrongful use of confidential information, obtained by them while in the employ of the New Haven Car Register Company, in such a way as to divert to their own enjoyment a contract which in the natural course of events would have been reaped by complainant?

It is unnecessary to analyze the proofs in extenso in order to establish the proposition that the first question must be answered in the affirmative. The story of the Porter & Berg sketch for the Tri-City order, as told by the defendant Kennedy, is enough, without more. Porter & Berg had sent the sketch of a bracket to the New Haven Car Register Company, which was to be used in getting out portions of an order given that company by the Tri-City Railway. After the sale to complainant this sketch was found by a shipping clerk on the floor, and handed to Kennedy, about March 25th. Kennedy, under the name of Recording Car Register Company, the copartnership formed by Yates, Hayes, Littlejohn, and himself, attempted to make very bad uses of this sketch, and of other things, but gave up the effort on April 4th. If Kennedy's story is the whole truth, he is not relieved from fault. He made a copy of the sketch, and tried to utilize it in diverting a portion of the Tri-City order from the complainant, who owned it by purchase. Drastic measures brought him and the others to book, but the complainant had learned enough about their actions to justify the demand for relief by injunction, and, as the matter stands, no harm can come from making the same permanent. Complainant's manager, Mr. Woodward, has not been guilty of any action in the Tri-City matter, or in any other respect, which disentitles him to seek relief in a court of equity. The doings of the defendants in connection with the Boston & Maine order are equally reprehensible. After defendant Hayes had been to Boston, and obtained the Boston & Suburban order, which will be discussed later, he wrote a letter to the Boston & Maine Railroad. While in the employ of the New Haven Car Register Company he had obtained an order for fixtures, and a certain bracket was to be changed in accordance with a blueprint. Hayes turned over the blueprint to the New Haven Car Register Company and a bracket was made from it by defendant Littlejohn. The matter had been explained by Kennedy to Brown, of the complainant company, and the bracket made with his knowledge. Just before starting for Chicago, Brown laid it on a radiator in the office, intending to take it in his satchel, but in the hurry of departure it was overlooked. After Brown had gone to Chicago, Hayes wrote the letter, in which he says that, much to his surprise, he found the pattern bracket in a box of junk; that he did not know whether the International people intended or cared to execute the order; that they had shipped all of the belongings of the New Haven Company to Chicago, and had overlooked that pattern, as well as many others; that his new enterprise could execute it promptly, in accordance with the agreement with the New Haven Company, and would do it in fine shape; and, in his opinion, the complainant (which at that moment confessedly owned the order) could not execute it "in less than five or six weeks, if then." When examined about this matter, he evaded the direct assertion contained in the letter that he found it in a box of junk, but said that he heard so from somebody, but never touched it. This was a deliberate attempt by the defendants to divert to their hastily formed enterprise a certain

order, which had been acquired by the New Haven Company at large expense, and sold to complainant for value; and they were only able to make the attempt because they could use information which had reached them by reason of their employment by the New Haven Company, and in making it they were using complainant's property. Defendants must have known that the bracket was left behind by the complainant's officers through oversight, and honest men would certainly have undertaken to restore the property at once to its rightful owner. This was not done, and it is almost inconceivable that such an attempt to make use of it as the admitted facts demonstrate could have been undertaken. That they tried to do what they did is an excellent reason for an order which will prevent similar acts hereafter. The first question is thus plainly solved in the affirmative.

The second and third questions are the really serious ones, and require careful thought. The facts bearing thereon can only be touched currente calamo, but the final conclusion reached is based upon a thorough scrutiny of the proofs. The Boston & Suburban Companies had been using the New Haven register for some time, and about a year prior to this trouble they had equipped a few cars with fixtures supplied by the New Haven Company. These worked so well that the companies decided to equip all their cars in the same way. Lewis, of the Boston Companies, had informed Hayes that he wished to equip his cars with New Haven Company fixtures, and early in March, 1903, the directors voted to equip all cars on their system with register rod fixtures of the style heretofore furnished them by the New Haven Company. This having been done, the matter was put in the hands of Mr. Henderson, of the companies, to arrange. On March 13, 1903, said Henderson wrote to the New Haven Car Register Company saying that his companies wished to equip the cars of all their lines with the New Haven Company's rod fixtures, and were in a hurry. He suggested that the New Haven Car Register Company send a man to Newtonville, Mass., on the following Monday, to look into it, and take measurements, after which the New Haven Company could furnish a complete list of what would be required, together with their best quotations. When this letter was written, an agreement existed between the New Haven Car Register Company and the Boston & Suburban Companies about prices on all registers, rods, etc. The letter was received by the New Haven Car Register Company on the 14th, and defendant Hayes was informed on that date of its contents, and knew it was in his line of work, because he had been familiar with all the details from the beginning of their dealings with the Boston & Suburban. March 16th was Monday, and on that day Mr. Woodward, of complainant company, asked Hayes if he would go to Newtonville and attend to the order. Hayes temporized, and delayed a definite answer, but does not claim that he refused to go. Up to Wednesday nothing definite had been reached, although Hayes then agreed to meet Wood, New England agent of complainant, on the morning of March 19th. Up to this time Mr. Woodward could only have known of Hayes' position in the

matter by inference. There had been no positive refusal to go. After getting the information about this matter from Woodward on Monday, the 16th, Mr. Hayes got into touch with a Mr. Townsend, of the Boston Companies, about the suggestions contained in the letter, and on March 18th wrote Townsend that he was struggling to get a company together, and as soon as things were in shape he would run up to see him, and asked Townsend to tell Lewis. Mr. Townsend was a personal friend of Mr. Hayes, had no direct connection with the equipment of the cars, and had not been approached by Mr. Hayes about the matter prior to this time. On March 19th Townsend telegraphed that Lewis was in a hurry; that Hayes had been expected the day before, and asking why he did not come. In reply to the telegram Hayes wrote, apologizing for his delay, and explaining that many things had come up, etc. He then proceeded to ask Townsend to tell Lewis that the complainant could not get out the fixtures for some weeks, that he was perfecting his own company, that as soon as he got it in shape he would come on and look after Lewis; and on the same day (March 19th) telegraphed Townsend, "Will take care of Lewis. Have written you." On that same day (March 19th) Townsend wrote Hayes that Lewis must have his fixtures at once, and unless Hayes came the next day he would place the order elsewhere. Hayes went to Boston the next day, saw Townsend and Lewis, and got the order for his own little company, which had been organized with such speed. It is a fair inference that the size and importance of the Boston order had much to do with the celerity which characterized the getting up of the little company. Complainant's Mr. Wood had been told to send a man to measure the cars, but after the deal with Hayes he was directed not to do so. Order was given Hayes on March 23d. On same day Lewis wrote to complainant, asking for a confirmation of special prices made in agreement with the New Haven Car Register Company, stating in a postscript that arrangements had been made for rods, fixtures, and installation of their last order of registers. The prices in the Hayes order were based upon and agreed with the prices at which the New Haven Company had been supplying fixtures for former installations of registers. In these circumstances it appears that the New Haven Car Register Company came very close, indeed, to getting an order, but I do not think that they did exactly get it. The delays incident to the shifting of business and Mr. Hayes' personality entered into the equation, and just prevented an absolute, complete, unequivocal order. There are, however, sufficient reasons why the defendants had no right to obtain and execute the Boston order. First, Mr. Hayes had been paid by the New Haven Car Register Company for his services in advancing the business to the stage it had reached, and it was only by making use of private information which had reached that company through Mr. Hayes' efforts that he was enabled to divert the business to the uses of himself and companions. And again, during all the time which he spent in gathering the Boston connection around his new company, he was, by his own admissions, under contract to the

New Haven Company. In the last analysis, the defendants cannot escape, even if it be admitted that no valid reason has yet been presented for holding their action in relation to the Boston order illegal. Hayes would have been in no position to obtain the Boston order for himself and friends if he had not learned from the letter to the New Haven Car Register Company that the directors of the Boston Companies had voted to obtain the fixtures from the New Haven Company. He made use of private advance information, obtained by the New Haven Company at large expense, conveyed to him by Mr. Woodward, agent of the complainant, who had purchased that information from the New Haven Company. The information was property, and was capable of sale. It was such a kind of property that it furnished the necessary basis for getting the Boston business. By using this valuable property, which he knew belonged to another, Mr. Hayes was able to divert and appropriate to the defendants the profits of the Boston equipment, and the fruits thereof belong in equity and good conscience to the complainant, which acquired that valuable property by purchase. In the case of Hayes it is the more objectionable to reap the fruits of the information, because he was paid to obtain it, but those who joined with him, knowing the situation, cannot escape the odium which attaches to him. They are tarred with the same brush. Upon careful review, it is clear that the original injunction was warranted by the proofs, and upon the merits it is equally clear that it should be made permanent. The matter of the Boston & Suburban Companies order must go to a master for an accounting.

Upon the motion for contempt, I do not think the original injunction order was made specific enough to remove a reasonable doubt from the defendants' minds as to whether the filling of the Boston order would be a violation. It is not the purpose of this court to permit the advice of counsel to relieve the parties enjoined from the consequences of their acts; but in this matter, and in the circumstances, it does not appear that such advice in any way infringed upon the duties which counsel owe to the court as officers thereof. It is believed that the penalties which this decree inflicts upon the defendants are entirely ample.

In re F. B. VANDEGRIFT & CO.

(Circuit Court, D. Massachusetts. April 8, 1905.)

No. 1,406 (1,571).

CUSTOMS DUTIES—CLASSIFICATION—SHEARED STEEL SHAPES.

In construing the provisions for "plate iron or steel sheared," and for "sheared * * * shapes," found respectively in paragraphs 126, 135, Schedule C, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 159, 161 [U. S. Comp. St. 1901, pp. 1637, 1638], *held*, that the former was intended to cover stock plates of a general commercial shape and for ordinary use, and the latter something not in general stock, but sheared to a particular or given shape, and that certain sheets of steel, cut, according to a sketch, and for a special purpose, to a specific shape, varying very slightly from a rectangle, are within the latter provision.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question affirmed the assessment of duty by the collector of customs at the port of Boston on merchandise imported by F. B. Vandegrift & Co. The opinion filed by the board reads as follows:

Fischer, General Appraiser. The merchandise in question consists of plates of steel 154½ inches by 156 inches by 62½ inches by 63¼ inches, and one-fourth of an inch in thickness. Duty was assessed thereon at the rate of five-tenths of one cent per pound, under the provisions of paragraph 126, Schedule C, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1637], which reads as follows:

"(126) Boiler or other plate iron or steel, except crucible plate steel and saw plates hereinafter provided for, not thinner than number ten wire gauge, sheared or unsheared, and skelp iron or steel sheared or rolled in grooves, valued at one cent per pound or less, five-tenths of one cent per pound.
* * *

The importers claim that for the reason that these plates have been cut to certain size and shape, and are not rectangular, they are properly dutiable at the rate of four-tenths of one cent per pound, under the provisions of paragraph 135, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1638], which reads as follows:

"(135) * * * Sheets and plates and steel in all forms and shapes not specially provided for in this act, all of the above, * * * valued above one cent and not above one and four-tenths cents per pound, four-tenths of one cent per pound. * * *

The importers rely upon the ruling laid down in G. A. 5,395 (T. D. 24,602). That case differs entirely from this. The merchandise which was the subject of that ruling consisted of shapes or forms of steel which had been sheared or stamped out of plate, and which were, as the board held, no longer sheets or plates, but articles made therefrom. The merchandise now before us does not consist of articles made from plates, but are plates and nothing else. All plates are sheared after leaving the rolls, and these plates were sheared at a slight angle from a true rectangle, which did not alter their character or form as plates. The language of paragraph 126 is very broad. It does not merely cover boiler or other similar plate, but it covers boiler or any other kind of plate, iron, or steel, except crucible plate steel or saw plates. As this merchandise is clearly plate steel, it is covered by the provision. An examination of the invoice discloses the fact that these plates are valued above one cent, and not above two cents, per pound. As the paragraph provides a higher rate for plates of such value than was assessed, we must overrule the protest, without affirming the correctness of the classification.

Charles P. Searle, for petitioners.

Melvin O. Adams, U. S. Atty.

William H. Garland, Asst. U. S. Atty.

ALDRICH, District Judge. The question in this case is whether certain merchandise, consisting of sheets of steel, admittedly cut to a specific shape according to a sketch, and for a special purpose, was dutiable under paragraph 126 or under paragraph 135 of the tariff act of July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 159, 161 [U. S. Comp. St. 1901, pp. 1637, 1638].

Unquestionably the language of paragraph 126, "boiler or other plate iron or steel * * * sheared or unsheared," as well as the language of paragraph 135, "pressed, sheared or stamped shapes," is sufficiently broad to cover the merchandise in question. Still,

looking at the sections of the statute to which I have referred, and the context, in connection with the testimony as to the kind and character of steel plates known in the steel trade, it would seem that the general description of sheared or unsheared shapes, contained in paragraph 126, was intended to cover steel stock plates of commerce, sheared or unsheared, of a general commercial shape, and for ordinary use, and that the language of paragraph 135, "sheared * * * shapes," was intended to cover something out of the ordinary commercial course—something not in general stock, not usual in the trade, but something sheared to a particular or given shape.

The language of paragraph 126 is general, "sheared or unsheared," with no suggestion of a particular shape, and the natural inference is that it had reference to a usual commercial shape, while the language of paragraph 135 is more specific; sheared shapes manifestly meaning plates of steel shaped into a particular form by shearing. It is difficult to see why the reasoning and the decision of the board of appraisers in G. A. 5,395 (T. D. 24,602) do not cover the case now under consideration. It is there said:

"The fact that the imported articles were cut from sheets or plates of steel takes them out of paragraph 126, for they are no longer sheets or plates, but forms or shapes, not structural in form, and answer the description set out in paragraph 135. What is meant by 'sheared' in paragraph 126 is that process of finishing which results in trimming off the rough edges of sheets or plates after the process of rolling is completed, and does not include articles cut out of such sheets or plates. Such cutting up results in destroying the form. * * * In fact, these articles answer the specific description of 'sheared or stamped plates,' mentioned in paragraph 135."

So of the plates in question, the record discloses that the ordinary commercial rectangular shape, with the rough edges sheared off, was subjected to a further process of shearing for the purpose of changing the form and shaping the plates to a given design for a particular purpose, and it results that subjecting them to such shearing process produced sheared shapes within the meaning of paragraph 135.

The decision of the Board of Appraisers is reversed.

KNICKERBOCKER TRUST CO. v. COYLE.

(Circuit Court, D. New Jersey. July 22, 1905.)

1. PLEADING—SUFFICIENCY OF PLEA.

A plea in bar, which professes to answer an entire count of the declaration and which answers only a part, is bad.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 181.]

2. ASSIGNMENT OF CHOSE IN ACTION—NECESSITY OF NOTICE.

A plea in bar to a suit brought by the assignee of a chose in action to the effect that the chose in action was assigned without notice to the defendant is bad in the absence of any agreement requiring such notice, or of any allegation of injury arising from want of notice.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments, § 116.]

3. GUARANTY—RIGHT OF ACTION AGAINST GUARANTOR—EFFECT OF PLEDGE OF COLLATERAL.

In an action brought upon an unconditional guaranty, a plea by the guarantor to the effect that the plaintiff had not realized upon certain stocks and bonds pledged as collateral to the debt guarantied is bad, and will, on motion, be stricken out.

Action at Law on Contract. On motion to strike out pleas.

McCarter, Williamson & McCarter, for the motion.

John J. Mulvaney, opposed.

CROSS, District Judge. This matter comes before the court on motion to strike out the second plea to the first count and the fifth plea to the second count of the declaration. Each plea purports to answer the entire count to which it is directed. A plea in bar which professes to answer a whole count and answers only a part is bad. *Grafflin v. Jackson*, 40 N. J. Law, 440, and cases cited; *Newark v. Stout*, 52 N. J. Law, 35, 18 Atl. 943. The action is brought upon ten notes or obligations of the defendant, each of which was made payable to the Consolidated Industries Company, "or to their order by the indorsement hereof," and was duly indorsed by said company to the plaintiff. The first plea to be considered sets up as a defense that no notice was given to the defendant by the plaintiff, or by any other person, of the assignment of the said notes or obligations, at the time of such assignment, or at any time since. There is nothing in the instruments themselves which requires any such notice to be given, and, although not in form negotiable paper, they were nevertheless assignable upon their face, and were also assignable under the nineteenth section of "An act to regulate the practice of courts of law" (Laws N. J. 1903, p. 540), which act further provides that the assignee could sue thereon in his own name, subject to all set-offs, discounts, and defenses, not only against the plaintiff, but against the assignor, before notice of such assignment shall be given to the defendant. The plea does not allege that the defendant has suffered any injury from the want of notice. It goes no farther than to allege that he was entitled to notice of the assignment in any event, but this was not his legal right. In *Young v. Upson* (C. C.) 115 Fed. 192, 195 the court says:

"It is contended that it is essential to the validity of the transfer that notice should have been given to the debtors whose claims were assigned. This contention is unsound. The necessity for a notice by an assignee to the debtor arises where he seeks to protect himself against a payment by the debtor to the original creditor."

To the same effect are *Williams et al. v. Ingersoll*, 89 N. Y. 522; *Thayer v. Daniels*, 113 Mass. 129; *Marsh v. Garney* (N. H.) 45 Atl. 745. But, irrespective of the general rule of law pertaining to the matter, we think the defendant is concluded by an agreement executed contemporaneously with the obligations and referred to in the declaration, by which he agreed that they might be pledged to the plaintiff, or to any other party, as collateral security for a loan which the industries company was thereby authorized

to obtain. Since, then, the certificate was assignable, not only by statute, but upon its face, and such assignment was further authorized by the contemporaneous agreement above referred to, and as the defendant alleges no injury from the want of notice, we think the plea setting up the fact that he had no notice is bad, and must be stricken out.

The second count of the declaration, which the second plea is intended to answer, briefly stated, alleges that the said Consolidated Industries Company agreed with the defendant (by an agreement, a copy of which is annexed to and made a part of the declaration) that the said company might borrow from the plaintiff a certain sum of money; that the defendant, in consideration of the making of said loan by the plaintiff to the industries company, and for other considerations set out in the declaration, promised and guaranteed to the plaintiff the repayment of a certain portion of said loan; that the plaintiff, relying upon the guaranty of the defendant, made such loan to the industries company, to be repaid January 10, 1904, and that such loan has not been repaid, whereby the defendant became liable to pay the plaintiff, etc., and, being so liable, undertook and promised to pay, etc. The agreement above referred to provides also that the Consolidated Industries Company, in order to further secure said loan to the plaintiff, might pledge the aforesaid notes or obligations of the defendant, and certain securities to which he would become entitled upon their payment, to the plaintiff or other party making the loan, as collateral security for the payment thereof. The only defense set up in this plea is that the plaintiff corporation has brought suit against the defendant upon his guaranty without first having exhausted its collateral. In our opinion, the plea does not set up a valid defense. There is no rule of law that requires a pledgee of a chose in action or evidence of debt assigned to him as collateral security to realize on the collateral before he can bring suit upon his cause of action. The law is otherwise. In 22 Am. & Eng. Enc. of Law (2d Ed.) p. 897, the correct rule is laid down as follows:

"It is well settled that where a chose in action or evidence of debt is assigned as collateral security, the pledgee, when the debt secured falls due, is not obliged to enforce the payment of the debt out of the collateral, but he has his election either to enforce the collateral when it matures or to proceed personally against the pledgor."

In the footnote a large number of cases decided by many different state courts are given.

Bigelow, C. J., in rendering the opinion in *Rogers v. Ward*, 90 Mass., at page 389, 85 Am. Dec. 710, says:

"The taking of collateral security for the payment of a debt does not afford any implication that the creditor is to look to it only or primarily for the payment of the debt. The obligation of the debtor to respond in his person and property is the same as if no security had been given. This is the well-settled rule at law."

In *Whitwell et al. v. Brigham*, 36 Mass. 117, 121, the court says:

"The collateral security which the defendant had given to the plaintiffs by depositing in their hands the note of Denny and others constituted no obstacle to their suit or attachment."

De Cordova v. Barnum, 130 N. Y. 615, 29 N. E. 1099, 27 Am. St. Rep. 538, is another case in point. At page 617, 130 N. Y., and page 1099, 29 N. E. (27 Am. St. Rep. 538), the court says:

"The defendant asked the court to hold or to instruct the jury that the plaintiff could not maintain this action without showing that he had used all reasonable means to realize upon the fourteen shares of stock which he held as collateral; that it was plaintiff's duty to advertise and sell it, and credit defendant with the proceeds, or to return it to defendant before this action was brought. The court refused to hold as requested. The defendant offered to prove the value of the fourteen shares of stock. The plaintiff's objection to such proof was sustained. In these rulings no error was committed. The plaintiff held the fourteen shares of horse palace car stock as collateral security to protect him from loss. There was no special agreement that the plaintiff should first realize upon the collateral before bringing an action against the defendant to recover the debt due him, and therefore the plaintiff was not required to realize upon the collateral before resorting to this action. [Citing cases.]"

This seems to be the universal trend of the decisions in the absence of an agreement to the contrary. There is no such agreement to be found in the contract above referred to. The guaranty is unconditional, and is in form that "each underwriter [of whom the defendant was one], in consideration of the making of said loan, hereby guaranties to the said trust company, or such other party, the repayment of said loan, to the extent only of the par of the underwriters' certificates signed by him and so pledged." We think this plea is bad also.

Both pleas will be stricken out.

EDWARDS v. NATIONAL WINDOW GLASS JOBBERS' ASS'N.

(Circuit Court, D. New Jersey. July 11, 1905.)

RECEIVERS—AUTHORITY TO SUE IN ANOTHER JURISDICTION.

A receiver appointed by a federal court for a corporation, but not shown to have been vested with title to its property or rights in action, cannot be authorized by such court to maintain a suit in a federal court of another jurisdiction on a cause of action in favor of the corporation.

At Law. On demurrer to declaration.

Vreeland, King, Wilson & Lindabury, for plaintiff.

Frank P. McDermott and Theodore W. Morris, Jr., for defendants.

CROSS, District Judge. This matter is before the court on demurrer to the declaration. The action is brought to recover threefold damages under the act of July 2, 1890, c. 647, "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. The declaration contains two counts, against each of which a large number of grounds of demurrer have been assigned. In the view we take of the matter, it will be necessary, however, to consider such only as

raise the question of the power of the plaintiff to bring his action in this jurisdiction. This is a vital question, to which all of the others are subordinate. The authority of the receiver to sue is set forth in the following terms: "Francis M. Edwards, a citizen of the state of Massachusetts, and an inhabitant thereof, receiver of Wheeler Stenzel Company, a corporation duly organized and existing under and by virtue of the laws of the state of Massachusetts, and a citizen and inhabitant of said Massachusetts, having been appointed as such receiver by a decree of the Circuit Court of the United States for the District of Massachusetts, made and entered therein on the 4th day of August in the year of our Lord 1903, in said court duly qualified, and by a decree thereof duly authorized and empowered to bring this suit." In the consideration of this question, every intendment must be taken most strongly against the pleader. We cannot imply, much less supply, anything in his favor. The question is not whether the corporation itself could maintain this suit, or whether an assignee or trustee or receiver vested with title to all its property and choses in action could maintain the suit. So far as appears, the plaintiff has no title whatever to this right of action. We may assume that he was appointed under the general equity powers of the circuit court of Massachusetts, but this is as far as the assumption can go. We cannot assume that the corporation of which the plaintiff is receiver is being dissolved, and that the receiver has title to its assets, property, and things in action for the purpose of collection and distribution. The question for determination therefore is whether a foreign receiver, regardless of his character or powers, can be authorized to bring this suit by the decree of a court of another jurisdiction. "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property." *Union Bank v. Kansas Bank*, 136 U. S. 223, 236, 10 Sup. Ct. 1013, 34 L. Ed. 341. The burden was upon the plaintiff to show that he had power to maintain his action. His power will not be presumed. *Great Western Mining and Manufacturing Company v. Harris*, 128 Fed. 321, 63 C. C. A. 51; *Hilliker v. Hale*, 117 Fed. 220, 54 C. C. A. 252.

There is no statute of the United States which can be invoked to show such power in this receiver, nor is there any statute in Massachusetts, so far as has been disclosed, which confers title upon a receiver. On the contrary, the decisions of the courts of that state show that his appointment does not confer title upon him. *Amy v. Manning*, 149 Mass. 487, 21 N. E. 943; *Wilson v. Welch*, 157 Mass. 77, 31 N. E. 712. There are numerous decisions which tend to show what the powers of a receiver appointed by a United States court are. In the case of *Great Western Mining and Manu-*

facturing Company v. Harris, *supra*, it was held that a receiver appointed by the United States Circuit Court of Kentucky could not sue in the United States Circuit Court in New York, either in his own name or in the name of the corporation. The court says:

"In *Hale v. Allinson*, 188 U. S. 56, 68, 23 Sup. Ct. 244, 47 L. Ed. 389, Mr. Justice Peckham, referring to *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, says: 'It was there held that an ordinary receiver could not sue in a foreign jurisdiction, and an elaborate examination was made by Mr. Justice Wayne of the principles upon which the decision was founded. In speaking of the right of a receiver appointed under a creditors' bill in New York to bring an action in a foreign state, it was said in the course of the opinion as to such receiver: "Whether appointed as this receiver was, under the statute of New York, or under the rules and practice of chancery as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation under his action. His responsibilities are unaltered. Under either kind of appointment he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has no extra-territorial power of official action; none which the court appointing him can confer with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done where his debtor may be amenable to the tribunal which the creditor may seek." This statement has not been overruled or explained away by any subsequent decision of this court to which attention has been called.'

In *Hilliker v. Hale*, *supra*, an order was made which in terms authorized the receiver to sue outside of the territorial jurisdiction in which he was appointed. The court said:

"Without regard to the nature of the claim asserted against the defendant, the plaintiff has no relation to that claim, otherwise than through such order and decree [referring to the decree under which he was appointed]. He is not the assignee of all or any of the creditors. He has no title to anything, so far as appears, except to his office of receiver. The order and decree in terms made him a mere agent of the Minnesota court. That court undertook to authorize him to sue nonresidents in other jurisdictions. * * * The Minnesota court thus attempted to send its agent to collect money by suit outside of its jurisdiction, and bring it back to be disposed of as it might direct. If it had had power to transfer the claim against the defendant to the plaintiff, and had in fact so transferred it, he could assert the title thus acquired, and sue upon such claim here, in accordance with the principles stated in *Association v. Rundle*, 103 U. S. 222, 26 L. Ed. 337. Apparently the court had no such power. Whether it had or not, it did not attempt to exercise it. It transferred nothing to the plaintiff. * * * The court could not reach beyond the limits of its jurisdiction through a receiver any more than it could through a marshal or a sheriff"—citing *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164.

The distinction apparent in all cases is as to whether the receiver has title or whether he is simply appointed an agent or officer of the court under its general equity powers. In the one case, through comity, he may be allowed to maintain a suit in a foreign jurisdiction, where such a course would not conflict with local policy or the rights of creditors in such jurisdiction; while in the other his powers are limited to the jurisdiction of the court appointing him. In the case of *Wigton v. Bosler* (C. C.) 102 Fed. 70, Judge Dallas, in deciding in the case before him that a receiver was not

entitled to sue in a jurisdiction outside of that in which he was appointed, questioned, but did not decide, whether, in view of the decisions of the Supreme Court of the United States, federal courts would in any case, through courtesy or comity, recognize the right of a receiver to sue in a foreign jurisdiction. In *Hazard v. Durant* (C. C.) 19 Fed. 471, 477, the court (the same that appointed the receiver in the case at bar), following *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, "decided that a receiver appointed in one jurisdiction to take charge of a fund cannot sue in another in his own name, though expressly authorized by the decree to maintain action in his own name." *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380. Inasmuch, therefore, as the allegations of the declaration only show the appointment of the plaintiff as receiver, and that he was authorized and empowered to bring this suit, the demurrer must be sustained. We might add that an examination of the counts shows that they are both radically defective.

The demurrer will be sustained.

UNITED STATES v. ECCLESIASTICAL ART WORKS.

(Circuit Court, S. D. New York. December 16, 1904.)

No. 3,550.

CUSTOMS DUTIES—CLASSIFICATION—MARBLE ALTARS—WORKS OF ART.

Held, that the provision in paragraph 703, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 203 [U. S. Comp. St. 1901, p. 1690], for "works of art" intended for presentation to religious societies, includes certain marble altars imported for presentation to a church, which were carved by a professional sculptor and were of a value of \$1,800.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below (G. A. 5,666, T. D. 25,256) reversed the assessment of duty by the collector of customs at the port of New York on certain imported articles. The questions involved in the case appear from the opinion of the Board of General Appraisers, which reads as follows:

Waite, General Appraiser. In these cases certain marble altars imported for presentation to the Church of Our Mother of Sorrows, Philadelphia, Pa., were assessed for duty as manufactures of marble at 50 per cent. ad valorem, under paragraph 115, Tariff Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]. The goods are claimed to be free under paragraph 703 of the act, § 2, Free List, 30 Stat. 203 [U. S. Comp. St. 1901, p. 1690], which reads as follows: "703. Works of art, the production of American artists residing temporarily abroad, or other works of art, including pictorial paintings on glass, imported expressly for presentation to a national institution, or to any state or municipal corporation, or incorporated religious society, college, or other public institution, except stained or painted window glass, or stained or painted glass windows; but such exemption shall be subject to such regulations as the Secretary of the Treasury may prescribe." The importers duly applied to the Secretary of the Treasury for free entry of the articles in accordance with the treasury regulations upon the subject (article

569, Cust. Regs. 1899), their application being denied upon the ground that the altars were not works of art. The sole question presented for the board's decision therefore is whether or not the altars are works of art within the meaning of said paragraph 703.

The importations consist of a main altar, two side altars, and an altar railing, their total value being 9,323 lira (\$1,800). One Martino Barsanti, in affidavits made before the United States consular agent at Carrara, Italy, declares that the work in question was executed under his personal supervision, and finished by him, and that he has been a sculptor by profession for twenty-one years, being a graduate of the School of Fine Arts at Pietrasanta, Italy. Accompanying these declarations is a certificate by the president of the Municipal Institute of Fine Arts at Pietrasanta, to the effect that Barsanti took a regular course in the section of sculpture in that institution in the years 1875 to 1885, receiving the highest honors, and is a member of the academical board. The appraiser's report describing the importations states that "they are produced from original designs made in this country and executed abroad, in pure white Carrara marble, and carved in the purest Byzantine of the thirteenth and fourteenth centuries, the handwork largely predominating in value throughout," and that "they are believed to fall within the provisions of paragraph 703." The design and sculptural work of the altars, as shown by a photograph, reveal considerable artistic skill in execution. Forming our judgment without regard to the highest technical standards, we do not hesitate to characterize the work as being, upon the whole, an impressive and highly ornamental piece of church architecture. No distinction in principle is apparent between this case and *Morris European and American Express Company v. U. S. (C. C.) 85 Fed. 964*, where a marble altar valued at \$404 was held to be free under paragraph 686 of the tariff act of 1894 (Act Aug. 27, 1894, c. 349, § 2, Free List), which corresponds in its relevant provisions to paragraph 703 of the present act. That decision reversed the board's decision in *G. A. 4,023, T. D. 18,625*. Judge Townsend's observations are, we think, conclusive upon the point in issue. He said: "Distinguished sculptors, among them Messrs. J. Q. A. Ward, Hartley, and Donaldson, testifying on behalf of the United States, admitted that if it [the altar] was not a work of art in sculpture it was a work of art in architecture, or in the broad sense. It would be presumptuous to question the correctness of the views of such eminent artists as to what constitutes a work of art in the strict and technical understanding of sculptors, who exclude architectural works from their definition. But when they undertook to determine what was meant by the words 'works of art' in the phraseology of the law, and was the intention of the framers of the law, they manifestly overlooked the well-settled rule in the interpretation of the tariff acts that words used therein are to be understood in the sense which they bear in the common speech of the people of this country. In that sense the altar and reredos was a work of art. Several of the eminent sculptors already referred to say, in effect, that it was a work of art in the commonly accepted meaning of the phrase. As Mr. Ruckstuhl, another sculptor, says, 'From my point of view, any human work made with a specific purpose of stirring human emotions is a work of art, and I consider that work comes under that head.' Mr. Ward says, 'Art is the work of a human being in plastic material or color, or something to render a sentiment, to imitate a form, or something of that kind, which does not grow on trees, which is not in nature.' If the proportions are sufficiently symmetrical, and the lines so far free from faults as to stir the emotions of people, the work is to them a work of art. Whether it is good or bad art is a mere question of quality. This work was originally designed by one of the leading American artists in this style of church architecture. An artist of reputation in France made original designs for the angels and imposed his personality upon the work. The specifications and detail drawings show this fact beyond question. Whether the design and construction show such originality of conception and perfection of execution as to mark it as the work of a genius is not the question herein. The work as an entirety confessedly falls within the accepted definition of a work of art. It represents the handiwork of an artist; it embodies something more than the mere labor of an artisan; it is a skillful production of the beautiful in visible form. It

is unnecessary to consider the contention that architectural works of art are not works of art, for writers such as Mr. Ruskin, and all witnesses herein, refuse to impose a limitation which would exclude the famous churches, triumphal gates, and graceful towers of Europe. The further contention that it cannot be a work of art if adapted to a useful purpose would exclude the Ghiberti doors of Florence or the fountains of Paris and Versailles." As further illustrating the liberality of the courts in construing the various provisions of the tariff relating to works of art, reference should be made to the case *In re Hempstead* (C. C.) 95 Fed. 969, where certain embroidered silk banners of artistic appearance were held to be free as "works of art," under paragraph 686 of the act of 1894, and to the trend of the decisions dealing with marble statuary, cast statuary, and paintings. Without reviewing in detail these authorities, which are cited below, it may be stated that the courts, up to that of last resort, have refused to construe the various tariff provisions covering sculpture and paintings as limited to works of genius, or even to those possessing a high degree of artistic merit. *Townsend v. U. S.* (C. C.) 108 Fed. 801, affirmed 113 Fed. 442, 51 C. C. A. 276; *Benziger v. U. S.*, 192 U. S. 38, 24 Sup. Ct. 189, 48 L. Ed. 331; *Tiffany v. U. S.* (C. C.) 66 Fed. 736; *United States v. China & Japan Trading Co.*, 58 Fed. 690, 7 C. C. A. 433; *White v. U. S.* (C. C.) 113 Fed. 855.

We have not overlooked the fact that the Supreme Court, construing the provision in the tariff act of October 1, 1890, c. 1244, § 2, Free List, par. 757, 26 Stat. 611, corresponding to paragraph 703 of the present act, intimated that its privileges extended only to the "fine arts, properly so called, intended solely for ornamental purposes, and including paintings in oil and water, upon canvas, plaster, or other material, and original statuary of marble, stone, or bronze" (*U. S. v. Perry*, 146 U. S. 71, 13 Sup. Ct. 26, 36 L. Ed. 890); but the court did not in terms exclude objects of architectural art from the class of the fine arts; nor did it, in its familiar analysis of works of art embodied in that decision, expressly include architectural works in any other class. Furthermore, the court did not undertake to set any standard of artistic excellence to which articles within the domain of the fine arts must attain. We do not believe that there is any necessary conflict between the construction placed upon the provision in the *Perry* Case and the construction given it by the authorities previously cited, which we deem controlling in this case. Note, also, *In re Vonnegut & Bohn*, G. A. 5,609, T. D. 25,104.

For these reasons the protests are sustained, and the collector's decision reversed, in each case.

Henry A. Wise, Asst. U. S. Atty.
Mayer & Gilbert, for importers.

PLATT, District Judge. Decision of the Board of General Appraisers affirmed.

SANITARY FIREPROOFING & CONTRACTING CO. et al. v. SPRICKERHOFF et al.

(Circuit Court of Appeals, Second Circuit. April 19, 1905.)

No. 190.

1. PATENTS—SCOPE OF CLAIMS—INFRINGEMENT.

An inventor is not called upon to describe every use to which his invention may be put, and, if he discloses it fully and clearly in one environment, a person who uses it in another and different environment, the change requiring no inventive skill, cannot escape infringement.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 381.]

2. SAME—INFRINGEMENT—FIREPROOF WALLS.

The Geraerds patent, No. 555,693, for a fireproof wall consisting of a series of thin plates or blocks placed edge to edge, and provided with grooves in their sides and ends, and with registering mortises in the grooved edges thereof, and metallic tenons for connecting the plates or blocks at the sides and ends, discloses invention, and is valid, and is infringed by the use in building dumb-waiter shafts of plates or blocks, each extending across one side of the shaft, having grooves, and mortises and tenons on the horizontal edges, and on the vertical joints at the corners held together by metallic tenons bent at right angles and laid in the horizontal grooves, such method being an obvious adaptation of the principle of the patent to corner construction.

Wallace, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

On appeal by the complainants from a final decree of the Circuit Court for the Eastern District of New York, entered August 29, 1904, dismissing the bill of complaint, which was founded on letters patent No. 555,693, granted March 3, 1896, to H. & W. Geraerds, for improvements in fire-proof walls. The opinion of the Circuit Court is reported in 131 Fed. 868.

Henry D. Williams, for appellants.

Menken Bros., for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The invention covered by the patent in suit relates to walls in which a number of fire-proof plates are connected by means of metallic tenons, which enter mortises in the adjacent plates, the plates being preferably provided with longitudinal grooves at their inner edges, which grooves are filled with cement so as to produce a good joint, the inner faces of the plates being covered with a layer of plaster. The plates are provided with transverse mortises for the tenons, which extend into the adjacent plates, so that the wall is held in position and strengthened by perpendicular and horizontal tenons connecting the plates and holding them firmly in place, each plate being fastened to the plates above and below and also to the plates at either end. The plates may be made of any suitable plastic composition and of any size. They may be made solid or with cavities, smooth or molded into

any desired ornamental shape. Each plate is provided at its edges with longitudinal grooves into which suitable cement is placed to make a solid joint at the meeting edges of the plates.

The specification refers to the use of these plates for ceilings, but as its language in this respect is vague and indefinite and as their use for this purpose is not involved no further allusion to this part of the specification is required.

The claim is as follows:

"A fireproof wall, consisting of a series of thin plates or blocks placed edge to edge and provided with grooves in their sides and ends, and with registering mortises in the grooved edges thereof, and metallic tenons for connecting the plates or blocks at the sides and ends, substantially as set forth."

The usual defenses—lack of patentability and noninfringement—were interposed. The judge of the Circuit Court decided that the patent was valid but that the claim must be limited to the precise structure described and shown, and, as so limited, the defendants do not infringe.

We agree with the first conclusion, but are inclined to think that too narrow a construction was placed upon the claim. But three prior patents are cited in the record. The Fowler patent of June 3, 1873, shows building blocks with large central grooves and two smaller grooves on each side of the central groove extending continuously around the blocks. The large grooves are intended for the reception of mortar; the smaller grooves for the reception of dry cement which, in practice, is first inserted. After the dry material is evenly spread on each tier and filled into the smaller grooves the liquid mortar is poured into the larger grooves and, as it spreads through the structure, sufficient moisture is furnished to convert the dry cement into a binding material. The object of the inventor was to facilitate the laying of double-faced blocks with dispatch, exactitude, neatness and firmness. No tenons are used or suggested. Seldis, in 1873, described a cube-shaped building block, made in two or more segments, adapted to be fitted together by tongues and grooves or by dowel pins and sockets. Seldis evidently had in mind a convenient substitute for the large, heavy blocks of granite which were hoisted into position by a crane, requiring the co-operation of several men. By molding his block in segments each segment was of such size and weight that it could readily be handled by one man. The patent shows nothing germane to the controversy except that dowel pins and sockets were old in the building art, a proposition which would probably have been conceded. The patent to Frost of 1880 had for its object the fastening together of building blocks of the size and shape of an ordinary brick by an unadhesive material, which will permit the ready detachment of the blocks for reuse. The blocks were made with perforations for the reception of fastening pegs which connected them together. No mortar, cement or metallic tenon was used. The foregoing is the entire prior art so far as is disclosed by the record. It is seldom that so few references are cited against a patent and it is not pretended that any of these an-

icipates the Geraerdt's invention. Of course, mortises and tenons were old; so were building blocks provided with grooves and held together with mortar, and so was fire-proof material made in the form of plates and blocks. We are unable to find that these old elements were ever assembled in a structure like the one described and claimed.

It is said that there is no explanation of the manner in which a right-angle connection can be made, and as no method of turning a corner is suggested the claim must be construed to cover a straight wall only. An inventor is not called upon to describe every use to which his invention may be put. If he discloses it fully and clearly in one environment, a person who uses it in another and different environment, the change requiring no inventive skill, cannot escape infringement. The limitation suggested removes all vitality from the claim; under such limitation he alone can be held as an infringer who uses the fire-proof material to form one side only of an inclosure. When it is remembered that the invention is for a thin fire-proof wall it would seem that such restricted use would be most infrequent. A person having wit enough to use it on four sides, three sides or two sides of a small inclosure will avoid the claim. He cannot use it as a partition wall, but he can use it for a room, a vault, an elevator or a dumb-waiter shaft, with impunity. The greater the use the less would be the infringement. The complainants employ the invention, *inter alia*, in the construction of dumb-waiter shafts, extending through the various stories of a building, the interior of the shaft being from two to three feet square. The plates are grooved on the sides, namely, on the top and bottom of the plates when placed in position. They are held together by mortar and metal tenons in registering mortises, precisely as described in the patent. In so small a structure, having four corners, it is manifest that vertical grooves in the ends which do not come in contact with the plate placed at right angles thereto, perform no function whatever and therefore may be omitted. In order to hold the plates together at the corners a slight mechanical change from the construction shown in the drawings is made necessary. Instead of a straight metal tenon one is used bent at right angles to fit the horizontal grooves, one side of the groove being cut through at the end to permit the tenon to rest on the bottom of what is thus made a right angle groove. When the mortar is inserted and another plate is laid thereon these tenons connect the plates at the ends as the vertical tenons connect them at the sides. The defendants' structure is almost the exact counterpart of the complainants', except that their horizontal tenons are flat instead of round. It is unnecessary to dwell upon the details of the defendants' construction because it is conceded that it is substantially the same as the complainants'.

The defendants' brief contains the following frank admission:

"The solution of this case depends upon whether or not the complainants' construction of dumb-waiter shafts is covered by their patent. This is the sole question in this controversy and upon its determination the subsidiary matters in dispute depend. And at the outset of this discussion, it may be

admitted that there is no substantial difference between the complainants' and defendants' dumb-walter construction, and if, therefore, the complainants' construction of these shafts is covered by its patent, then under the doctrine of equivalents, the defendants would be infringing on their rights."

Bearing in mind that there is nothing in the claim limiting it to a straight wall or to round tenons or straight tenons, we are of the opinion that infringement has been established. The invention relates to fire-proof walls for ordinary buildings constructed with hallways, rooms, closets, shafts, etc., having walls meeting at right angles. To construe the claim as applicable only to a straight wall and inapplicable when the only departures from the specification are those obvious changes made necessary when the plates meet at right angles, would, we think, be placing an unwarranted restriction on the claim.

The decree is reversed with costs and the cause is remanded with instructions to enter a decree for the complainants with costs.

WALLACE, Circuit Judge (dissenting). I dissent from the opinion of the court, and concur fully in the opinion of Judge Thomas in the court below so far as he decided that the defendants do not infringe the claim of the patent. The opinion of the court does not, in my view, set forth correctly the state of the prior art, and it sanctions a broader construction of the claim than can be fairly given to it.

The invention of the patent is a very narrow one, and, if it were necessary to pass upon the question of patentable novelty, it would be difficult to regard the claim as embodying anything more than an aggregation of old parts, in which each performs merely its old function. The grooved blocks were old in the wall-building art, blocks having registered mortises were old, and the metallic tenons were old, and the grooves had been used for affording mortar spaces, and the mortises and tenons for binding the blocks more firmly together, but the grooves and mortises and tenons had not been used in the same block. What the patentee did, and all he did, that was new, was to employ in the same block both the grooves, the mortises, and the tenons, thus binding the blocks together with the tenons as well as by the increased body of mortar held by the grooves. This is apparent from the proceedings in the Patent Office as disclosed by the file wrapper. The application described the subject-matter substantially as it is set forth in the patent, and originally contained three claims, as follows:

"(1) A fire-proof ceiling or wall, consisting of a series of plates or blocks which are connected by means of metallic tenons extending into registering mortises in the adjacent edges of the plates or blocks, substantially as set forth."

"(2) A fire-proof plate or block for walls and ceilings, provided with mortises in its sides and ends, adapted to receive connecting tenons, substantially as set forth."

"(3) A fire-proof plate or block for walls and ceilings provided with mortises in its sides and ends, and with grooves in said sides and ends, substantially as set forth."

These claims were rejected by the Patent Office for want of novelty. The applicant acquiesced, and amended his claims so that they read as follows:

"(1) A fire-proof ceiling or wall, consisting of a thin series of plates or blocks, placed edge to edge and provided with registering mortises in the adjacent edges of the plates or blocks, and metallic tenons for connecting the plates or blocks, at the sides and ends, substantially as set forth."

"(2) A fire-proof plate or block provided with grooves in its sides and ends and with mortises in its grooved sides and ends, substantially as set forth."

The claims were again rejected by the Patent Office for want of novelty. The applicant acquiesced, and thereupon by amendment he introduced the claim which appears in the patent. The claim specifies as constituents not only blocks provided with grooves in their sides and ends, but also provided with registering mortises in the grooved edges thereof, substantially as described. The registering mortises as described in the specification and shown in the drawings are distinct from and supplementary to the grooves, and some register transversely and some longitudinally, and they have a distinct and supplementary office in the composite structure. The specification reads as follows:

"The ends of the plates or blocks, *a*, are provided with mortises for receiving tenons, *d*, which extend into the corresponding mortises of the adjacent ends of the plates or blocks, so that the plates or blocks, *a*, are connected * * * in a longitudinal direction with the plates at the ends of the same."

These mortises, as well as the grooves in the ends of the blocks, are omitted by the defendants in constructing dumb-waiter shafts, which are the only walls made by them. The walls in these shafts are only a single block in width, and it would be impracticable to connect the plates at the corners by mortises and tenons such as are shown in the patent. It is true the defendants use the top and bottom grooves in the block, and thereby get the benefit of the more ample mortar space; and they also use a tenon laid in the grooves, and bent at right angles so as to enter the corresponding grooves at the corner of the wall; but as it was old to use the grooves for mortar spaces, and old to use tenons and mortar in binding the blocks of the wall together, it is quite impossible to discover what they have done which they were not entitled to do, or how they infringe, so long as they have not used the registering mortises described in the specification and enumerated in the claim. The patent is one in which there is no room for the application of the doctrine of equivalents. The claim must be confined, in view of the prior art and the action of the Patent Office, to a combination of the specific parts mentioned. The patentee thought only of a wall or ceiling in which a number of blocks were to be laid side by side, and framed his specification accordingly. If it had occurred to him that walls might be built consisting of single stones, one laid on top of the other, it is not improbable that he could have devised some means of binding the corners together by tenons; but this did not occur to him, and he did not devise any means for that purpose. It in-

volved practically as much invention to dispense with his registering mortises in the ends of the block, and utilize the groove with a right-angled tenon to bind the blocks together at the corners, as it did to bring into one structure the parts which he assembled together.

STANCLIFT v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. August 18, 1905.)

No. 2,150.

DISTURBING THE PEACE—EVIDENCE—SUFFICIENCY TO SUSTAIN VERDICT.

Testimony that one drew a six-shooter, said "Let's shoot 'em up!" put his weapon in his pocket, and walked off, and that the witness subsequently heard shooting in the direction he went, constitutes no substantial evidence of the offense of disturbing the peace of a town.

(Syllabus by the Court.)

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 82 S. W. 882.

Francis R. Brennan, for plaintiff in error.

William M. Mellette and E. L. Kistler, for the United States.

Before SANBORN and HOOK, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge. This writ of error challenges a judgment for disturbing the peace, rendered under section 1800 of Mansfield's Digest of the Laws of Arkansas (Ind. T. Ann. St. 1899, § 1143), which is in force in the Indian Territory. The grand jury in their indictment charged that the plaintiff in error, on October 1, 1902, did "disturb the peace and quiet of the town and neighborhood of Elam, Indian Territory, by loud and unusual noise, by abusive, violent, obscene, and profane language, by threatening to fight, by quarreling, by challenging to fight, by fighting, by shooting off a gun, the said gun being then and there a firearm, and by brandishing a gun, the said gun being then and there a firearm." After a plea of not guilty had been interposed, a trial was had. A single witness testified that the plaintiff in error came to his place in Elam, pulled out his six-shooter, waved it, said "Let's go shoot 'em up!" put his six-shooter in his clothes, walked off toward the northwest, and that after he went away the witness heard some shooting pretty nearly in the same direction. There was no other evidence in support of the charge. Counsel for defendant below at the close of the evidence requested the court to instruct the jury to return a verdict in his favor. This request was refused, and an execution was noted. The instruction should have been given. There was no substantial testimony to sustain the case of the government, much less to establish it beyond a reasonable doubt.

The judgment of the court for the Western District of the Indian Territory, and of the United States Court of Appeals of the Indian Territory, which affirmed that judgment, must be reversed, and the case must be remanded, with instructions to grant a new trial.

BLEAKLEY v. CITY OF NEW YORK.

(District Court, S. D. New York. July 28, 1905.)

1. SHIPPING—INJURY OF CHARTERED VESSEL BY ICE—NEGLIGENCE OF CHARTERER.

A charter of a scow under a verbal charter being bound as a bailee for hire to use reasonable care and diligence to protect the property from injury is liable for its loss by being crushed by floating ice, where it was left on the north side of a pier in North river at a place exposed on the north, and generally regarded as dangerous on an ebb tide when there was ice moving in the river.

2. SAME—INEVITABLE ACCIDENT.

An injury to a vessel which could have been foreseen and might reasonably have been expected in the ordinary course of events cannot be considered as happening through inevitable accident.

In Admiralty. Recovery of damages for the sinking of scow, hired by the city, from contact with ice, while lying on the northerly side of pier at foot of 134th Street, North River.

Alexander & Ash, for libellant.

John J. Delany and E. Crosby Kindleberger, for respondent.

ADAMS, District Judge. This action was brought by Cara R. Bleakley to recover the damages she suffered in consequence of injuries to her scow No. 38, by reason of being crushed and sunk by ice at the pier at the foot of 134th Street, North River, on the 22nd day of February, 1904. The scow was hired by the city for an indefinite period under a verbal charter and was being used, under the control of the Department of Street Cleaning, to remove street sweepings from the northerly part of the city. For that purpose she was sent to 134th Street and at first moored on the south side of the pier. Subsequently she was moved under the dumping board on the north side of the pier, where she received a load and was afterwards sunk.

The question of liability arises out of the alleged neglect of the performance by the city of its duty to the scow under its relation of bailee for hire. There is no substantial controversy with respect to the measure of such duty, it being well established that the bailee is bound to exercise the diligence of a prudent man with respect to the property in his charge and for any default is responsible to the owner. *Smith v. Bouker*, 49 Fed. 954, 955, 1 C. C. A. 481. And see *The Three Brothers* (D. C.) 134 Fed. 1001. The city contends that it performed its duty and that the accident was an inevitable one. The libellant on the other hand urges that there was a failure on the part of the city to observe the care which it owed to the boat.

It appears from the testimony that the place in question has been quite generally regarded among boatmen, having that class of business to perform, as a dangerous place on the ebb tide when there is ice moving in the river. The city's witnesses, not experienced as boatmen, say that it is not a dangerous place under such circumstances, as is proved by the fact that very few accidents have happened. Some accidents have, however, occurred, causing injury to boats subject to the ice and that a greater number could not be shown is probably being due to good fortune more than proper management, because the place having no protection from the north and the ebb tide setting the ice on the pier, it is obviously not a place where boats can be left with any reasonable assurance that they will not be injured.

There is no merit in the contention that the accident was inevitable. With the exercise of proper care, the result could have been anticipated and provided against. An accident which could have been foreseen and expected in the ordinary course of events can not be considered as happening without the agency and neglect of man. It is apparent that the ice which had collected about the pier, would leave there upon a change of wind, which was liable to occur at any time, and being set free from the shore and carried up the river, it would be borne by the tide against the northerly side of the pier upon a change of the tide to ebb. That is what happened here. The fact that the ice was brought back in a large and dangerous field might have been expected. Doubtless in many instances, the ice broke away in smaller quantities and was more or less ground up before its return, so that it was not harmful in its effects upon the boats lying there, but it is well known that moving ice is dangerous to ordinary boats and when possible that they should be kept free from its contact. Risk to a boat lying on the northerly side of the pier when ice was in the river and liable to be carried against it was a matter which should have been taken notice of. The case is distinguishable from *The Transfer* No. 2 (D. C.) 56 Fed. 313, on such ground and is more in accord with *The Ship John Tucker*, 5 Ben. 366, Fed. Cas. No. 7,431, where Judge Blatchford said (page 370 of 5 Ben. [Fed. Cas. No. 7,431]):

"But the circumstances do not bring it within the category of a case of inevitable accident. *Union Steamship Co. v. N. Y. & Va. Steamship Co.*, 24 How. 307 [16 L. Ed. 699]; *The Morning Light*, 2 Wall. 550 [17 L. Ed. 862]; *The Louisiana*, 3 Wall. 164 [18 L. Ed. 85]; *Vantine v. The Lake*, 2 Wall. Jr., 52 [Fed. Cas. No. 16,878]; *The Moxey*, 1 Abb. Adm. Rep. 73 [Fed. Cas. No. 9,894]; *The Brooklyn*, 4 Blatchf. 365 [Fed. Cas. No. 1,939]; *The Baltic*, 2 Ben. 452 [Fed. Cas. No. 823]. The movement of the ice, with the ebb tide, which was the cause of the damage, was not a thing that arose suddenly and unexpectedly, but was to be anticipated and guarded against by the ship, even if her attention had not been specially called to it by the steamboat. It was not a vis major, in the sense of the rule. The ship was bound to secure herself so that her fastenings would not be broken or torn away, when the tide should change."

It seems that the city was consulting its convenience in the removal of sweepings etc. from the northern part of the city and

urges the necessity of the use of the pier for such purpose. While it was doubtless expedient to use the pier, such plea can have no effect in relieving a bailee from results due to its neglect of duty to the particular piece of property which it has hired and impliedly undertaken to return uninjured to the owner, save from ordinary wear and tear, if reasonable care and prudence will accomplish the result.

Decree for the libellant, with an order of reference.

THE HORACE P. SHARES.

(District Court, D. Connecticut. July 12, 1905.)

No. 1,397.

COLLISION—SAILING VESSELS—FAULT OF OVERTAKING VESSEL.

In a suit for collision off Cape Henry, on a clear day, between two sailing vessels on courses varying not more than one point, evidence considered, and *held* to show that libelants' was the overtaking vessel, and in fault for the collision in failing to change her course and keep out of the way.

In Admiralty. Suit for collision.

Peter S. Carter, for libelants.

Carpenter, Park & Symmers, for claimant.

PLATT, District Judge. The libelants seek to recover damages sustained by the schooner Edith S. Walen in a collision with the three-masted schooner Horace P. Shares on the 6th day of June, 1903, about 4 o'clock in the afternoon, at a point about 10 miles east of Cape Henry. The Walen was working about the fishing grounds in that vicinity, and the Shares was running light from New Haven, and bound for Brunswick, Ga. It is idle to follow out the various notions which encompassed the pleader when he filed this libel. It now appears that the weather was clear, and the wind a moderate south by east breeze, leaving a smooth sea, at the time of the collision. The Shares was sailing southwest by west, not closer, however, to the wind than six points. The Walen was heading southwest, but she sailed faster, and at least one point closer to the wind, than the Shares. Both vessels were sailing upon the port tack. This brings us at once to the gist of the matter, viz., to determine from the evidence which was the overtaking vessel. Tapper, the wheelman of the Walen, gave his testimony on March 23, 1904. No further testimony for libelants was taken until July 20, 1904. He states that he had been at the wheel of the Walen for half an hour before the collision; that as he took the wheel he first observed the Shares; that the Walen was on the port tack; that he steered by the wind, which was south by east, and that his course was southwest; that the Walen had more sail for her size than the Shares; that the Shares was upon the port tack; that standing at the wheel he had to look between the fore and main riggings to

see the Shares; that he did not change his course until the collision. This strongly corroborates the officers of the Shares as to the position of the Walen after she shifted her tack from starboard to port, shortly prior to the collision. The testimony of Capt. Reed, of the Carnegie, is also strongly corroborative, and I cannot see that there is any reason why he could not have seen what he says he did see, and he is certainly an intelligent and experienced mariner. Robinson, of the Lady Elgin, makes some rather startling assertions in support of the libelants, but he appears to have been quite willing to assist an old friend. Looking at the situation in the light of probabilities alone, it would seem that the defense made by the Shares is a reasonable one. It is unlikely that a large cargo schooner, light, and without a center-board, would sail as close to the wind as a fishing smack, which is built for the very purpose of delivering its catch of fish in the market at the earliest possible moment. The fatal admission made by the wheelman of the Walen was made perhaps inadvisedly, at a time when the proportions of the case were misunderstood by him; but, nevertheless, it is impossible to believe that he was mistaken in that part of his testimony. Robinson, of the Lady Elgin, admits that the Shares would not have been doing what he thinks he saw if she were bound on the trip which it is now admitted that she was on, and he cannot conceive how Tapper could have seen the Shares where he said she was. He was disingenuous about having seen the master of the Walen, and is generally unreliable.

Let the libel be dismissed, with costs.

THE PRINZESS IRENE.

(District Court, S. D. New York. July 25, 1905.)

SHIPPING—INJURY OF PASSENGER—NEGLIGENT REGULATIONS IN STORMY WEATHER.

A steamship was negligent in requiring steerage passengers to come onto the upper deck to receive their food in weather so stormy as to make it dangerous, and is liable for the injury of a passenger while so on deck by being thrown down by a wave which came over the deck.

In Admiralty. Liability of steamship for injury to steerage passenger through negligence in requiring him to come on deck in bad weather to obtain food.

Abbott & Coyne, for libellant.

Butler, Notman & Mynderse, for claimant.

ADAMS, District Judge. This action was brought by Pietro Antonio Noris to recover from the steamship Prinzess Irene, the damages he sustained through a severe injury to one of his legs, received on the 30th of March, 1903, while being transported from Bremen, Germany, to New York. The libellant bought a through ticket from Chiasso, Italy, to Boston, Massachusetts, by way of Bremen and New York. Having reached Bremen he was received

as a steerage passenger on the steamship, which sailed for New York on the 28th of March. Two days thereafter, while waiting for some food on the upper deck, he was struck by a mass of water which came over forward, and was thrown on the deck, receiving the injury of which he complains, which was a wound in the right leg below the knee, cutting through the flesh to the bone.

The points in dispute are whether the water, which came on deck, was in the form of spray or a wave, and whether there was in any event liability on the part of the steamship. There can be no doubt that whether the water be called a wave or spray, there was sufficient of it to cause the passenger to be thrown down and the only real question to be determined is respecting the steamship's liability in such a case. Was she under a duty to protect the passenger from the results of such an accident?

Concededly, in very bad weather, it was the ordinary duty of the steamship to keep the passengers below deck for the sake of protection. The passenger here did not voluntarily expose himself to danger but went on deck at the instance of the ship's servants to secure his food. It is contended by the ship that it was an ordinarily safe place for the purpose and that it would work a hardship to the steerage passengers if they were obliged to remain confined in the foul air which necessarily prevails below when persons are required to stay there. When continued bad weather prevails, it would no doubt operate as a hardship upon the passengers to be kept below even if the vessel is provided with proper ventilating appliances, as appears to have been the case here, but such result would be necessarily incident to the weather and there would be no liability arising from the results of the precaution if prudently adopted. In this case the trouble arose because the passengers were not kept below and it seems to me that the only question is whether the ship's officers, under the circumstances that prevailed, were justified in requiring the steerage passengers to go on deck for their food at their own risk.

It appears that rough weather was encountered from the beginning of the voyage but that no trouble arose therefrom until the day of the accident. The wind was then from the west about two points on the vessel's port bow. She had been pitching and throwing water over the deck, so that the previous evening the hatches on deck were battened down, but without affecting the companionway, by means of which the passengers came up from below. The deck had become wet and it was necessary to spread sand over it to prevent persons from slipping. The pitching of the vessel continued the next day and the hatches were kept closed and were so when the accident happened. The libellant came up about 3:30 o'clock in the afternoon and with other steerage passengers formed a line to receive coffee from the galley located forward in the forecastle house in the centre of the ship. While there, the water came over the side of the ship from forward and knocked the libellant down, causing the injury of which he complains. There was during the morning every indication of the continuance of the existing conditions and it seems to me that those on the ship who

were charged with the duty of determining what course should be pursued in feeding the steerage passengers, might well have anticipated the trouble which followed, and in compelling them to come on deck the vessel failed in the duty of care, which she owed to her passengers of the class to which the libellant belonged. It appears to be a clear case of negligence.

There will be a decree for the libellant, with an order of reference.

THE SOVEREIGN OF THE SEAS.

(District Court, E. D. Virginia. July 17, 1905.)

1. COLLISION—DAMAGES RECOVERABLE—DEMURRAGE DURING THE MAKING OF REPAIRS.

The report of a commissioner fixing the amount of damages recoverable for the injury of a barge in collision considered, and confirmed except as to the demurrage allowed while repairs were being made, which largely exceeded the cost of the repairs. Such award reduced on evidence showing that the repairs could have been made in much less time if the vessel had been taken to a place having proper facilities and equipment.

[Ed. Note.—Demurrage, see note to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

2. SAME—INTEREST ON DEMURRAGE.

Interest on the amount awarded for demurrage while a vessel was being repaired after collision, while discretionary with the court, will not be allowed prior to the decree confirming the award, where there has been long delay in the prosecution of the suit.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 284.]

3. SAME—FINDINGS OF COMMISSIONER—REVIEW.

The rule that the findings of a commissioner fixing the damages recoverable for collision should not be disturbed unless plainly wrong has little application where only a small part of the evidence was taken before the commissioner.

4. SAME.

The fact that the award of damages for a collision made by a commissioner was less than the amount claimed does not entitle the libellant to a more favorable consideration of such award, where his claim was clearly excessive and exorbitant.

In Admiralty.

See 124 Fed. 861.

Whitehurst & Hughes, for libelants.

Bickford & Stuart, for respondent.

WADDILL, District Judge. This case is now before the court on the exceptions filed by the proctors for the libelants and respondent, the Sovereign of the Seas, to the report of Commissioner George E. Bowden, filed herein on the 18th day of January, 1905, ascertaining the damages sustained by the libelants by reason of a collision between their barge the Juniata and the barge Sovereign of the Seas, the question of fault having heretofore been ascertained to be solely that of the Sovereign of the Seas. The commissioner reports the damages to be \$3,236.06, and that interest should run from the 3d day of November, 1900. The items making up the total of

\$3,236.06 are mainly of three classes, namely, four items aggregating \$72.40, costs of survey, cost of protest, and towage charges; the sum of \$1,138.66 for repairs, of which \$249.74 is for temporary repairs on the barge; and the sum of \$2,025 for demurrage pending the making of such repairs, \$540 being for demurrage during the making of the temporary repairs, and \$1,485 during the making of the permanent repairs. The exceptions of the respondent, the Sovereign of the Seas, raise the question of the propriety of the towage charges, and challenges as well the amount per day allowed on account of the demurrage as the number of days of detention of the Juniata during the making of the temporary repairs at Newport News and the permanent repairs at Philadelphia; and also presents for the consideration of the court whether interest should be allowed as given in said report. The court is disinclined to disturb the items of allowance covered by the first three classes above enumerated, one of which includes towage, as also the amount of \$45 per day for demurrage, though \$45 per day is quite liberal to the libelants. But the number of days for which allowance is made seems to be out of all proportion to the time that should have been taken to do the necessary work on the injured barge, and this is particularly true of the time allowed for the permanent repairs. The result that it brings about is of itself striking, namely, an allowance for demurrage for the barge of \$2,025 while \$1,138.66 worth of repairs were being put on it.

The collision occurred on the night of the 17th of February, 1900, at Newport News, Va., and, upon a survey being had, it was determined to make temporary repairs to the Juniata, and accordingly she was taken to the Newport News Shipyard at noon on the 20th of February, and remained there until 10:30 a. m. on the 24th of February. After she commenced loading, on the 27th of February, she sprung a leak, and was returned to the shipyard at 8 o'clock on the morning of the 28th, and the leak was on that day stopped. She was at the shipyard in all 5 days and 3½ hours. It is claimed that by reason of the collision she originally lost her right to a berth for coal, and also lost time by having to leave after she was berthed, to return to the shipyard a second time. The Juniata arrived in port on the 17th of February, 1900, and her master claims that he could have loaded, but for this collision, by the 20th of February at the outside; and that as a matter of fact he did not finish until the 3d day of March, 1900. He was thus detained at Newport News from the 17th of February to the 3d of March, 14 days in all; and the commissioner allowed on account of demurrage 12 days; which is at least 2 days more than should be allowed on the Juniata's master's own showing. Nine days' time would seem to be a full allowance for the demurrage caused by making the temporary repairs. After the completion of this temporary repair, the barge continued in her regular business in the coal trade, without interruption, until the fall of the year 1900, though she leaked some, when heavily laden, from time to time. On the 17th of September, at Philadelphia, it was determined to have permanent repairs made to the barge, and Rylatt & Barrett Dry Dock Company

was employed for this purpose. While the libelants claimed that they should be allowed demurrage from the 17th day of September to the 3d of November, namely, 45 days, at \$72 per day, the commissioner only allowed from the 2d of October to the 3d of November, at \$45 per day, as the actual days that the barge was undergoing repair as claimed by the libelants. The master of the barge describes the work of making permanent repairs as follows:

"Q. What did those repairs consist of? A. Well, on her starboard quarter her sheathing was taken off, and the plates were repaired. Q. Do you know how many plates were repaired? A. There were three at least, and I think that there were four plates, but I am certain there were three. When these plates had been put on, the sheathing was put back again. Q. After this work was done, was there any trouble with the leaking? A. Well, when we first loaded, there was a little, but not much. Q. Did the work which was done upon the barge in the fall of the year practically stop her leaking? A. Yes, sir; after her first trip. Q. Captain, I wish you would state whether those repairs were necessary to restore the vessel to her former condition. A. Yes, sir; it was necessary. It was necessary they should be done, as the barge was leaking badly, and could not do her work properly until she was repaired."

And David Matticks, the foreman of the Rylatt & Barrett Dry Dock Company, thus described the work that was done:

"Well, we took off the sheathing—the sheathing plank over the iron—so as to allow the repairs to be made to the ironwork which was made in our yard by a gang of men from Neafie & Levy's shipyard here; and after they were through with the ironwork I went back with the gang and had the sheathing put back again."

Just why it should have taken 33 days to do this work upon this barge, the total cost of which was only \$888.92, is hard to conceive of. Certain it is no court would be warranted in allowing demurrage for so long a time for doing the work. The barge was not sent to a shipyard that seems to have been equipped for fully doing the work in hand, or at least it did not so do this work, for the woodwork seems to have been done at the shipyard of the Rylatt & Barrett Dry Dock Company, whereas the ironwork was done by a gang of men from another yard, namely, that of Neafie & Levy; and the barge does not appear to have been put in the dry dock, or upon a marine railway, at all, but, on the contrary, as described by the Juniata's master on page 47 of his evidence, as follows:

"Q. In making these repairs in the fall of 1900, was the barge put on a railway or in a dry dock, or, if not, how was the work done? A. No, sir; she was not put on a railway, but in the mud. She would ebb out at low water. She only just floated at high water. Q. Was that a cheap and economical way of repairing her or not? A. Yes, sir; it was. It was much less expensive than if she was hauled out on a railway."

While it may be doubtless true that this method of doing the work was cheaper, it does not follow that it could not have been performed more expeditiously, and it is with the matter of the time it took to do the work that we are now dealing. The libelants reiterate the fact that they were economical in making the repairs, because they did not know at the time on whom the loss would fall, as the fault of the collision had not been settled; but it by no means appears that they were in a hurry in doing the work, as they might not at that time have been busy with their barge; and

if they could be allowed full demurrage for all the time consumed by the slow method adopted of doing the work it would result in quite a remunerative plan of doing business. They are not entitled to and should not receive demurrage for any such length of time as is charged here upon any principle upon which allowances of that character are made. Moreover, the fact that a full allowance for demurrage was made for the time lost in making temporary repairs to the barge should cause only a very reasonable allowance to be made, when it was found that it was necessary to do the work permanently. Experts from some of the leading shipyards were examined, including one from the Newport News Shipyard, as to the time necessary to make the repairs in this case permanent, and they concur in fixing the time from six to eight days. Upon this evidence, certainly, the allowance of 33 days should not be made.

After a careful review of the entire evidence in the case, the conclusion reached by the court is that an allowance of 10 days for the permanent repairs would be the utmost that ought to be given, making in all an allowance for demurrage for permanent and temporary repairs of 19 days, or \$855, for doing \$1,138.66 worth of work. The commissioner's allowance of \$2,025 for demurrage will be disallowed, and in lieu thereof the sum of \$855. To allow such an award as \$2,025 on a barge of the size and value in question should not be considered seriously, unless under some extraordinary circumstances, which do not appear in this case.

Coming to the question of interest, the exception to the commissioner's report should also be sustained, and interest on the demurrage allowed only as of the date of the decree confirming the report. The allowance of interest upon demurrage is a matter within the discretion of the court, and in this case should only be allowed as of the entry of the decree, instead of the time the claim arose. The length of time which has occurred during the prosecution of this suit would of itself cause the court to hesitate to allow interest even upon the other items covered by the commissioner's report, to the end that the practice of allowing admiralty causes to be prolonged as in this case should be discouraged; and certainly interest will not be given upon the allowance for demurrage.

Counsel for libelants insist that the commissioner's award of \$1,485 demurrage during the making of the permanent repairs in this case should be approved, and as a reason urge that the original claim as made was for \$3,240, namely, for 45 days at \$72 per day, instead of 33 days at \$45 per day, as allowed by the commissioner; and, moreover, insist that the commissioner's finding should not be disturbed unless plainly wrong. Suffice to say as to the latter proposition that in this case but little of the evidence of importance was taken by the commissioner, and he did not, therefore, have any better opportunity to judge of the weight of the evidence than the court; and hence the rule insisted upon as to the weight to be given to the findings of the commissioner has little application. So far as the size of the bill is concerned, the fact that the libelants asserted a plainly excessive and exorbitant demand does not com-

mend their cause to the consideration of the court, since by so doing it has caused needless work to be imposed upon the respondent, and unnecessary and unusual cost in court. The entire claim in this case was something over \$5,000, and on account thereof the commissioner allowed \$3,236.05, and this sum the court reduces to \$2,066.06.

It follows from what has been said that the exceptions of the Sovereign of the Seas should be sustained as above indicated, and that an award should be made in behalf of the Juniata for the amount of the four items above named, aggregating \$72.40, and for the repair bill of \$1,138.66, with interest from the 3d day of November, 1900, until paid, and for demurrage of \$855, with interest thereon from the date of the entry of the decree carrying out this decision.

LUCAS v. MILLIKEN et al.

(Circuit Court, D. South Carolina. July 26, 1905.)

1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—FORMAL PARTIES.

A bill for specific performance of a contract for the sale to complainant of certain shares of the issued stock of a corporation, and to recover damages for its breach, which does not allege the insolvency of the other party to the contract, nor that he is about to dispose of the stock, does not state any cause of action against the corporation, which is not an indispensable nor a necessary party. If joined, it is merely a formal party, and its presence, although a citizen of the same state as complainant, will not defeat the right of the real defendant to remove the cause, where it is otherwise removable.

[Ed. Note.—Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. SAME—REALIGNMENT OF PARTIES—INTEREST AS SHOWN BY PLEADINGS.

In a suit by a stockholder of a corporation against the corporation and other stockholders to prevent the consummation of an alleged conspiracy by the latter to obtain control of the corporation for the purpose of canceling or terminating a contract made by the corporation, and alleged to be for its benefit, and substituting another, by which the conspirators would profit at the expense of the company and its other stockholders, the corporation must be aligned with the complainant for the purpose of determining the removability of the cause, in accordance with its interest as shown by the bill, and especially where it adopts the allegations of the bill by its answer.

3. CORPORATIONS—LEGAL RIGHTS OF STOCKHOLDERS—VOTING OF STOCK.

Where by the law of the state each share of stock of a corporation is given one vote at meetings of stockholders, the general right of the holders of a majority of the stock to control the corporation follows as a legal consequence, and the right of the legal owner of stock to vote the same is a property right, in which he is entitled to be protected by the courts as against the doubtful claim of another to such stock.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 747.]

4. SAME—INTERFERENCE BY COURTS—UNWARRANTED GRANTING OF INJUNCTION.

A court of equity is not warranted in granting an injunction, on an ex parte showing by a minority stockholder on the eve of a corporate election, restraining the legal holders of a majority of the stock from voting the same, with the result of giving the minority stockholders control of the corporation.

5. SAME.

An allegation in a bill by a stockholder of a corporation that other stockholders, made defendants, have conspired to elect a board of directors for the purpose of obtaining from such board a contract with the corporation by which they will make an exorbitant profit at the expense of the corporation and its other stockholders, affords no legal ground for an injunction restraining the defendants from voting their stock at the corporate election.

6. SPECIFIC PERFORMANCE—PRELIMINARY INJUNCTION—GROUNDS—SUIT FOR SPECIFIC PERFORMANCE.

A preliminary injunction should not be granted in a suit for specific performance of a contract where the contract is disputed or is uncertain in its terms, or the plaintiff's right sought to be protected is for any reason doubtful, nor where it does not appear that there is any danger of loss to complainant for which he cannot obtain compensation in damages.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 353.]

7. SAME.

In a suit for specific performance of an alleged contract for the sale to complainant of stock of a corporation to which defendant holds the legal title, the court should not grant a preliminary injunction on an ex parte showing which deprives defendant of his right to possession, and the incidental right to vote the stock, which he is entitled to exercise until an adverse determination on the merits.

8. SAME—DISSOLUTION—UNFAIR USE BY COMPLAINANT.

Two days before the annual election of directors by the stockholders of a corporation, complainant, who was its president, instituted a suit against certain of the defendants who were stockholders for the specific performance of an alleged verbal contract for the sale to him of a certain number of shares of stock. He also alleged that since making the contract they had conspired to purchase other stock, and thereby obtain control of the corporation for ulterior purposes detrimental to its interests. Without notice, and on an ex parte showing, an order was granted restraining defendants from voting any stock held by them, and restraining the corporation from allowing them to vote. Such order was by complainant's direction withheld until after the meeting had been organized with the necessary quorum, and then served; the result being to leave complainant and his supporters in control, although they held but about one-third of the stock. They refused to adjourn until a full hearing could be had before the court, and chose a board of directors who re-elected complainant president. *Held*, that the order was unwarranted to any extent on the case presented, and also in that it extended to stock not in litigation; that the use made of it by complainant was, moreover, unfair, and an abuse of legal process; and that it should be dissolved, especially where, on complainant's own showing, his right to relief on his alleged contract was doubtful.

Smythe, Lee & Frost, George Johnstone, Cothran & Dean, C. C. Featherstone, and W. R. Richey, for plaintiff.

Wm. G. Sirrine, for Laurens Cotton Mills.

Augustine T. Smythe, for F. J. Pelzer, Wm. M. Bird, Thomas R. McGahan, and W. W. Ball.

Simpson & Bomar, Ralph K. Carson, Adrian H. Joline, and Dial & Todd, for defendant.

BRAWLEY, District Judge. William E. Lucas was at the time of the commencement of this suit the president of the Laurens Cotton Mills. He was mainly instrumental in securing subscriptions to the capital stock, and since the organization, in 1895, has been its

president, conducting its affairs with ability and success. The company began to pay dividends on its stock in January, 1900, and has continued to do so; its stock selling above par, and the stockholders testifying to their satisfaction with the management by successive unanimous re-elections of the plaintiff as president and treasurer. The firm of Deering, Milliken & Co. is a commission house, which since 1899 has been the selling agents of the mills in New York, selling its produce on commission; S. M. Milliken being the head of the firm. Friction arose between plaintiff and said firm, who, for convenience, will hereafter be designated as the defendants, some time in 1904. It is difficult to fix precisely the time or the cause of this friction. It appears from the letters and affidavits that during the year 1904 various reclamations were made upon the commission merchants on account of alleged defects in the quality of the goods, and a letter of Milliken to Lucas, of November, 1904, shows that some persons, who, presumably at Milliken's request, had examined the mill, reported that the "machines showed lack of proper care, and some of the goods did not look very well." It also appears that Lucas had built some time about 1903 another mill, known as the "Watts Mill," of which he became president, somewhat against the opinion and advice of Milliken, and that he had taken some umbrage at Milliken's refusal to lend said mill what he called the "paltry sum of \$100,000." However that may be, it is apparent that the relations between Lucas and the Millikens had become strained during the year 1904, and early in 1905 Lucas was beginning to look for another commission house which would sell the product of his mills at a lower rate of commission than that which the Millikens demanded; Lucas claiming that the commissions were exorbitant, and the Millikens claiming that that was the usual rate which they charged to the other mills in this section, of 16 of which they were the selling agents, and that they charged the same commission that other houses were charging for like services. It is not impossible that another cause of the inharmonious relation arose out of the condition of the Darlington Mill, of which Lucas was likewise the president, and the defendants the selling agents, to which mill they had advanced about \$300,000, the settlement of which led to negotiations which culminated in the breach between the parties. On behalf of the plaintiff it is claimed that, as the result of these negotiations, he undertook to raise the money to pay off this indebtedness, all of which was not due, and that the defendants had agreed to allow a rebate of \$25,000 on account of said indebtedness, and that S. M. Milliken at the same time, and as a part of the same negotiations, agreed to sell to the plaintiff 500 shares of stock of the Laurens Cotton Mills at \$150 per share. On April 12, 1905, the plaintiff entered into an agreement with J. P. Stevens & Co. whereby they became commission agents of all the mills of which Lucas was president, upon terms which it is alleged were greatly more advantageous to the mills. The indebtedness of the Darlington Mills was discharged, and the connection of the defendants with these mills as selling agents was terminated. Cor-

respondence then ensued between plaintiff and defendants; the plaintiff demanding that Milliken should turn over to him the shares of stock which he claims that the latter had offered to sell, and notifying him that he had made arrangements with a bank in Greenville to pay therefor upon the receipt of the stock; Milliken denying that he had made any binding agreement to sell the stock, and refusing to sell the same.

S. M. Milliken for some years previous to April had been the owner and holder of 273 shares of stock in the Laurens Mills. G. H. Milliken was the holder of 24 shares, and S. D. Brewster of 92 shares. The parties named composed the firm of Deering, Milliken & Co., and S. M. Milliken, Jr., a physician, of New York, a son of S. M. Milliken, Sr., but not a partner in the firm, had for four or five years been the owner of 224 shares. After the breach with Lucas, S. M. Milliken began to purchase stock of the Laurens Mills, obviously for the purpose of obtaining control in co-operation with other stockholders who were friendly to him, and it appears from the affidavit of the secretary of the company that by May 15th he had bought and had transferred to him something over 600 shares of stock, in addition to that previously held. The plaintiff, Lucas, thereupon commenced a suit in the court of common pleas for Laurens against S. M. Milliken, S. M. Milliken, Jr., G. H. Milliken, S. D. Brewster, and Laurens Cotton Mills, setting forth, among other things, that the Laurens Cotton Mills is a corporation under the laws of South Carolina, having a capital stock of \$350,000, represented by 3,500 shares, of the par value of \$100 each, and that the plaintiff is the president of said corporation; that the defendant S. M. Milliken is a leading copartner in the firm of Deering, Milliken & Co. of which firm G. H. Milliken and S. D. Brewster are partners, and that S. M. Milliken, Jr., is the son of the leading partner; that on the 28th of March, 1905, the Darlington Mills was indebted to the firm above named in the sum of \$300,000 and that in pursuance of negotiations between the plaintiff and said Seth M. Milliken, acting for the firm of Deering, Milliken & Co. the latter entered into a legal, lawful, and binding agreement with the plaintiff that in consideration of the payment in cash by the said Darlington Company, within 30 days, of the amount so owing, the said Seth M. Milliken would sell and deliver to the plaintiff 500 shares of the capital stock of the Laurens Cotton Mills at and for the price of \$150 per share; that on the 12th of April said Lucas, acting as the president and the treasurer of the Darlington Company, did pay to the said firm the full amount due; that on the same day, to wit, the 12th of April, the plaintiff notified the defendant S. M. Milliken that he accepted the offer made by him for his shares of stock, and requested him to send the same to the City National Bank of Greenville, and he would remit promptly upon receipt of the same; that up to a recent period the said firm had been the agents of the Laurens Cotton Mills for the sale of its products, charging and receiving therefor a commission of 3 per cent. on the gross sales of print cloth, and 4 per cent. upon the gross sales of other products; that

plaintiff, in discharging his duty as president of said mills, and in the interest of economy, and in the interest of all the stockholders, submitted to said firm that the commissions so charged were exorbitant, and could and should be reduced, and, upon their refusal to comply with this reasonable request, the plaintiff, in the discharge of his duty, and for the best interest of all the stockholders, entered into arrangements with another commission house to sell the product of said mills at a commission not exceeding 2 per cent. upon the gross sale; that this arrangement was obviously greatly to the advantage of all stockholders of said mills, but was to the personal disadvantage of the said defendants, who took umbrage thereat, and did all they could to prevent the consummation of so beneficial an agreement. He thereupon charged that the other defendants named, including the partners and son of S. M. Milliken, were conspiring and confederating with said S. M. Milliken and other parties to the plaintiff unknown to vote the stock standing in their names for the common purpose of canceling and avoiding the beneficial agreement made by the plaintiff, for and in behalf of the stockholders of the said cotton mills, and again subjecting said corporation and the stockholders thereof to the exorbitant charges made by said firm, and that said S. M. Milliken, for the purpose of carrying out said illegal agreement and conspiracy, had recently purchased a large number of shares of stock of the Laurens Mills, for the purpose of effecting a change in the management, and putting in charge of said mill a management entirely amenable to their wishes and instructions. He demands judgment (1) that S. M. Milliken be required to perform specifically the contract for the sale of 500 shares at and for the sum of \$150 per share; (2) that the defendant S. M. Milliken be enjoined and restrained from transferring or in any way changing the possession of 500 shares of stock, and from voting the same at any meeting of the stockholders of the defendant Laurens Cotton Mills; (3) that the other defendants named, and each of them, be enjoined from voting any and all shares of stock held by them, save under the direction of the court; (4) that the defendant Laurens Cotton Mills be enjoined from receiving and counting at any election the votes of any of said parties of any of the stock standing in their name; (5) for damages against S. M. Milliken by reason of his failure to specifically perform his contract in the sum of \$50,000; (6) for damages against said S. M. Milliken and the other defendants for the damage so willfully, wantonly, and maliciously done to the plaintiff, in the sum of \$50,000; (7) for such and other and further relief as is proper in the premises; (8) for his costs in this action.

Upon this complaint an order was made by his honor Judge Klugh, May 17th, enjoining and restraining S. M. Milliken from transferring or in any way disposing of the said 500 shares of stock specifically, and voting the same at any meeting of the stockholders of the defendant company. Said Milliken and all of the other defendants were also enjoined from voting any and all shares of stock held by them, and the Laurens Cotton Mills was enjoined from al-

lowing them to so vote. It was further ordered that defendants, or any of them, have leave, upon eight days' notice given to the plaintiff or his attorneys, to move before the court or any judge thereof to dissolve or modify the restraining order, provided that with notice of such motion said defendants serve a copy of the grounds and affidavits, if any, upon which such dissolution or modification was asked. It was further ordered that within five days plaintiff should file a bond in the sum of \$1,000, conditioned for the payment of any damage which defendants, or either of them, might sustain by reason of the injunction granted, and further ordered that a copy of that order be served upon each of the defendants herein. It appears from the affidavit submitted that G. H. Milliken, one of the defendants named, was at Laurens on May 15th, and remained until the afternoon of May 16th, within the knowledge of the plaintiff, who signed certain certificates of stock which he had tendered for transfer, and that he remained in the state continuously to May 19th, at Laurens and at Spartanburg, and it was known that he had come to the state for the purpose of attending the annual meeting; that he returned from Spartanburg to Laurens at 1:30 p. m. on May 19th; and that the injunction was served on him about 5:30 p. m. The regular annual meeting of the company was held at Laurens on May 19th. A committee was duly appointed to ascertain whether a quorum was present, and reported that 3,404 out of 3,500 shares were represented in person or by proxy. The usual annual reports were submitted, and, after the transaction of the customary business, Mr. Smythe put in nomination the names of nine gentlemen as directors for the ensuing year. Mr. G. H. Milliken then stated that he desired to place in nomination the names of nine gentlemen for directors. At this juncture the deputy sheriff, who, it appears from the affidavit submitted, had been in waiting for some time, thereupon served Milliken with a copy of the order of injunction hereinbefore referred to. Mr. John B. Cleveland moved that the meeting be adjourned for eight or ten days. Mr. Dial moved to amend by moving to adjourn for the space of two weeks. On Mr. Cleveland's motion, as amended by Mr. Dial, the vote stood ayes 13, nays 20. The motion was therefore lost, and the meeting refused to adjourn. Mr. Cleveland then asked that Mr. Milliken's proxies be returned to him. This motion was refused. Mr. Cleveland then announced that Mr. Milliken and his friends proposed to withdraw from the meeting, and thereupon Mr. John B. Cleveland, the owner of 100 shares, Mr. Jesse Cleveland, the owner of 64 shares, Mr. W. S. Montgomery and Mr. D. B. Little, holders of a small number, all of Spartanburg, and Mr. N. B. Dial, holder of 130 shares, Mr. J. O. C. Fleming, owner of 76 shares, who heretofore had been directors of the company, resident at Laurens, and two other Laurens stockholders, withdrew from the meeting, and the directors nominated by Mr. Smythe, consisting of Mr. Lucas and his friends, were thereafter elected, receiving 1,293 votes. Mr. Lucas was thereupon elected president of the company. The Milliken defendants filed

their petition in the court of common pleas for Laurens county, June 6, 1905, for the removal of this cause to the Circuit Court of the United States, filing the usual bond in such cases provided, and shortly thereafter gave notice of motion to dissolve the injunction, and June 23d was the day fixed for the hearing of said motion. On June 19th the plaintiff, Lucas, served upon defendants' attorneys copy of petition to remand, and the two motions were heard June 23d and June 24th; many affidavits having been filed, and the case fully argued. I have deferred the consideration and determination of the case because of a statement that there were negotiations looking to an adjustment of the controversy, but, being now assured that a settlement is not probable, I will proceed to state my conclusions.

On the Motion to Remand.

1. The parties in the suit are W. E. Lucas, plaintiff, a citizen of South Carolina; the Millikens, citizens of New York; Laurens Cotton Mills a citizen of South Carolina; and F. J. Pelzer and others, citizens of South Carolina, who, upon their own petition, were made parties defendant. The first question to be considered is the nature of the controversy, and whether it can be wholly determined between Lucas, on the one side, and the Millikens, on the other, without the presence of the other parties defendant, or, in the event that it should be considered that the others are necessary parties, whether their interest in the controversy is so far identical with the interest of the plaintiff, Lucas, that they will be grouped together on one side, without reference to their status in the pleadings. Examination of the complaint shows that it is framed with a double aspect. First, it is a suit for specific performance of a contract for the sale of 500 shares of stock to Lucas by Milliken at a price named; and coupled with that is a claim for damages to Lucas of \$50,000 because of nonfulfillment. This is a controversy wholly between Lucas and the Millikens. The Laurens Cotton Mills, as a corporation, can have no possible interest in it. It can receive no benefit, and suffer no detriment, however it may be determined, and could not appeal from any judgment entered, if the real parties are satisfied. 1 Dan. Ch. Pl. & Pr. *230, states the rule in suits for a specific performance: "It is a general rule that none but parties to the contract are necessary to the suit;" and on page 296: "In a suit to ascertain the property in a certain share in a banking company, litigated between two claimants, the company is not a necessary party." Frye, on Specific Performance, § 79, says: "The general rule is that the parties to a contract are alone to be parties to the suit." Cook on Corporations, § 338, says: "In a suit by the claimant of stock to obtain the stock from another person, the corporation is a proper, but not a necessary, party."

Reeves v. Corning (C. C.) 51 Fed. 778, cited with approval in Dillon on the Removal of Causes, is to the effect that where one of the defendants is a mere stakeholder, or has interest on the same side with the plaintiff, the fact that he is a citizen of the same state

with the plaintiff will not defeat the right of his codefendant, with whom the real controversy exists, to remove the cause. *Williamson v. Krohn*, 66 Fed. 656, 13 C. C. A. 668, is on the same line.

Numerous cases have been cited by counsel for plaintiff to show that the corporation is an indispensable party. I have carefully examined them, and in my opinion the facts in each case differentiate them from that now under consideration.

In *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061, the complainant was the owner of 184 shares of stock. During the Civil War the defendant obtained possession of the books of the company, and it was charged in the bill of complaint that, being so in possession, he wrongfully and fraudulently transferred upon the books of the company to his own name, as owner, the shares of complainant's stock. The relief asked was the restoration of the stock on the books of the company to the name of the complainant, and its recognition of his rights. The suit was brought against Dean, and the company was not made a party and the court held that the gaslight company was an indispensable party to the relief sought by this bill.

In *St. Louis, etc., Railway Company v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738, 29 L. Ed. 66, suit was brought by Wilson against the railway company and the Seligmans to compel the company to transfer to Wilson on its books certain shares standing in the name of the Seligmans, and to issue to him certificates therefor. The petition stated that Wilson had purchased the stock at a sale under an execution in his favor against the Seligmans, and that he had exhibited to the company his certificate of purchase, and demanded that it should cause his name to be entered on the stockbooks as the owner. The prayer was for the transfer of the stock, the cancellation of the certificates to the Seligmans, and the issue of new certificates to Wilson. The court held that the sole purpose of the suit was to establish the duty of the railroad company to transfer to Wilson the stock standing in the name of the Seligmans, and to enforce its performance; that the Seligmans were made parties only in aid of the principal relief which was asked for.

In *Crump v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154, 29 L. Ed. 328, suit was commenced by Crump against Wilson and the dairy company; the complaint alleging that Crump had, under a contract with Wilson, assisted him in selling rights under a patent, by the terms of which Wilson was to receive \$12,000 for the rights for Kentucky, and \$8,000 for the rights for Indiana, and all received above those sums for either state was to be divided equally between Crump and Wilson; that the rights for Kentucky and Indiana were disposed of to the dairy company, and 1,000 shares of its capital stock, out of 2,000, were issued to Wilson in payment for the rights; that he refused to give to Crump any part of the money, but a large amount of the stock still stood on the books of the corporation in Wilson's name, and that Crump was entitled to 300 shares thereof; the petition praying that Crump should be adjudged to be the owner of this stock; that the corporation be ordered to cancel on its books the stock standing in Wilson's name, and to issue to

Crump certificates therefor. The corporation was served with process, and filed its answer, stating that one Thurber had bought Wilson's stock, and had received from him the certificates thereof, and had notified the corporation thereof, and claimed to have it transferred to his own name. Crump then amended his petition by making Thurber a party to the suit. Thurber answered, and filed his petition and bond for the removal to the United States court, he being a citizen of New York. On appeal to the Supreme Court of the United States, that Court held that in the controversy between Crump and Thurber the corporation was an indispensable party, and, as that was a Kentucky corporation, and Crump a citizen of Kentucky, the case could not be removed by Thurber.

In *Wilson v. Oswego Township*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70, the plaintiff was a citizen of Missouri, and the defendant a citizen of Kansas, and the controversy was between the plaintiff and defendant relative to the right of possession of certain bonds that were in the custody of the bank, which was a corporation of the State of Missouri. The court held that, the bank being a necessary party, the suit could not be removed to the federal court by its codefendant.

In *Patterson v. Farmington (C. C.)* 111 Fed. 262, Patterson, a citizen of Connecticut, brought a suit against a street railway company of that state, Coykendall and Soop, citizens of New York, and Greeley, a citizen of Connecticut, alleging an agreement with Coykendall to sell him certain mortgage bonds of a Connecticut corporation, the foreclosure of the mortgage, the purchase by the three parties named as trustees, the organization of the street railway company by subscription by them as trustees for the persons entitled to the bonds, which bonds were then represented by stock in the railroad company, and that no certificates had been actually issued by the street railway company, and that these parties intended to transfer the stock, and prevent plaintiff from obtaining his due portion of the same. He sought a decree against the trustees and an injunction, etc. The District Court held that the corporation was a necessary party.

In all of that line of cases where the corporation is held to be an indispensable party, either the principal relief sought is against the corporation for some wrong done by it, or the action is for the purpose of having the ownership of the stock in question recognized by the corporation, and the stock transferred on its books. Except in the Connecticut case, none are for specific performance, and in that case the stock had not been issued by the corporation, and the defendants therefore had no evidence of ownership which could be delivered to plaintiff if he succeeded in his suit.

In *Cella, Adler & Tilles v. Brown (C. C.)* 136 Fed. 439, Judge Sanborn reviews most of the cases above cited in a case where the complainants brought suit for specific performance against Brown Bros. & Co. and certain corporations—among them, the National Bank of Commerce, who had been appointed by Brown Bros. their agent to receive contributions of all the stockholders in a certain reorganization plan. The bill prayed that the proceedings in the at-

tempted reorganization be avoided for fraud, that Brown Bros. & Co. and the Bank of Commerce be required to deliver up to complainants their share of the pledged securities, and that Brown Bros. be enjoined from allotting their share to any other party. The case was removed from the state court, and, on a motion to remand, the court considered at some length a contention that the Bank of Commerce was an indispensable party, and, after reviewing most of the cases cited here, it held that the cause of action against Brown Bros. & Co. and the National Bank of Commerce was not joint; that the action against Brown Bros. to enforce their contract could be maintained without the presence of the Bank of Commerce, and its presence was not necessary to a complete adjudication of the controversy, and the complainants, by naming it as a party in their bill, and by asserting that it made a claim to have contributed and was entitled to a share of the pledged securities, could not make it a party to the contract of Brown Bros. & Co.; and, not being an indispensable party to the cause of action, he refused the motion to remand.

In this case there is but one controversy, and that is between Lucas and Milliken, growing out of an alleged breach of contract between the two. The bill seeks specific performance, and demands damages against Milliken. There is no cause of action against the corporation, and no relief is sought against it. Therein it differs from all of that class of cases considered by the court in *Chesapeake & Ohio Railway Company v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, where the complaint charged joint negligence of the defendant company and others, or the familiar cases of suits for joint trespass or for breach of a joint contract, where the court holds, as in *Railroad Company v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63, *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269, and *Powers v. Chesapeake & Ohio R. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, and *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442, that defendant cannot make an action several which the plaintiff elects to make joint; that, while a separate defense may defeat a joint recovery, it cannot deprive the plaintiff of his right to prosecute his own suit to final determination in his own way, and that the cause of action is the subject-matter of the controversy; and that, for all the purposes of the suit, is whatever the plaintiff discloses it to be in his pleadings. In other words, in considering the plaintiff's cause of action on motion to remand, the court, in determining whether or not a separable controversy exists, will look only at the allegations of the plaintiff's complaint, and, in determining that question, will not consider matters of defense, and, if the complaint states a joint cause of action, either as joint negligence or joint trespass or breach of a joint contract, it cannot allow the defendant to make the action several which the plaintiff has elected to make joint: but the mere joinder of a party as a party defendant does not of itself show that a cause of action is joint where the allegations of the complaint show a cause of action against one defendant only. It is not contended here that the plaintiff has a cause of action against the *Laurens Mills*.

He has sought no relief against it. The contention is that the Laurens Mills is an indispensable party, because it is necessary to the fruition of any judgment against Milliken. The cases relied on must be considered in the light of the facts disclosed in each case, and wherever it appears, as it does appear in most of those cases, that the presence of a corporation as a party is essential to the securing of the relief which the plaintiff seeks, the courts are governed accordingly; but I am of opinion that these cases are not authority for the proposition that the corporation is a necessary party to a suit for the specific performance of a contract for its issued stock.

There is no allegation that the Millikens are insolvent, nor is there any doubt that the plaintiff will obtain the full fruition of any decree to which he may show himself to be entitled. The case might be otherwise if the complaint alleged that the defendants were about to dispose of their stock, and it was necessary to enjoin a transfer in order to prevent the stock being put beyond the control of the defendants or of the court, but the gravamen of the complaint is that the defendants have bought the stock for the purpose of controlling the company. If the plaintiff should succeed in his suit, and obtain a decree for specific performance of the contract for the transfer to him of 500 shares, he is the president of the company, and it is idle to say that he would not obtain the fruits of his victory. The only prayer in the bill against the corporation is that it be enjoined from receiving and counting any votes of the Millikens at the stockholders' meeting, but, as the bill seeks to enjoin the Millikens from voting, any decree against the company would be a matter of form, and not of substance. This was decided in *Higgins v. B. & O. R. Co. et al.* (C. C.) 99 Fed. 640, which was a bill filed by citizens of New York in the Circuit Court of Pennsylvania against a Maryland and a Pennsylvania corporation, and, the case having been removed to the United States Court, a motion was made to remand. It was alleged in the bill against the Baltimore & Ohio Company that its ownership of stock in the Pittsburgh & Western Company, was ultra vires, and the prayer was that such stock be sold, and pending the sale the Baltimore & Ohio Company enjoined from transferring it and from voting it. The court says:

"It will thus be seen, if these prayers be granted, the full measure of the relief sought will be obtained by a decree against the Baltimore & Ohio Company alone. It is not sought to include or join the Pittsburgh Company in such decree, and its corporate rights or property are not affected thereby. It will therefore seem clear that both by the subject-matter of the bill, and the specific relief sought thereunder, a separate controversy is presented. * * * It is true, the fourth prayer seeks a decree against the Pittsburgh & Western Railway Company, but the bill shows no complaint or cause of action against that corporation. It is evident its relation to the case is merely formal. A decree against it would be a formal sequence to the third provision of the decree sought against the Baltimore & Ohio Company for, clearly, if the Baltimore Company were enjoined from voting the stock, the further enjoining the Pittsburgh Company from receiving or voting already enjoined would be a matter of form, not substance, and would neither add to nor detract from the all-sufficient decree against the Baltimore Company."

2. But even if I were of the opinion that the Laurens Mills was an indispensable party, it would not follow that the case should be remanded, because it is well settled by repeated adjudications of the Supreme Court of the United States that in a controversy between citizens of one state on one side, and citizens of another state on the other side, a case may be removed without regard to the position they occupy in the pleadings as plaintiffs or defendants; that the court will look at the pleadings, and determine on which side of the controversy the codefendant whose citizenship is asserted as a ground for nonremoval stands, and the fact that such defendant is a citizen of complainant's state does not prevent the case from being removed, where the interest of such codefendant is identical with that of the complainant. This requires consideration of the second aspect of the plaintiff's case. As we have already said, the complaint sets forth two grounds. The first relates solely to his personal claim against S. M. Milliken for specific performance and breach of contract relating to 500 shares of stock. With that controversy neither the defendant company nor the other defendants have any concern. His second cause of action states that Lucas, as president of the Laurens Mills, has made an arrangement with another commission house for the sale of its products at a commission not exceeding 2 per cent. on gross sales, which arrangement, he states, was obviously greatly to the advantage of the company; and the charge is made that S. M. Milliken conspired with the other defendants and with other parties unknown for the purpose of obtaining control of the Laurens Cotton Mills; of canceling, if possible, and avoiding this beneficial contract, and thereby subjecting the said corporation and the stockholders thereof to the exorbitant charges of Deering, Milliken & Co. Obviously the Laurens Cotton Mills has an interest in this controversy, but its interest is precisely that of the complainant, Lucas. This appears upon the face of the complaint, but in determining a question of this nature the court is not limited to an examination of the complaint alone. Its duty is to ascertain the truth. The first counsel who addressed the court in behalf of the plaintiff on these motions was Mr. Featherstone, who frankly avowed that his sympathies were altogether with the plaintiff, and although he had appeared for the Laurens Cotton Mills, and had prepared its answer, he had since that time substituted other counsel as attorneys for the company, who had prepared an amended answer. The answer of the company did not appear in the record certified by the clerk of the state court, but, it appearing that it had been served before the petition for removal, the court ordered—plaintiff's counsel objecting—that a copy of the answer be attached to the record. The original answer was exhibited upon the hearing, and it appears that it was served on June 5, 1905. The third paragraph of that answer is as follows:

"The said defendant, further answering, says that it has for a number of years been paying excessive and unnecessary commissions on the sale of its goods, amounting to about \$15,000 per annum; that within the last few months it has succeeded in getting the output of its mills sold for about one half of the former rate paid; and that said arrangement is now in existence."

In so far, then, as the object of the plaintiff's bill was to protect the company from the alleged conspiracy of the Milliken defendants, which was designed to reimpose upon it "excessive and unnecessary commissions," and to cancel the beneficial contract alleged to have been made for commissions to be paid at about one-half of the former rate, the Laurens Cotton Mills have the same interest that the plaintiff avows.

In the Removal Cases, 100 U. S. 468, 25 L. Ed. 593, the court held that:

"Either party to the controversy may remove the suit to the Circuit Court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purpose of the removal, the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of the dispute. If, in such arrangement, it appears that those on one side were all citizens of different states from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute according to the facts."

In *Barney v. Latham*, 103 U. S. 214, 26 L. Ed. 514, the court, considering a removal case where the plaintiffs were citizens of Minnesota, and defendants citizens of New York and other states, and a corporation of Minnesota, held that the mere form of the pleadings was immaterial and was to be disregarded; that in that case the land company, as a corporation, had no necessary connection with the controversy, and, although it might be a proper, was not an indispensable, party to the relief asked; and in *Harter v. Kernochan*, 103 U. S. 566, 26 L. Ed. 411, in a suit which involved the liability of a township in the state of Illinois, the court says:

"Disregarding, as we may do, the particular position, whether as complainants or defendants, assigned to the parties by the draftsman of the bill, it is apparent that the sole matter in dispute is the liability of the township upon the bonds; that upon one side of that dispute are all of the state, county, and township officers and taxpayers that were made parties, while upon the other is Kernochan, the owner of the bonds whose validity is questioned by this suit. He alone of all the parties is in a legal sense interested in the enforcement of liability upon the township. It is therefore a suit in which there is a single controversy, embracing the whole suit, between citizens of different states, one side of which is represented alone by Kernochan, a citizen of Massachusetts, and the other by citizens of Illinois."

These cases arose under the removal act of 1875. The acts of 1887-88 does not affect this question. There have been numerous decisions since its date repeating the same doctrine. It is useless to cite them all. The latest decision is that of the Circuit Court of Appeals of the Eighth Circuit, March 4, 1905 (*Boatmen's Bank v. Fritzlen*, 135 Fed. 658), where Judge Sanborn says:

"The positions assigned to parties in a suit by the pleader are immaterial in determining the removability of the cause. It is the duty of the national court to ascertain the real matter in dispute, to arrange the parties on opposite sides of it according to the facts and their respective interests, and then to determine whether or not a controversy exists between citizens of different states which involves the jurisdiction of that court."

It appearing, then, that, in so far as the Laurens Cotton Mills has any interest whatever in this controversy, its interest is on the same side with Lucas, I am of opinion that its joinder as defendant with the Millikens does not prevent the removal of the suit by the Millikens. The same remark, of course, applies to Messrs. Pelzer and others, who were made parties defendant on their own petition for the purpose of aligning themselves alongside of the plaintiff.

It has been strongly pressed upon me that, inasmuch as there may be a question of doubt whether this cause was properly removed, it is the duty to remand it to the state court. If I had grave doubts as to my jurisdiction, I would not assume it, for I do not covet jurisdiction, and there are many reasons why I would prefer not to be compelled to decide this case, and had well hoped to avoid that necessity by giving the parties opportunity to adjust their controversies; but the Constitution and laws of this country give to its citizens the right to a hearing in the courts of the United States of certain controversies which arise between the citizens of different states, and the parties here are entitled to the protection and preservation of that right.

The case presents the unusual spectacle of a party representing a little more than one-third of the capital stock of a corporation controlling absolutely its affairs, and excluding from all participation therein the owners of nearly two-thirds of its stock. Prior to 1860 there were in South Carolina various checks and safeguards designed to prevent, in its political affairs, the control of a mere numerical majority, and the same principle obtained with respect to corporations. Nearly all of the charters granted up to that time provided that stockholders should be entitled to vote according to a scale which was so arranged that no holder was entitled to more than a certain number of votes, but for the last 40 years the fixed policy of the state has been to give to the majority of stockholders the right to control the affairs of a corporation in which they are interested, each share of stock representing the right which the owner has in the management, profits, and ultimate assets of the corporation, and the certificate held by him is *prima facie* evidence of his title and ownership. Nothing, therefore, can be more clear than that at this date in South Carolina the holders of a majority of the stock of a corporation are entitled to control it. The right to vote one's stock is a right of property, and should be as sacred as any other property right. Now, it is undisputed that the Millikens and their friends own nearly two-thirds of the stock of this corporation, and they would be in control of it to-day if an order of injunction obtained without notice upon the *ex parte* affidavit of the plaintiff two days before the meeting, service of which was designedly withheld until the meeting to which they were invited as stockholders was organized, and in which their presence as stockholders was necessary to make a quorum. In these circumstances, a deputy sheriff, lying in wait until the moment of election arrived, served the order of injunction which restrained not only the voting of the 500 shares about which there was a dispute, but all of the stock held by the defendants, some of which had been

bought subsequent to the alleged contract in open market, under the sanction of the laws, and 247 shares of which had been held for more than four years by one of Milliken's sons, who was not a member of his firm or a party to any of the plaintiff's negotiations. All of this is done under the guise of preserving the status quo until certain legal questions arising out of an alleged contract for the purchase of certain shares can be determined. The case for the plaintiff is that in consideration of the payment by the Darlington Manufacturing Company of its indebtedness of \$300,000, a part of which was not then due, and through his exertions (he being its president). S. M. Milliken, acting for the firm of Deering, Milliken & Co., would allow a rebate of \$25,000 to that company, and as a further consideration, would sell to Lucas individually 500 shares of Laurens Cotton Mills stock at \$150 per share. Milliken denies making such agreement, and submits that any such agreement was without consideration, and was otherwise void. That a bill will lie for the specific performance of a contract for the sale of stock, although once doubted, is no longer open to question; but the contract thus sought to be enforced must be a legal and binding contract, certain and definite in all its terms. Whether Milliken's offer was binding, and whether there was such part performance as to take it out of the statute of frauds, can be determined finally only after a full hearing, but that there is uncertainty as to the number of shares that it is alleged that Milliken agreed to sell is apparent. There was no offer in writing, and plaintiff claims that S. M. Milliken was then acting in behalf of the firm of Deering, Milliken & Co., and such consideration as is alleged was the payment of the debt of the Darlington Mills to that firm. Now, at that time S. M. Milliken owned 273 shares; his partner, G. H. Milliken, owned 24 shares; and S. D. Brewster, 92; the firm owning in all 389 shares. On April 12th Lucas writes to Milliken as follows:

"I have arranged to accept your offer for your holdings in the Laurens Mills at the price asked by you, namely, \$150 per share. I will take also the holdings of Messrs. S. M. Milliken, Jr., G. H. Milliken, S. D. Brewster and Mrs. Hatch at the same price. I will ask you to please send this stock to the City National Bank, Greenville, S. C., and they will remit you promptly on receipt of same."

In the correspondence that ensued there is no mention anywhere of any agreement to sell 500 shares of stock. Lucas insists upon Milliken's standing by his agreement, and Milliken replies that he does not make offers to stand open unless it is so agreed at the time; but, to ascertain what the offer was, we must turn to Lucas' letter, above cited, where is found the only reference in writing to the alleged contract. The offer, as therein stated, is, "your holdings," which were 273 shares; and then follows an offer by Lucas, not accepted by the parties, for the holdings of Messrs. S. M. Milliken, Jr., G. H. Milliken, S. D. Brewster, and Mrs. Hatch, at the same price. If the holdings of S. M. Milliken, Jr., and Mrs. Hatch are added to those of the firm, there would be more than 500 shares. So far as appears in the papers before me, it was not until May 15th, when the bill was filed, that any claim was made

that there was an agreement to sell specifically 500 shares of stock. By that time Lucas knew that there was to be a contest for control of the mill, and he doubtless knew how many shares of stock could be relied upon to support him. If to these were added S. M. Milliken's holdings at the date of the alleged contract, he would still fall short of a majority. In the letter inclosing drafts in payment of the debt of the Darlington Mills there is no mention or claim that the same is intended to be in part performance of any contract for the sale of any stock in the Laurens Mills. So the *prima facie* case for the plaintiff seems to be this: That he was desirous of changing his commission agents, and placing the accounts of the three mills of which he was president in other hands, and before making such change it was necessary to arrange for the payment of the indebtedness of the Darlington Mills, then amounting to a large sum; that Milliken agreed to allow him a considerable rebate on the debt of the Darlington Mills if it was paid, and at the same time, not desiring to hold stock in mills of which he was no longer the agent, he made an offer to sell his stock at \$150 per share. But this was a verbal offer; no definite time being fixed for its acceptance or rejection, and no definite number of shares being named. As a general rule, an offer to sell, if not accepted at the time when made, may be withdrawn. It is equally a rule of law that an agreement without consideration cannot be enforced, and that a court of equity will not enforce a contract, any of the terms of which are vague, uncertain, and doubtful. It must be sure that the minds of the parties have met and mutually agreed, and, where any of these requisites are lacking, specific performance will be denied. Whether the uncertainties which now appear may be made certain by proof, and whether there has been sufficient part performance to take the case out of the statute of frauds and warrant a decree for specific performance, can only be determined when the proof now lacking is supplied; but, upon the case now made, the plaintiff has shown no ground whatever for holding Milliken to any agreement for the sale of more than 389 shares, assuming that at the time of the agreement he offered to sell his own holdings and those of his partners. Would such an agreement, if legally binding, deprive Milliken of the right to vote this stock? This would depend upon the agreement. A mere option or an executory contract for the sale of stock would not ordinarily deprive the owner of his right to vote it, for the right to vote is incident to the ownership, and remains with the legal holder.

One of the counsel for plaintiff, apparently recognizing this difficulty, seems to rest the case upon the doctrine that Lucas has an equitable title to the stock. If he had paid for it, he would have an equitable title which would enable him to restrain the holder of the legal title from the exercise of any of the rights of ownership, but that is not the case. He has paid nothing on account of the purchase of the stock. All that he claims is that he has an agreement which gives him an equity for specific performance, and a court might very well conclude that he has made out such a *prima facie* case as would entitle him to enjoin the Millikens from selling

or disposing of the stock until the question of his right to buy the stock at a certain price is determined. But an injunction which deprives Milliken of his right to vote his stock, which in effect is like a judgment entered before trial and without a hearing, is a very different case. Plaintiffs contend that this injunction was necessary to preserve the status quo. The general authority of courts of equity to grant injunctions *pendente lite*, so as to preserve the subject of the controversy until opportunity is given for full investigation, is a power in aid of justice, and most beneficial; but this powerful and peremptory instrumentality cannot be used to take property out of possession of one of the parties except under very extraordinary circumstances, where there is some pressing necessity to avoid injurious consequences that cannot be compensated in damages, and where the right is established with a certainty of proof that leaves no doubt. Acknowledged rights are more entitled to the protection of courts than the establishment of new and doubtful ones. The right of a majority of stockholders to control the corporation is an acknowledged and undisputed right, established by every legal sanction. That was the status quo that should have been preserved, but this order of injunction, obtained and executed in the manner already recited, had no other purpose and no other effect than to destroy the status quo which consisted in the right of the majority to control the corporation.

A case frequently cited is *Hilles v. Parrish*, 14 N. J. Eq. 390, where a bill was filed to restrain certain stockholders from selling or assigning their stock, or from voting upon it at an election which was to be held within three days from the date of the filing of the bill. The court held that inasmuch as the probable effect of the injunction would be to change the result of the election and control of the affairs of the company, without allowing the stockholders sought to be restrained to be heard in their own defense, the injunction ought to be denied. Precedents may be found where elections are enjoined until questions relating to the ownership of stock can be determined, but no case has been cited, and after exhaustive search I have been unable to find any, where on the eve of an election a minority has, on an *ex parte* application, obtained an injunction tying the hands of a majority, with the result of giving such minority control of the corporation. None of the cases cited in behalf of the plaintiff give support to any such doctrine. It would prolong this opinion to undue length if these cases were critically analyzed to show how far they fall short of giving color even to such a pretension. The only ground upon which it is sought to support it is that, if Milliken and his friends secure control of the corporation, they will abrogate the contract with Stevens & Co., and secure for themselves the business of the company at exorbitant rates of commission. Nobody knows better than the counsel who make this contention that a court of equity would not hesitate to enjoin a transaction of such nature. There is nothing better settled than that a majority of stockholders controlling a corporation will not be allowed to make a contract with themselves for undue profit at the expense of the corporation. There is nothing to justify the

assumption that the Millikens are so unwise or so dishonest as to make such an attempt, and, if they were, it could easily be prevented. Hence the claim that there was danger of irreparable damage to the corporation if the injunction was not granted may be dismissed as scarcely worthy of consideration, and it is only upon the ground of danger of irreparable injury which could not be adequately compensated in damages that an injunction *pendente lite* in a case of this nature could ever be properly asked. So far, then, as the corporation is concerned, it is perfectly clear that there is no legal ground upon which the injunction can be sustained. It is an unheard-of thing that stockholders of a corporation can be enjoined from voting on the ground that the persons they may vote for to manage it may possibly abuse their trust.

We come now to the consideration of the rights of the plaintiff individually. The purpose and effect of the injunction was to secure the re-election of Lucas as president of the Laurens Cotton Mills. Can the great powers of a court of equity be properly invoked for such an object? It is scarcely necessary to say that the president of a joint-stock company has no indefeasible title to his office beyond the term for which he has been regularly elected, whatever may be his merits. The majority of the stockholders have the right, at the expiration of his term, with reason or without reason, to refuse to re-elect him; and courts have no right to inquire into the motives of such stockholders, or to interfere with their discretion. Lucas well knew about the middle of April, after the breach between himself and Milliken, that the latter denied that he was under any obligation to sell his stock in the Laurens Mills. He refused absolutely to do so, and shortly afterwards began to purchase additional stock. There was apparently no concealment of such purchases, and it must have been obvious to Lucas, as to all the world, that there would be a contest for the control of the company at the annual meeting, May 19th, and the issue of that contest would necessarily depend upon the preponderance of the holdings on one side or the other; and it appears that by May 15th Milliken had added to his holdings by purchase something over 600 shares of stock, which, with the holdings of the local stockholders in Spartanburg and Laurens, the Messrs. Cleveland, Montgomery, Dial, Fleming, and others, gave to the opposition to the Lucas management a large majority of the stock—nearly two-thirds, in fact. If the object of this suit and of the injunction was to test the legal rights of the plaintiff under the alleged contract and claim for specific performance, no good reason is shown or is conceivable why the order of injunction should not have been served immediately after it was made. The party upon whom it was ultimately served was in the state, within reach of process, at the time the order was obtained. It was designedly withheld, and nothing was done to indicate to Milliken and his friends that the annual election would be anything other than the normal proceeding whereby a majority of the stockholders would be enabled to exercise the indubitable right of the majority to elect a board of directors in consonance with their views. After the service of the injunction in the

manner and at the time as already recited, it was still within the power of the plaintiff and his friends to give to Milliken and his friends what, in the parlance of the day, is called a "square deal." Mr. Cleveland and Mr. Dial, large stockholders—the latter a director of the company—asked for an adjournment for two weeks. This would have given opportunity to the defendants to appear before the judge who granted the order to move to dissolve or modify it, for the restraining order expressly provided for such leave upon eight days' notice. The order was obtained without notice upon an ex parte showing, and, if the plaintiff believed that he had right on his side, every consideration of fairness required that the defendants should have an opportunity to be heard before they were deprived of a substantial right, for the right to vote is inherent, but this reasonable request was refused. The injunction not only restrained the voting of the stock, concerning which it might fairly be claimed that there was a dispute, but all the stock held by the defendants, or any of them, their right and title to which was indisputable, with the result that a board of directors was chosen by a minority, and the holders of nearly two-thirds of the stock of the company are excluded from all participation in its management.

The jurisdiction of a court of equity to grant preliminary injunctions or injunctions pendente lite is well settled. It is not a matter of strict right, and the limitations of this power are tolerably well defined. The general rule is stated in *Pelzer v. Hughes*, 27 S. C. 415, 3 S. E. 781, as follows:

"The sole object is to preserve the subject of controversy in the condition in which it is when the order is made until an opportunity is afforded for a full and deliberate investigation. It cannot be used to take property out of the possession of one person and put it into that of another."

In 16 A. & E. Ency. of Law, 347, numerous cases are cited, and there is a summing up which correctly states the rule:

"(3) The power to grant preliminary injunctions should be exercised with great caution, and an injunction should not be granted except in cases of the most urgent necessity. Interference by injunction rests on the principle of a clear and certain right to the enjoyment of the subject-matter in question, and an injurious interruption of that right, which, on just and equitable grounds, ought to be prevented. The rule that great caution should be exercised is especially applicable in the granting of preliminary injunctions on an ex parte hearing, as experience shows that an ex parte statement seldom presents the full truth."

And again, on page 360 of the same volume:

"To warrant the allowance of a writ of injunction, it must clearly appear that some act has been done or is threatened which will produce irreparable injury to the party asking an injunction."

Applying these well-settled principles to this case, it seems to me that the injunction should not have been granted, for the following reasons:

(1) Plaintiff's right to claim specific performance is, to say the least, doubtful. The agreement is disputed, the number of shares covered by it is uncertain, and its legality is impeached. "An injunction will not usually be granted where the complainant's right is doubtful. Where the right of the party is doubtful an injunction

will not, in general, be granted to prevent an interference therewith until the right is established by law. Nothing is better settled as a rule of equity procedure than that the complainant is not entitled to a preliminary injunction to protect a right which depends on a disputed question of law, and which question has never been adjudged in his favor by a court of law. When the principles of law on which rights are disputed will admit of doubt, a court of equity, although satisfied as to what is the correct conclusion of law upon the facts, will not, without a decision of the courts of law establishing such principles, grant an injunction. So, if the facts on which the right to injunction is based are in dispute, the injunction will not be granted." 16 A. & E. Ency. of Law, 359. Spelling, on Extraordinary Relief, states the rule thus (section 207): "An injunction will not issue where the right to protect which the injunction is claimed depends upon a doubtful and disputed question of law," nor where it would have the effect of interfering with the legitimate use and enjoyment of property.

(2) There was no danger of irreparable damage to plaintiff, or of any injury which could not be compensated by damages. The plaintiff's loss of the presidency of the company is not such an irreparable injury, for, if he should succeed in his suit, and show that he was entitled to sufficient stock to have given him control and secure his re-election, he could recover from the defendants, as damages, not only for his loss of salary, but for any other loss as stockholder which he has suffered by reason of a change of management; and the law is well settled that an injunction will not lie in any case where the plaintiff can obtain adequate pecuniary compensation for the injury complained of. It is not disputed that the defendants are amply solvent and able to respond in damages. If they had obtained control of the Laurens Mills they could not have removed it beyond the jurisdiction of the court, or have inflicted upon it or upon the plaintiff any injury for which they would have been unable to respond in damages.

(3) As the sole object of the preliminary injunction is to preserve the subject-matter of the controversy in the condition in which it is until the merits can be heard, an injunction should never be granted upon an ex parte application, the effect of which is to deprive the party enjoined of his right of property to the thing in dispute. The object of this suit is to determine the right of property in certain stock held by the defendants. Until that right is decided adversely to them, they are unquestionably entitled to the possession of the stock, with all of its incidents, among which is the right of voting it. The effect of this injunction is to deprive them of such possession. Not only that, but the right to other stock, the title to which was not disputed, was taken away from them. The subject-matter of controversy, which it is the sole object of the preliminary injunction to preserve in the condition in which it is until the merits can be heard, is not left in statu quo. To all intents and purposes, this injunction ties the hands of defendants as completely as would be the case if there had been a final decision against them on the merits. They are deprived of their property for all purposes of

voting and exercising rights of ownership as effectually as if their certificates of shares had been actually sequestered.

(4) There was no case of urgent necessity which required that a court should, upon an ex parte application, make an order, the effect of which was to allow a minority of stockholders to obtain control of property against the will of the majority. The case would be different if the election had been enjoined until the question of the right to vote the disputed stock could be heard. In such case the old administration would have held over until defendants had a hearing. Or, even after the injunction had been served, common fairness required acquiescence in the motion of Mr. Cleveland and Mr. Dial to adjourn the meeting for two weeks, in order that defendants might be heard, before all their rights were taken from them. But the plaintiff and his friends, having obtained their vantage ground by such use of the court's process as merits severest condemnation, securing thereby a nominal majority, and having as their motto, "Beati possidentes," were determined not to surrender the advantage thus unfairly obtained, and to take their chances in the lottery of litigation to maintain it. The numerous, astute, and industrious counsel for plaintiff have cited no case which sustains this injunction, or which comes near it, and there is no support for it in principle. It remains, therefore, to take brief notice of the appeal urged with some vehemence, that the plaintiff should be supported because he had made a fight in behalf of the Southern mills against Northern commission houses, or, as one of the counsel given to military metaphors has expressed it, that this is the first battle in the war for Southern industrial independence. These are considerations that might very well have been addressed by Lucas to the stockholders of his company—that it was their duty to stand by him in the contest which he alleges he was making in their interest—but such appeal does not appear to have been effective. The Clevelands, Montgomeries, Flemings, Dial, Todd, and others, all of whom are interested in Southern mills, are aligned with the defendants in the desire for a change in the management of the Laurens Mill, and considerations of this nature surely have no place in a court of law, as furnishing motives of decision.

In reaching the conclusion that this injunction should be dissolved, I have not considered the charges of misconduct set forth in the affidavits as reasons why the defendants do not regard the plaintiff a safe man for the presidency of this mill. Stockholders are not required to give reasons for a desire for a change of management. Nor has it been necessary to consider the charges made by Lucas that the defendants had been receiving exorbitant commissions. Where both parties are free to choose, the amount paid for personal service is a matter of bargain, or regulated by the usages of the trade, and generally beyond the cognizance of the courts, unless the charges are so unconscionable as to shock the conscience. As a rule, the character and standing of a commission house, its probity and financial responsibility, its experience, its clientage, its ability to find purchasers where others not so well known would fail, are all elements which enter into the determination of the question

whether the commissions charged are reasonable or otherwise. There is no infallible standard of measurement or rule of law which governs, and it is not the province of courts to balance the probabilities of profitable results likely to arise from the following of one or another plan in the management of a business. If the defendants charged the same commissions to this company which they charged other companies for like services, and the same that other houses of like standing charged other companies in like plight, it cannot help the plaintiff's cause to vilipend them as extortioners. On the other hand, the plaintiff was entirely within his right, and deserves nothing but commendation, if, believing that the rates of commission were too high, he endeavored to secure a reduction therein, and, failing that, transferred the business to another house. It may be his misfortune, and not his fault, that he was unable to persuade a majority of his stockholders of the wisdom of such change. It is not an uncommon lot of pioneers to be overtaken by disaster, and success is not always the criterion of merit. To have deserved it is sometimes better than to have attained it. But the question of the plaintiff's merits or demerits as a manager of an industrial enterprise which apparently he had hitherto conducted with conspicuous success is not before me for decision. That for which he is to be condemned is that, having invited a contest for the control of the mill, which all the rules of the game required to be fairly played, he has won it by having an injunction up his sleeve.

It is ordered, adjudged, and decreed that the order of injunction of May 17, 1905, restraining the defendants from voting the stock held by them, and restraining the Laurens Cotton Mills from receiving the votes of said defendants, be, and it hereby is, dissolved. It is further ordered and adjudged that the defendants S. M. Milliken, G. H. Milliken, and S. D. Brewster, members of the firm of Deering, Milliken & Co., be, and each and every one of them is, hereby restrained and enjoined from selling or otherwise disposing of any and all shares of stock in the Laurens Cotton Mills held by the firm of Deering, Milliken & Co. or by said parties individually, on April 12, 1905, until the further order of this court.

BADGER GOLD MIN. & MILL. CO. v. STOCKTON GOLD & COPPER MIN. CO.

(Circuit Court, D. Oregon. July 26, 1905.)

No. 2,846.

1. MINING CLAIMS—SUIT TO QUIET TITLE—POSSESSION TO SUSTAIN.

The surreptitious running of a drift from one mining claim underneath the surface of another adjoining does not constitute such possession of the latter as will sustain a suit in equity to quiet title against one who is in the open and adverse possession of the surface and of workings therefrom.

2. SAME—DISMISSAL OF BILL—EFFECT ON CROSS-BILL.

The dismissal of a bill to quiet title to a mining claim does not carry with it a cross-bill filed by defendant seeking to have the title to the same claim quieted in him and which alleges facts not alleged in the original bill; nor is it necessary to the retaining of the suit for trial on the cross-bill, where it is in a federal court, that the cross-bill should contain the jurisdictional allegations as to the citizenship of the parties, which was shown by the original bill.

3. SAME—EFFECT OF ABANDONMENT BY PART OWNER.

The abandonment of a mining claim, the legal title to which is in the United States, by a part owner, does not vest any right or title to his interest in his co-owner.

4. SAME—FORFEITURE OF INTEREST OF PART OWNER.

The fact that after the owners of a part interest in a mining claim had done the assessment work thereon for a particular year they conveyed the claim to a corporation, taking in payment substantially all of its capital stock, which they retained, did not preclude the forfeiture of the interest of their co-owner for failure to contribute to the work by a notice given in accordance with Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426], and signed both by them and by the corporation, and the vesting of such interest in the corporation by virtue of their deed, which purported to convey the entire claim.

5. EQUITY—PLEADING—CROSS-BILL.

Where a bill to quiet title to a part interest in a mining claim alleged that defendant claimed title to such interest by virtue of forfeiture proceedings under the statute against complainant's grantor, which were alleged to be void, and proofs were taken upon the issue so raised without objection, it is not essential to the granting of relief to the defendant prayed for by a cross-bill that such forfeiture proceedings should have been again pleaded in the cross-bill.

In Equity.

The Badger Gold Mining & Milling Company, a corporation of the state of California, brought its bill as complainant against the Stockton Gold & Copper Mining Company, a corporation of the state of Washington, as defendant, alleging, in substance, that the complainant is the owner in fee simple of an undivided one-half interest in and to a mining claim in the Elk mining district, Grant county, state of Oregon, known as the Stockton Lode or Mining Claim; that on and prior to January 1, 1894, the land included in said claim was a part of the vacant, unoccupied, public mineral land of the United States subject to location; that William Welsh duly located the same; that on February 3, 1894, he caused a certificate of his location to be duly recorded; that on February 23, 1895, he sold and conveyed an undivided one-half interest in said claim to William Moran; that said Welsh and said Moran continued to hold and work said claim, including the lawful assessment work thereon for each year until March 23, 1897, when Welsh conveyed his remaining interest to other persons; that Moran and the successors of Welsh continued to hold the claim and do the assessment work thereon until February 12, 1902, when Moran conveyed his interest to Wellington Gregg, Jr.; that on July 22, 1902,

Gregg conveyed his interest to the complainant; that the defendant bases its claim of ownership to the entire mining claim through a conveyance of an undivided one-half interest therein and certain pretended proceedings of forfeiture instituted against Wm. Moran by virtue of section 2324 of the Revised Statutes [U. S. Comp. St. 1901, p. 1426], which proceedings were null and void; that the complainant is the owner of an undivided one-half interest of said claim, and is in possession of said claim; that the defendant has wrongfully caused said claim to be surveyed for a United States patent, and has caused the register of the proper land office to give notice of said application; that the complainant has caused a protest and adverse claim to said application to be filed, and proceedings on said application are stayed to await the determination of a court of competent jurisdiction; and the complainant prayed that it be decreed to be the owner of an undivided one-half interest in the said claim. The answer of the defendant denied that the complainant was, or ever had been, in possession of said mining claim, or any portion thereof, or was the owner of any interest therein. It denied that said Moran ever held said mining claim or did any act whatever required by law to hold the same, or did any work or labor or made improvements thereon at any time. It denied that the said Gregg ever did any act or things required by law to entitle him to hold the claim, or that he was ever in possession thereof, or entitled to any part or interest therein. The answer alleged that from and after the execution of the conveyance to said Moran on February 23, 1895, the said Moran never was in possession of any part of said mining claim, never took possession of any part thereof, but, on the contrary, soon after said last-named date, and long prior to December 15, 1897, he wholly abandoned said mining claim, and every part thereof, and left said claim with the intention of abandoning it; that by reason of said abandonment all interest in said claim inured to said William Welsh, and said Welsh remained in the exclusive possession thereof until December 15, 1897, when he conveyed said claim to W. C. Gibbs, and said Gibbs went into the actual, exclusive, open, and notorious possession of the whole of said claim, and so remained until about December 21, 1897, when he conveyed the claim to H. H. Ames and I. J. Simmons, who, from the time of said conveyance were in the open, exclusive, and notorious possession of said claim until June 14, 1899, when they conveyed the same to the Stockton Mining Claim; that said mining company and its immediate grantors expended in labor and improvements on and in developing said mine \$24,671.69. The defendant thereupon set up its cross-bill for affirmative relief, and therein alleged that since June 14, 1899, by virtue of the location alleged in the bill and mesne conveyances from said locator, the defendant has been and still is the exclusive owner as against all the world except the government of the United States, and has been and still is in the exclusive and sole possession of said mining claim; that prior to April 29, 1904, the defendant filed in the proper land office field notes and a diagram of the mineral survey of said claim, also an application for a United States patent, and caused the register of the land office to give notice of said application for patent according to law, but thereafter, and prior to 60 days from the first publication of said notice of application for patent, the complainant, the Badger Mining & Milling Company, filed in the office of said register its adverse claim and protest to said application for patent; that thereupon all proceedings upon said application were stayed to await the determination of a court of competent jurisdiction; that at all times since the location of said claim the said Welsh and the mesne grantors of the defendant and the defendant during the time that each of them have been in possession of said claim have in all respects done and performed all the acts and things required by the laws of the United States, etc., to entitle them to ownership and exclusive possession thereof. And the defendant in the cross-bill prayed that such adverse claim of the complainant be adjudicated and declared null and void, and that the title and ownership of the defendant be established and confirmed, and that all cloud thereon be forever removed. The complainant filed its replication to the bill and its answer to the cross-bill, and thereupon the testimony was taken before an examiner.

M. A. Folsom and R. A. Leiter, for plaintiff.
G. G. Ames and John M. Gearin, for defendant.

GILBERT, Circuit Judge (after stating the case as above). It is clear from the evidence that the complainant's bill must be dismissed. The bill contained the averment that the complainant was in possession of the disputed premises. This averment was denied by the answer. The proof relied upon by the complainant to sustain its allegation of possession was that it had sunk a drift on a vein apexing in an adjacent claim, had followed the same on its dip beneath the surface of the claim in controversy, and had made side drifts therefrom into the ground underneath the surface of the latter claim. It was admitted that this alleged possession was acquired without the knowledge or consent of the defendant, and at a time when the defendant was in the adverse and open possession of the surface. Such a possession is not sufficient to sustain a suit to quiet title, and this for two reasons: First. It was a possession acquired secretly by trespassing and by unfair means. Equity will not lend its aid to protect a possession thus obtained. *Comstock v. Henneberry*, 66 Ill. 212; *Gould v. Sternburg*, 105 Ill. 488; *Stetson v. Cook*, 39 Mich. 750; *Watson v. Lion Brewing Co.*, 61 Mich. 595, 28 N. W. 726; *Dyer v. Baumeister*, 87 Mo. 134. Second. It was not a possession of the whole claim. Actual possession of a portion of the property to quiet the title of which a suit is brought may be sufficient to authorize the complainant to bring the suit if it be coupled with constructive possession of the remainder (*Coleman v. S. R. R. Co.*, 49 Cal. 517, *Roberts v. N. P. R. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873), but here there was no such constructive possession, for the surface of the claim and all the workings from the surface were in the adverse possession of the defendant.

But it does not follow that the dismissal of the bill shall carry with it the dismissal of the cross-bill. Where the cross-bill alleges facts not alleged in the original bill, but which are directly connected with the subject-matter of the original suit, and prays affirmative equitable relief directly connected with and arising out of the matters of the original suit, and germane to the same, the court will order the cause to be retained for final hearing, and decree upon the cross-bill. *Chicago & A. R. R. v. Union Rolling Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081; *Heinze v. Butte & Boston Con. Gold Min. Co.*, 126 Fed. 1, 61 C. C. A. 63; *Markell v. Kasson* (C. C.) 31 Fed. 104; *Jesup v. Illinois Central R. Co.* (C. C.) 43 Fed. 495; *Lowenstein v. Glidewell*, 5 Dill. 325, Fed. Cas. No. 8,575; *Small v. Peters* (C. C.) 104 Fed. 401. Nor is it necessary that the cross-bill shall contain the jurisdictional averments as to the citizenship of the parties. The parties to the original bill, being already before the court as parties thereto, are subject to its jurisdiction. *Jesup v. Illinois Central R. Co.* (C. C.) 43 Fed. 481-496; *Schenck and Bliss v. Peay*, 1 Woolw. 175, Fed. Cas. No. 12,450.

The defendant claims to have acquired the interest formerly belonging to Moran both by virtue of Moran's abandonment thereof and by its notice and forfeiture under the provisions of section 2324 of the Revised Statutes [U. S. Comp. St. 1901, p. 1426]. While

the evidence sufficiently shows that Moran, in 1895, left the mine without the intention of returning, and gave up and abandoned his interest therein, it is not shown how such abandonment operated to transfer his interest to the other owners. By an abandonment an occupant leaves the claim free to the location of the next comer. His interest reverts to the United States, and the claim is open to relocation. His abandonment inures to the benefit of no one except a relocater, and there was no relocation in the present case. By his abandonment Moran lost all interest in the claim, and had nothing which he could convey to the complainant's grantor, so that the complainant may be said to have acquired nothing through the conveyance of Moran to Gregg. It is equally true that the defendant has acquired nothing by the abandonment, and, in order to show that it is entitled to a patent to the whole claim, it must show its title to the whole.

It is contended that the proceedings to declare a forfeiture of Moran's interest are void by reason of defects in the notice. Welsh, on December 15, 1897, quitclaimed the whole mining claim to Gibbs, and on December 21st of that year Gibbs conveyed it to Ames and Simmons. Ames and Simmons did the assessment work for the year ending December 31, 1898. On June 14, 1899, they conveyed the claim to the defendant in consideration of 999,993 shares of the 1,000,000 shares of stock of that corporation. The remaining shares were transferred to others for the purpose of organizing the company. The date of the notice was July 28, 1899. At that time Ames and Simmons still owned the shares of stock which they had received. The notice was signed by Ames and Simmons and the Stockton Gold & Copper Mining Company. It is said that the notice did not comply with the law for the reason that at the time when it was given Ames and Simmons had parted with their interest in the claim, and at the time when the assessment work was done the mining company was not an owner. Reference is made to *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed. 1189, in which the court said: "It will be observed that the right to give this notice on a claim for contribution is limited to a co-owner who has performed the labor." The facts in the case so cited were that Turner, who gave the notice, did the annual assessment work for the year 1884; but the court found that he did it at a time when he was not a co-owner, since he did not acquire his title until March 3, 1885. The court in its decision strictly construed the language of the statute, which provides that "the co-owners who have performed the labor or made the improvements may at the expiration of the year give such delinquent co-owner personal notice," etc., and held that the work was done by one who did not come within the description of those to whom the remedy was given. In the present case a different state of facts exists. Ames and Simmons were owners at the time and during all the time when the annual assessment work for the year 1898 was done. Undoubtedly they could, at the end of the year, have given the notice provided for by the statute. Has that right become entirely

lost by the fact that prior to giving the notice they transferred their interest to a corporation, taking back substantially all its stock in consideration therefor? I am unable to see upon what ground it can be so held. The right given by the statute is a substantial one. No reason is perceivable why it is not assignable. But if it was not assignable it would seem that Ames and Simmons, owning as they did the stock of the defendant corporation, still substantially retained, notwithstanding their deed, their interest as owners which they had at the time when the assessment work was done. No substantial right of the complainant or its grantors is impaired by so holding, and the terms of the statute are complied with and its purposes are met. If Ames and Simmons had parted with their interest at the time of giving the notice, it is a matter which concerned them and their grantee. It did not concern Moran. And even conceding that their right was not assignable, and that by their conveyance to the defendant they parted with all their interest in the claim, they were nevertheless the co-owners who had done the assessment work, and to whom were given the right to proceed to forfeit Moran's interest. They would be estopped from denying the title of the defendant to the interest thus acquired, both by their conveyance of the whole claim to the defendant and by their action in the present suit. In *Elder v. Horse-shoe Mining & Milling Company*, 194 U. S. 248, 24 Sup. Ct. 643, 48 L. Ed. 960, the court said of the purposes and object of section 2324, that they were "to encourage the exploration and development of the mineral lands of the United States and the sale of the same, and that, all the provisions of the law having been framed with that object in view, if the required work is not performed after the expiration of the year, and notice of contribution properly served or sufficiently published, the rights of delinquents are absolutely cut off, though the failure to do the work may have been caused by the death of the locator or locators during the year. When a notice has been rightfully published under the statute, it becomes effective in cutting off the claims of all parties, and the title is thus kept clear and free from uncertainty and doubt." Notice was given in the present case in the manner thus suggested by the Supreme Court. It is unimportant to consider to which of the parties signing the notice the forfeited interest accrued. I hold that the notice was effective to cut off the claim of Moran, and that that interest is now vested in the defendant.

It is objected that the defense of forfeiture is an affirmative one, and must be pleaded where the opportunity to do so is afforded, and authorities are cited which so hold. But in the pleadings on which this case is determined, no such opportunity was afforded. It is true that in the original bill of the complainant it was alleged that the defendant therein claimed to have acquired Moran's interest by forfeiture proceedings, and the defects were set forth which were said to render the proceedings void. But the cross-bill alleged no more than title and possession in the complainant, the nature of the cloud upon its title, and the adverse claim which it

sought to remove. The complainant answered the cross-bill by denials of the matters so alleged. The complainant having in its original bill so alluded to the forfeiture, and having offered its proofs herein under the issues which it so raised, and having made no objection to the proofs offered by the defendant, is in no position now to say that it is prejudiced by the failure of the defendant to plead in its cross-bill the forfeiture of Moran's interest.

The bill will be dismissed at complainant's cost, and a decree will be entered for the defendant as prayed for in its cross-bill, and for its costs and disbursements.

BUTTE & B. CONSOL. MIN. CO. v. MONTANA ORE PURCHASING CO. et al.

(Circuit Court, S. D. New York, May 6, 1905. On Rehearing, July 26, 1905.)

DEPOSITIONS—PROCEDURE IN TAKING—RULING ON OBJECTIONS.

On the taking of the deposition of a witness in an action at law, in another district, under Rev. St. § 863 [U. S. Comp. St. 1901, p. 661], questions asked by plaintiff were objected to as being irrelevant or immaterial, or as calling for incompetent testimony, or as inquiring touching matters about which the witness was privileged not to answer, and, the witness having refused to answer, the matter was certified to the Circuit Court of the district where the testimony was being taken. *Held* that, as the power and duty of such court to pass on the objections was unsettled, it would require the witness to answer all questions in conformity to the equity practice, to enable the question to be taken before the appellate court in contempt proceedings should the witness still refuse to answer.

Jno. A. Garver, for the motion.
Edw. M. Shepard, opposed.

LACOMBE, Circuit Judge. The action is for trespass in removing ore from a mining property of complainant, and witnesses are being examined before a commissioner under section 863, Rev. St. [U. S. Comp. St. 1901, p. 661]. Inasmuch as this is not a suit in equity, the peculiar rules governing the taking of testimony in such suits laid down in *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, and in many decisions in this circuit following that case, have no application.

What happens is this: A witness is asked a question. It is objected to as being irrelevant or immaterial, or as calling for incompetent testimony, or as inquiring touching a matter about which the witness is privileged not to answer. The commissioner makes no ruling—he has no power to make a ruling upon which an exception can be based—and the witness does not answer. When enough unanswered questions have thus been accumulated, the matter is brought before the court for a ruling, upon an application to compel the witness to answer; the commissioner certifying the record. It is right and proper that there should be a ruling by the court on each question, so that an exception may preserve all rights of the party asking the question. But what court shall pass upon the objections? Shall it be the court in which the action is pending, and

which is responsible to secure to litigants a fair trial of the issues before it? Or shall it be the court under whose process the presence of the witness, living more than a hundred miles from the trial court, is procured? Neither side discusses that question. If there were abundant time to examine the whole subject exhaustively, reviewing all the decisions, this court would willingly undertake the investigation, in the hope that the result would be a decision that it is not the duty of a court in which the issues are not triable to determine questions which often can be determined rightly only by the court to which the disposition of the whole case is consigned. But we have here only pressure for an early decision, and a great burden of causes pending here, and now on trial, which precludes any such examination of the whole subject. Undoubtedly it is frequently the practice for the court which issues the subpoena to instruct the witness to answer, or to refuse so to instruct. Generally it is only the disposition of a few questions in a long examination which is thus submitted, and it is easier, and tends to prevent the law's delays, which so often become an intolerable burden to litigants, to decide them in the court whose process brings the witness up to testify. It seems to the writer of this opinion very clear that the only logical system would be to have all objections to questions passed back to the trial court for determination, and, if they were overruled, that the court whose process produced the witness should constrain him to answer, even though it differed from the trial court as to the soundness of the objections. Otherwise it might happen that the judge in Montana, after conducting a long jury trial, with such careful attention and sound judgment that he committed no reversible error, would yet find the verdict which determined the case set aside because a judge in New York, wholly uninformed as to the involved articulations of the controversy, with nothing but the pleadings before him, had excluded evidence which, under section 863 [U. S. Comp. St. 1901, p. 661], the defeated party was entitled to take. Be that as it may, this court knows of no case, and, in a brief consultation of the digests, can find none, where, in circumstances such as are here presented, the objections have been sent back to the trial court to be passed upon; and, since a prompt decision is asked for, the usual practice will be followed. That is to say, the court here, with the whole cause before it, so far as that cause has progressed, which in this instance is limited to the filing of the pleadings, will proceed to rule on the objections. As the cause is here presented, the plaintiff is beginning to take his proofs under the issues, and this court will rule on all objections as if the trial were here begun.

Quite frequently upon a trial a question put to a witness does not seem relevant to the issues raised by the pleadings, but the propounder of the question is allowed to state to what point the question is directed, and how it is to be connected with other proofs. Often upon such a statement the court is satisfied that it is a reasonable one, since the whole case for the propounder's side cannot be put in at once, and rules accordingly. In the record before the commissioner, this statement does not appear, but, in the rulings

now about to be made, to which exceptions will undoubtedly be reserved, it should have a place. Therefore it is to be clearly understood that, in support of each and every question ruled on, the plaintiff made this statement before the ruling:

"Plaintiff offers this evidence to show that, if the ore was extracted under the nominal direction of the Johnstown Company, and reduced at the works of the Basin Reduction Company, those companies were the creations of the Montana Ore Purchasing Company and the other defendants; their officers being irresponsible clerks, and the proceeds of the ores going to the defendants named in the complaint."

The commissioner is instructed to see to it that the record which he returns to the Montana Circuit Court shows that each question objected to was coupled with this explanation, that each objection separately considered was ruled upon by this court, and that an exception to each ruling was duly reserved by the party to whom the decision was adverse.

Upon the argument a written statement was filed on behalf of one of the witnesses to the effect that some of the questions which he had declined to answer, he was now ready to answer. It is assumed that he will answer them, and therefore those questions are not here ruled on.

With apologies, therefore, to the trial judge in Montana, if the errors of this court thus reserved by exceptions may produce a mistrial, the several objections are here ruled on as if the cause were now on trial under the pleadings, and with no other evidence than that already elicited from these three witnesses, before the court.

Examination of Arthur P. Heinze.

Q. 37. Objection sustained. The opinion of the witness is immaterial.

Q. 44. Objection sustained.

Q. 51. Objection sustained.

Q. 55. Objection overruled.

Q. 67. Objection overruled.

(Here follow 50 questions, objection to which were sustained or overruled.)

On Rehearing.

Upon a similar application to compel witnesses in this cause to answer the writer expressed his opinion as to the practice, and ruled upon the materiality, relevance, and competency of the questions, instead of requiring the witnesses to answer them all. Since then he has learned that his associates are inclined to take a totally different view of the practice under the section, and to hold that it should be conformed to that prescribed by the Supreme Court for equity causes in *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521. It is thought that to adopt for actions at law the practice prevailing since *Blease v. Garlington* in equity causes would be lamentable. The taking of testimony in equity causes has become subject to such abuses as to call forth on several occasions the vigorous reprobation of the court to which such testimony was submitted, although

that court and all others were powerless to prevent the abuse of its process. Under such a practice any outsider who may wish to learn the names, addresses, and respective holdings of the stockholders of any corporation, with some view, inimical, it might be, to their interests, could, through the easy contrivance of some action against a stockholder in a distant state, compel the officers of the corporation, although not a party to the litigation, to disclose such information, and, indeed, to reveal business transactions in which the parties to the action had no real or substantial interest. Although the opinion of the writer is unchanged, it seems proper that a different decision should be here rendered from that on the first motion. From a decision adverse to the plaintiff there is no appeal, and thus, through the accident of encountering one particular judge upon the bench, the plaintiff might lose the benefit of relief which he might convince the majority of the judges he was entitled to. On the contrary, from an order requiring answers to the questions and committing the witness for refusal to answer there is full opportunity for review by writ of error. In the opinion of the writer there are very many of these questions which should be answered, but no effort is here made to discriminate. Under *Blease v. Garlington*, all should be answered.

The witness is directed to answer. Upon his further refusal an order will be made punishing him for his contempt in such terms as to insure opportunity to sue out writ of error. Arrangements may be made for suspending the infliction of the punishment until after appeal shall have been prosecuted and disposed of.

BROWN v. URQUHART, Sheriff.

(Circuit Court, W. D. Washington, W. D. August 8, 1905.)

1. FEDERAL COURTS—HABEAS CORPUS—CONCLUSIVENESS OF STATE DECISION.

The federal courts are charged with a duty in the protection of individual rights secured by the Constitution of the United States, and the decision of the Supreme Court of a state that a state prisoner is not held in violation of such rights is not conclusive upon a federal court which may, in its discretion, determine the question for itself on a writ of habeas corpus.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, §§ 43, 44.]

2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—IMPRISONMENT OF INSANE DEFENDANT AFTER ACQUITTAL.

Pierce's Wash. Code, § 2208 (2 Ballinger's Ann. Codes & St. § 6959), which provides that where a person tried for crime shall be acquitted by reason of insanity the jury in their verdict shall state that it was given for such cause, and that thereupon, if the discharge of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, is constitutional and valid when construed in harmony with the general provisions of the Criminal Code, which require a conviction in orderly proceedings, and after a fair trial, prior to the rendition of a judgment under which a person may be imprisoned, but it does not authorize the judge of a trial court to commit a defendant to jail after a verdict of acquittal on the ground of insanity without a new arraignment upon a

formal complaint and an opportunity to defend; and an imprisonment on an order so made, based entirely on the verdict of acquittal and proceedings in the criminal case, is without due process of law, and in violation of the prisoner's rights under the fourteenth amendment to the federal Constitution.

On Petition for Writ of Habeas Corpus.

Hearing pursuant to a rule upon the respondent to show cause why a writ of habeas corpus should not issue to deliver the petitioner from imprisonment alleged to be without due process of law and in violation of the fourteenth amendment to the Constitution of the United States. For cause against allowance of the writ the respondent demurred to the petition, and also filed an answer alleging that the questions involved had been adjudicated by the Supreme Court of the state of Washington in a similar proceeding instituted by the petitioner for a writ of habeas corpus; also alleging other facts to justify detention of the petitioner. Demurrer overruled, and answer held to be insufficient.

Maurice A. Langhorne, C. H. Forney, and John M. Ponder, for petitioner.

E. C. McDonald, Asst. Atty. Gen., and J. R. Buxton, Pros. Atty., for respondent.

HANFORD, District Judge. The petitioner was tried before the superior court of the state of Washington for Lewis county and a jury upon an information charging him with the crime of murder and his plea of not guilty, resulting in a verdict of acquittal on the ground of insanity, and thereafter, without any further inquiry or proceedings, the superior court rendered the following decision and judgment:

"The said superior court, by reason of said verdict and all the evidence and proceedings in the trial and demeanor of defendant, finds that the discharge or going at large of Thomas Brown would be and is considered by the court as manifestly dangerous to the peace and safety of the community. The court therefore orders that said Thomas Brown be, and he is hereby, committed to the county jail of said Lewis county at Chehalis, Washington, until the further order of this court."

The petitioner, having been incarcerated in the jail of Lewis county pursuant to said judgment, applied to the Supreme Court of the state for discharge from imprisonment by a writ of habeas corpus, and relief was refused, not on the ground of any informality in the application, but for the reason that in the judgment of the court he was lawfully committed and held, and his continued imprisonment was not a deprivation of liberty without due process of law or of any right guaranteed by the Constitution of the United States, the Constitution of the state of Washington, or the law of the land.

The verdict is a conclusive determination of the only question submitted to the jury, viz., whether the defendant is guilty or not guilty of the crime charged in the information against him; and, being purged of criminality, the power of the court in which he was tried to imprison him depended entirely upon facts and conditions existing subsequent to the acquittal, which necessarily could not have been comprehended in the verdict. Applications to the federal courts by convicts for writs of habeas corpus which are ob-

structive of judicial proceedings under state laws are generally viewed with disfavor, and denied, even when supported by averments of deprivation of rights guarantied by the national Constitution or laws, if there is a way open for the correction of errors to their prejudice by a review of the proceedings in any court having appellate jurisdiction. It is now settled that in such cases the federal courts are required to exercise discretion, and may with propriety leave an applicant who has been convicted of a heinous crime to pursue his remedy by a writ of error or appeal. *In re Friedrich* (C. C.) 51 Fed. 747; *In re Frederich*, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653. The federal courts, however, are charged with responsibility in the protection of individual rights according to the principles of Magna Charta, which have been adopted as fundamental in our government, and incorporated into the national Constitution, and it is part of the business of the federal courts to see that no one can be criminally punished in this country except according to a valid law prescribed by the sovereign authority. Rev. St. U. S. §§ 751-753 [U. S. Comp. St. 1901, p. 592]; *Medley's Case*, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; 15 Am. & Eng. Encyc. of Law (2d Ed.) 138, 139; *In re Davenport* (C. C.) 102 Fed. 540.

If the imprisonment of the petitioner is in fact a deprivation of his liberty without due process of law, in violation of the national Constitution, an adjudication adverse to his contention by the Supreme Court of the state is not conclusive upon the federal courts, for the constitutional prohibition of the use of despotic power to deprive any person of liberty without due process of law applies to the state, and restrains all departments of the state government, including the judiciary, and forbids compliance with judicial process issued in disregard of the essential requirements of the orderly procedure recognized in this country as constituting due process of law. Therefore I hold that this court has jurisdiction to entertain the petition, and that the previous decision of the questions presented here by the Supreme Court of the state is not *res adjudicata*. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. I hold also that, as the petitioner has been acquitted of the only criminal charge preferred against him, and to which he has been accorded an opportunity to plead, this court, in the exercise of discretion, should grant his application for a writ of habeas corpus, rather than leave him in confinement while seeking relief by the more difficult method of an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the state, which denied the rights which he claimed under the Constitution of the United States.

It is conceded that the only color of authority for the order of the superior court for the imprisonment of the petitioner in the jail of Lewis county is a section of the Code of this state, which reads as follows:

"When any person indicted or informed against for an offence shall, on trial, be acquitted by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, or may give him into the care of his friends if they shall give bonds, with surety to the satisfaction of the court, conditioned that he shall be well and securely kept, otherwise he shall be discharged." 2 Ballinger's Ann. Codes & St. § 6959, Pierce's Wash. Code, § 2208.

The petition assails this law as being unconstitutional and void, and therefore not valid authority for the determination of the superior court pursuant to which the petitioner is imprisoned. I disapprove of that part of the argument made before this court in support of the petition which denounced this law. On the contrary, I regard it as legitimate and wise. It would certainly be unwise to discharge from legal restraint a person acquitted of a criminal charge by reason of insanity, if, in the opinion of the court in which the case was tried, the defendant, by reason of insanity, will probably be a menace to the peace and safety of the community. The court in which such a trial has been concluded is the appropriate tribunal to assume the responsibility of dealing with the defendant in a manner to protect the community from such mischievous conduct as may be expected to follow his release from restraint. The court, however, in the exercise of the power and discretion conferred by this statute, must dispose of the defendant upon due consideration of the facts and conditions existing subsequent to the time of acquittal, and, instead of punishing him by imprisonment for the injurious act constituting the basis of the criminal charge of which he has been acquitted, must find sufficient ground for committing him to prison in a then manifest necessity to restrain him in order to protect the community; and the conclusion of the court should be arrived at by means of orderly proceedings, and as a result of a judicial hearing, in which the defendant shall have a full opportunity to submit a legal defense if he has one. It is my opinion that the constitutionality of this law depends upon the true interpretation of its provisions. If this statute must be construed, as it seems to have been by the Supreme Court of this state, as a law authorizing the judge of the trial court to commit a defendant to jail after a verdict of acquittal on the ground of insanity, without a new arraignment upon a formal complaint or information setting forth the specific facts constituting cause for committing him to jail, and an opportunity given to controvert the averments of such complaint or information, or interpose a lawful defense, it is, in my opinion, unconstitutional and void. But I deem such an interpretation of the law to be unwarranted. The authority to commit to prison conferred upon the court by this statute is predicated upon the rendition of a verdict of acquittal on the ground of insanity, and other facts, viz., the actual insanity of the defendant, and probability that the peace of the community will be endangered by permitting him to go at large. This point may be more concisely stated thus: The law does not authorize a judgment adverse to the defendant upon the ver-

dict alone. This law is one section of the Criminal Code of this state, originally enacted by the Legislature of Washington Territory at its first session. See Laws of Washington Territory, 1854, p. 121, § 126. It does not in terms except cases which may be prosecuted under it from the general provisions of the same statute, intended to ensure orderly proceedings and a fair trial, and conviction preliminary to the rendition of any judgment of the court under which an offender may be imprisoned. To assume that this section confers extraordinary power upon the courts to condemn a man, after he has been acquitted of crime, without an accusation, and without a fair trial, requires reconstruction, so that there shall be read into it words conferring that power, or excepting cases arising under it from the provisions of the same statute prescribing the procedure to be observed in dealing with offenders. That, however, would be construction of the law, in the sense of building or creating law by the addition of matter not conceived by the Legislature, instead of construing the law in a way to effect the object intended, and the product would be a strange and noxious excrescence upon the jurisprudence of the country. Neither administrative officers nor the courts have any authority to construct laws by adding to the statutes, or reading into their provisions new or original ideas. The interpretation of all statutes should be harmonious with the general plan of our government and the explicit requirements of the Constitution, unless the words of the statute plainly express a contrary intention of the Legislature. To make my meaning plain, I will, for an illustration, refer to section 1856 of Pierce's Code, which is the law defining criminal libel and prescribing the punishment therefor. Without any suggestion of judicial proceedings, this section declares that every person who composes, dictates, publishes, or willfully circulates a libel, or in any way knowingly and willfully aids or assists in doing so, shall be imprisoned in a county jail. If, by virtue of this particular section of the Criminal Code of this state, sheriffs were authorized to seize violators and imprison them without indictment, arraignment, plea, or trial and conviction and sentence duly pronounced by a court of competent jurisdiction, all newspaper men in this state would spend most of their time in jail, and the liberty of the press would soon become a mere phantasm; and to enforce the libel law in such an unheard-of manner would not be more despotic and subversive of constitutional rights than would be the substitution of a judge's fiat condemning an untried victim as a maniac in place of a judgment rendered pursuant to customary and lawful proceedings.

I consider that this law can be administered and full effect given to its provisions according to the intention of the Legislature in its enactment without overstepping the limitations of power ordained by the Constitution. Therefore the court is not required nor authorized to pronounce it unconstitutional. I also consider that the law was not so administered by the superior court in rendering its judgment, and that the imprisonment of the petitioner with sanc-

tion of the judiciary of the state, without arraignment and a fair opportunity to defend himself against charges lawfully preferred, and to produce evidence in his defense, is deprivation of liberty by the state, without due process of law, and violates the national Constitution, and for that reason his application for a writ of habeas corpus will be granted.

CROWLEY v. SOUTHERN RY. CO. et al.

(Circuit Court, N. D. Alabama, S. D. August 11, 1905.)

1. REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURT.

A federal court cannot acquire jurisdiction by removal of proceedings instituted in what was supposed to be a state court, but which was subsequently determined by the Supreme Court of the state to have no legal existence.

2. SAME—SUIT PENDING—INVALIDITY OF ACT CREATING STATE COURT.

The Legislature of Alabama passed an act to create the Southern judicial division of St. Clair county, to require a circuit court to be held at Pell City in said division, and authorizing the clerk of the circuit court for said county to appoint a deputy and to maintain an office at Pell City. He established such office and appointed a deputy, who was placed in charge; the clerk himself remaining at his office in Ashville, the county seat. Plaintiff filed a complaint with the deputy at Pell City, who issued a summons thereon, which was served on defendants. They appeared, and filed a petition for a removal, which was ordered by the circuit judge. None of such papers were filed in the office of the clerk at Ashville. Subsequently, after the parties had appeared in the federal court, the Supreme Court of the state decided that the act purporting to create such court was unconstitutional and void. The laws of the state provide that, to institute a suit in any court of the state, summons and complaint must be filed in the office of the clerk at the place where the law requires him to keep his office. *Held*, that there was no "suit" pending in a state court which could be removed under the federal statute, nor could the federal court acquire jurisdiction by reason of any waiver or delay on the part of defendants in making objection on that ground, and that the proceeding must be dismissed.

On Motion to Dismiss.

Motion is made to dismiss the suit upon the following state of facts: On the 17th day of February, 1903, an act of the Legislature of Alabama was approved, "to carry into effect the provisions of ordinance No. 390 of the constitutional convention of 1901, to establish a courthouse and jail at some point to be designated at an election by the people of St. Clair county," etc. Laws 1903, p. 28. This act provided that certain parts of St. Clair county should constitute the Southern judicial division of St. Clair county, and required that a circuit court for said judicial division of the circuit court should be held at Pell City, Ala., twice in each year. Other parts of the county constituted the Northern division, and the act required courts for it to be held at Ashville. Prior laws provided for the holding of the circuit court of St. Clair county at one place only, which was Ashville, the county seat. After making provision for drawing and summoning juries therein, and other matters, the act contains the following provisions as to the duties of the clerk of the circuit court, and the deputy he is authorized to appoint:

"Sec. 8. That it shall be the duty of the clerk of the circuit court in the issue of all process for the Southern judicial division of the county, to make the same returnable at his office at the courthouse in Pell City, in said county of St. Clair, and as provided by law in cases of the return of process in the circuit courts of this state."

"Sec. 9. That it shall be the duty of the clerk of the circuit court of St. Clair county to make out and keep after the passage of this act, in his office at the courthouse in Pell City, all proper and necessary dockets, minutes, or court proceedings and all other books, papers, and records now required by law to be kept in the office of the circuit court, for the Southern judicial division of St. Clair county for use therein."

"Sec. 10. That it shall be the duty of the clerk of the circuit court of St. Clair county to keep an office in the courthouse at Ashville and Pell City, and to keep a deputy clerk at one of the offices, and it shall be optional with the clerk as to which of the offices he places the deputy, for the transaction of all business that may come before such clerk in said Southern or Northern judicial division of the county of St. Clair. The said deputy clerk shall have authority to issue all process returnable to the circuit court of said county, and to do and perform all acts in regard to the business of the division in which he is placed, in the name of the clerk, and in the same manner, and to the same extent, the circuit clerk could do if personally present, and for all official acts of such deputy circuit clerk the circuit clerk shall be liable on his official bond."

Under authority of this act, Hood, the circuit clerk, appointed Victor H. Smith deputy clerk at Pell City. On June 12, 1903, W. A. Crowley brought suit against the Seaboard Air Line Railway Company, the Southern Railway Company, and the Northern Alabama Coal, Iron & Railway Company, claiming \$10,000 damages for personal injuries received in an explosion of dynamite and powder, which defendants negligently stored and kept in their warehouse at Pell City. The summons and complaint were delivered by the plaintiff's attorney to Smith at Pell City. He signed the circuit clerk's name to the summons, which required the defendants "to appear at the next term of the circuit court to be held for the Southern division of St. Clair county, at Pell City, the place of holding the same, then and there to answer the complaint of W. A. Crowley." The summons and a copy of the complaint were delivered to the sheriff, who served them upon the defendants on June 18, 1903. On the 7th of July, 1903, the defendants filed their petition, with bond, for the removal of the cause to this court on the ground of diverse citizenship. The circuit court sitting at Pell City, on the 9th of July, 1903, approved the bond and made the order of removal. The record was filed in this court on the 7th of October, 1903. By an amendment to the complaint, filed in this court February 18, 1905, the Northern Alabama Coal, Iron & Railway Company was dismissed from the suit. The Seaboard Air Line Railway Company filed its plea of not guilty to the original complaint November 2, 1903. No plea was filed by the Southern Railway Company. The case, owing to the crowded condition of the common-law docket, was not reached for trial until the spring term, 1905, having been continued generally at prior terms. On the 17th of May, 1905, the Southern Railway Company, "appearing specially for the purpose," filed a written motion that the court dismiss the suit out of this court, on the ground that the Supreme Court of Alabama, by a judgment rendered February 16, 1905, had decided that the ordinance of the constitutional convention and the act to carry it into effect were null and void, and that therefore this court has no jurisdiction to hear and determine the suit. It was shown that the papers in the case had never been filed in the clerk's office at Ashville, and that they remained all the while at the clerk's office at Pell City, Ala. The Seaboard Air Line Railway Company made a like motion orally.

F. L. Blackmon and John P. Tillman, for the motion.
A. A. Evans, opposed.

JONES, District Judge (after stating the facts). The decision of the Supreme Court of Alabama, in *Ex parte Birmingham & Atlantic Railway Company*, 42 South. 118, declaring the act unconstitutional which sought to establish the Southern judicial division of the circuit court of St. Clair county at Pell City, is conclusive,

in this court, that no circuit court of St. Clair county was ever authorized to be held at Pell City. Everything attempted to be done under that act at Pell City is a mere nullity. That decision also establishes that there was no such office as that of deputy clerk of the circuit court of St. Clair county at Pell City. What Smith did under that act cannot be upheld as the acts of a de facto officer, because there never was any de jure office of deputy clerk of the circuit court of St. Clair county at Pell City. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178. Besides, if it could be admitted that Smith was deputy clerk of the legal court of St. Clair county, his acts in the premises at Pell City would be entirely ineffective to institute a suit in the circuit court of St. Clair, since the summons and complaint have never been in the clerk's office of that court, or in any wise brought to its attention or acted on by it. Under the laws of Alabama, no suit at law is instituted or commenced in any court of the state unless the summons and complaint are filed in the office of the clerk of the court in which the suit is sought to be instituted, at the place where the law requires the clerk to keep his office.

The act constituting the Southern division of the circuit court of St. Clair county at Pell City being unconstitutional, there was no authority for filing the summons and complaint with Smith or anybody else at Pell City. The issue of the summons to appear before a court or at a time not authorized by law was a nullity, and so was the service of the summons. What was done in this matter at Pell City was as ineffectual to institute a suit in the real circuit court of St. Clair county as if the plaintiff had filed the summons and complaint with some merchant at Pell City and procured him to hand them to the defendants. *Schulte v. First National Bank (Minn.)* 24 N. W. 320; *Cohen v. Figgins*, 1 Ill. 19; *State ex rel. Henderson v. Boone County*, 50 Mo. 317, 11 Am. Rep. 415; *Beene's Adm'r v. Phillips*, 37 Ala. 312; *Garlick v. Sangster*, 9 Bingham, 40.

It is insisted that this suit could have been brought originally in this court, and therefore the parties could waive the manner of its getting here; that the parties, by appearing at Pell City, obtaining the order of the tribunal there for removal, and afterwards appearing here and treating the case as properly removed and pending in this court for several terms, without objection of any kind, are not now in position to question the jurisdiction of this court; and that they have waived the manner in which the case has gotten here, which, it is urged, is the only ground upon which objection to the jurisdiction of this court, can now be rested. This argument overlooks the fact that the objection here goes to the jurisdiction of this court over the subject-matter, which waiver or consent of the parties cannot confer, when the law has not given it. The jurisdiction to remove a case from a state court to this court, and of this court to try it after it is removed, depends upon the statutes of the United States. They give the court jurisdiction only of "suits" pending in a state court. The existence of a "suit" in a

state court is an indispensable element of the jurisdiction, and when that is wanting there is no jurisdiction in the federal court over any proceeding removed from a tribunal which is not a court. *Upshur v. Rich*, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196. The defendants, by appearing at Pell City and obtaining an order of removal by that tribunal, could not create a court, or make a suit of that which was not a suit, since it was not pending in a court; neither did they waive any right to object to its jurisdiction when the proceedings were removed here. That result would not have been worked by their appearance there, if the Pell City tribunal had been a lawful court of the state, instead of a mere illegal assemblage of court officers, without any authority of law. *Wabash Western Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. This court has no jurisdiction of these removed proceedings, because the body whose proceedings were removed here could never acquire jurisdiction in any event whatever. That body having no jurisdiction in the beginning, and being powerless ever to obtain any, this court could not get jurisdiction of a "suit" by removing its proceedings here. *Fidelity Trust Co. v. Gill Car Co.* (C. C.) 25 Fed. 737; *Elliott v. Shuler* (C. C.) 50 Fed. 454; *Swift v. Railroad Co.* (C. C.) 58 Fed. 858. The objection raised by defendants goes to the jurisdiction of the subject-matter, and waiver or consent of parties cannot give that. Besides, the failure of defendants to earlier bring forward their objection, if that could work a waiver of the trouble here, can hardly be deemed a waiver, when objection was made at the earliest opportunity, after the decision of the Supreme Court of Alabama that the Pell City tribunal was never a court of the state. *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. Ed. 249. Moreover, it is the duty of the court, when its lack of jurisdiction of the subject-matter is made known, howsoever that information comes to it, to decline to further entertain the case.

This is a hard case upon the plaintiff. His right of action is now barred by the statute of limitations, without any fault upon his part, in consequence of his suing in a tribunal which a decision of the Supreme Court of the state, made after the proceedings were removed here, has declared never to have been a court. This court has struggled to find some way, consistent with legal principles, to relieve the plaintiff, but can find none. The proceedings cannot be remanded to the circuit court at Pell City, because there is not and never has been any such court. They cannot be remanded to the circuit court of St. Clair county, because the suit has never been instituted or pending in that court. The case must, therefore, be stricken from the docket.

PHILADELPHIA & R. RY. CO. v. WALKER.

(District Court, D. New Hampshire. July 15, 1905.)

No. 368.

WHARVES—LIABILITY OF OWNER—INJURY TO VESSEL FROM INSUFFICIENT DEPTH OF WATER.

Libellant's barge, laden with coal, consigned to respondent, was delivered at the dock owned by respondent, to be there discharged by him in accordance with the bill of lading. She was placed in position for discharging by the master, who had never before been at the dock, on the assurance of respondent that there was sufficient depth of water, but grounded, and was injured owing to inequalities in the bottom over which there was insufficient water. *Held*, that respondent was liable for the injury in failing to exercise the care and diligence imposed on him by law as dock owner, and that the master had the right to rely on respondent's statements, and was not in fault in failing to take soundings himself.

In Admiralty.

W. H. Richardson and J. W. Kelley, for libellant.

Carver & Blodgett and Page & Bartlett, for respondent.

HALE, District Judge. This is a libel in personam by the owner of the barge Elmwood for injuries sustained by the barge in lying at the dock of the respondent. The libel alleges, and the answer admits, that a certain cargo of 1,248 tons of coal was shipped to the respondent upon the said barge, and, by the terms of the bill of lading, was to be delivered to him at his wharf, known as "Walker's Wharf," at Portsmouth, to be there discharged by him. The libel alleges that the barge grounded in the dock by reason of its uneven bottom, and particularly because of the existence of a ridge or bar running across it; the existence of both the uneven bottom and of the ridge being unknown to her master. The Elmwood was a wooden barge, 186 feet long, 35 feet beam, drawing $14\frac{1}{2}$ feet forward and $15\frac{1}{2}$ feet aft. On February 1, 1899, she left Philadelphia with her cargo in tow of the tug Argus. On February 10th she arrived at the wharf of the respondent at Portsmouth. The next morning she was taken in tow by a river tug, and brought up to the dock of the respondent, where she proceeded to discharge from her forward hatch. After the discharge of the forward hatch, it was determined to move the barge forward in the dock so as to locate the fourth hatch under the coal hoist, but whether this was at the instance of the respondent or of the captain of the barge is in dispute. The respondent, however, admits that he said to the captain that the berth was clear; that the captain said that he "thought the proper thing to do would be to take the stern hatch, the after hatch." The respondent testifies: "I told him it was all right; there was plenty of water. * * * He says, 'I will move her ahead, and take the stern hatch out, the fourth hatch next.' * * * I didn't say anything to him any more after that. * * * He never asked me for a guaranty until he was fastening, and then he says, 'It is all right?' and I says to

him, 'Yes, it is all right.'" After being moved forward, the barge grounded, and was injured. The testimony shows that the captain had never been in the dock before, but that the respondent had owned the dock 37 years, during which time it had been used for the discharge of vessels laden with coal. The respondent testified that he had never made any examination to ascertain the depth of the water in the dock, and that he had no knowledge, at the time the Elmwood grounded, of the existence of any ridge. After grounding, upon examination by divers, it was found that the barge was resting on the bottom under the fourth hatch for a distance of several feet, and that her stern was clear of the bottom; that forward of that point the barge was not resting on the bottom for a distance of 70 or 80 feet; that her bow was resting in the mud; that there was a bar under the fourth hatch, which run across the dock. It appears that this bar was about 13 feet under water at low water; that the barge was drawing about $14\frac{1}{2}$ or 15 feet forward and $15\frac{1}{2}$ feet aft, and that before she was docked her draught was made known to the respondent. The captain of the barge testifies that the safety of the barge was guaranteed by the respondent. This the respondent denies. It is not important whether it was guaranteed or not. The respondent admits that he told the captain that there was plenty of water at the point where he desired to place his barge in order to enable him to unload from the fourth hatch. He was bound to know the condition of his dock, and neither directly nor indirectly to invite a vessel to enter there unless the dock was reasonably safe. The barge came to her berth under such invitation, both express and implied, as imposed on the owner of the dock the duty to use reasonable diligence to have the place safe and proper for a vessel to lie. From the testimony I find that he did not use such diligence, and that the dock was not reasonably safe. In the *Annie R. Lewis* (D. C.) 50 Fed. 556, Judge Nelson says:

"The master, being ignorant of the channel, had the right to rely on the judgment of the respondent, who was present, and, receiving no warning of the danger from him, to assume that the water was sufficient for his vessel. The silence of the respondent under the circumstances was equivalent to an assurance that the depth of the water was sufficient, and amounted to an express invitation to enter."

See, also, opinion of Judge Webb in *Stevens v. Donnell*, unfiled memorandum decision.

In the case at bar the dock owner, not merely by his silence, but by express language, assured the captain of the barge that there was plenty of water. In addition to the representation which the law implies from the owner of the dock inviting vessels to enter, there was therefore in this case an express representation of safety. Although a dock owner does not guaranty the safety of vessels coming to his wharf, he is under the duty of exercising reasonable diligence in ascertaining the condition of the berths, and, if there is any dangerous obstruction, to remove it, or give due notice of

its existence to vessels about to use the dock. The court must come to the conclusion that the respondent was in fault.

It now becomes necessary to inquire whether or not the libelant was in fault. The captain of the barge relied upon the assurance of the respondent as to the condition of the dock. He took no soundings. He was prevented from taking such soundings for at least a part of the time by the ice in the dock; and he relied upon the assurance of the respondent as to the amount of water and the condition of the bottom. Under the circumstances of this case the testimony forces me to the conclusion that the master was justified in relying upon the statement of the respondent, and was under no duty to take soundings. The case presents a different state of facts from those in the *Union Ice Co. v. Crowell*, 55 Fed. 87, 5 C. C. A. 49. In that case Judge Webb held that the circumstances placed upon the captain the duty of making personal inspection, the master of the *Weybosset* having been told that his vessel was larger than others that had loaded there, and he having full opportunity to make personal investigation. *Smith v. Burnett*, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756; *Garfield, etc., Co. v. Rockland-Rockport, etc., Co.*, 184 Mass. 60, 67 N. E. 863, 61 L. R. A. 946, 100 Am. St. Rep. 543; *The Calvin P. Harris* (D. C.) 33 Fed. 295; *The John A. Berkman* (D. C.) 6 Fed. 535.

It is insisted also by the respondent that the barge was unseaworthy and improperly manned and equipped at the time of the injury. Without discussing the testimony bearing upon these issues of fact, the court is of the opinion that the barge appears by the evidence to have been in a reasonable condition of seaworthiness, and to have been properly manned and equipped at the time of the injury. I am therefore of the opinion that the libelant was not in fault.

The libelant is therefore entitled to a decree in its favor. Reference may be had to a master for an assessment of damages.

THE ELECTRA.

(District Court, S. D. New York. August 7, 1905.)

COLLISION—STEAM VESSELS MEETING—FAILURE TO CARRY OUT PASSING AGREEMENT.

A steam yacht and steam lighter which came into collision near the Brooklyn shore after exchanging signals to pass to the right each *held* in fault for taking no measures to carry out the passing agreement until too late. The lighter was at the time turning, and continued her swing, which brought her across the yacht's course, while the latter did not stop or change her course until immediately before the collision.

In Admiralty. Suit for collision.

James J. Macklin, for libellant.

Harris & Towne and Lawrence Kneeland, for claimant.

ADAMS, District Judge. This action was brought to recover the damages suffered by the libellant through a collision between his steam lighter Dana and the steam yacht Electra, which occurred in the Red Hook Channel to the westward of the Erie Basin on the 22nd day of September, 1904, about 4:30 o'clock p. m. The stem of the yacht struck the port side of the lighter, doing considerable damage. The lighter was bound from pier 26 East River to the pier at the foot of 43rd Street, South Brooklyn, and the yacht was bound from the North River to the foot of Court Street, South Brooklyn. The tide was about half flood.

The Dana was a twin screw lighter 95 feet long with double engines. Her pilot house and engines were well aft. She was light, drawing $1\frac{1}{2}$ to 2 feet forward and 6 feet aft. The Electra was a single left hand screw steamer, about 175 feet long.

When the lighter was proceeding to her destination, and was about 300 feet from the shore, her attention was called by a danger whistle, to a sister boat, the Valiant, which was in trouble with a mud digger anchored in the channel about 600 feet out from the Erie Gap. This digger had two cables, each about 1000 feet long, stretching out from her corners and extending to the southward and westward in the channel. The Valiant, with a car float in tow alongside, had become fast on one of the cables, and the Dana, rounded to to go to her assistance. She backed her starboard engine and worked the other ahead. This operation enabled her to make a quick turn. When she was about half way round, she noticed the yacht, on her own starboard side, 800 or 900 feet away, proceeding down the westward part of the channel, showing her port side. The yacht also saw the lighter and blew her a signal of one whistle, to which the lighter answered with one and continued her swing. At this point there is a discrepancy between the vessels, the lighter contending that she was then far enough around to show her port side to the yacht. The latter's witnesses say that the lighter then showed her starboard side to the yacht. I think the yacht is right in this contention.

The decision turns upon the question, which of the vessels failed in her duty under the agreed course, or whether both did so. At the close of the trial I said:

“* * * It seems to me that this boat, the Dana, could not have made any such turn as is claimed. I think she must have gone further to the westward. She could not turn right around on a pivot. And the testimony on the other side is all against it.

I am rather inclined to believe that she was crossing the course of the yacht; that she was not going in that direction but that she did actually get so that she was across the stem and was all of the time swinging.

But of course the parties had agreed on a one whistle course, which was initiated by the Electra, and the Electra did not do anything to carry out the manœuvre. She perhaps expected the other vessel to do everything that was required to be done. Whether she was justified in expecting the other vessel to turn quickly enough to render cooperation on her own part unnecessary is something I will have to consider.”

I have since examined the testimony and it now seems to me that the courses having been arranged, it was the duty of each vessel to do what was necessary to carry out the agreement. The Electra did nothing efficient until the collision became imminent when she reversed her engine, the effect of which was to turn her bow to port, toward the Dana. Before the vessels came together, the latter had completed her turn, so that she was showing her port side to the yacht, and the collision happened on that side. The Electra claims that there was not enough water in the channel to permit her to go further to the starboard; that she was going very slowly and reversed in time to overcome her motion before the collision. I think it is true, excepting the latter. She was probably still going ahead a little when the vessels came together. The lighter was undoubtedly under motion at that time. The agreement required the Electra to so manœuvre as to keep to the right. The only way she could do so was to stop and back sooner than she did. In failing in such respect, she was primarily in fault for the collision.

It seems to me that the lighter was also in fault because she kept moving ahead, and to the starboard, into the collision, notwithstanding it was obvious that the yacht was not going to keep out of the way. The Dana's mistake was that her navigator thought she could turn sooner than apparently was possible. She failed to properly calculate the distance and took the chance of clearing the yacht.

Decree for the libellant for half damages, with an order of reference.

MINNEAPOLIS THRESHING MACH. CO. v. EVANS.

(Circuit Court, D. South Dakota. July 8, 1905.)

SALE—CONTRACT—ACCEPTANCE OF PROPOSAL AFTER NOTICE OF REVOCATION.

A written proposal by defendant to purchase certain machinery from complainant company was required by its terms to be submitted to complainant at its place of business and accepted before becoming a contract. A formal acceptance was mailed to defendant by the complainant, but after it had received notice from him of a revocation of the order. An officer of complainant, having authority to do so, had previously verbally accepted the order, but he also had been notified by defendant of its revocation. *Held*, that neither acceptance was operative to create a contract binding on defendant.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 45.]

In Equity.

Joseph Kirby and Samuel H. Wright, for complainant.
Abner E. Hitchcock, for defendant.

CARLAND, District Judge. The instrument sued on in this case was a proposal made by defendant to plaintiff on the 26th day of June, 1903, to purchase certain machinery. According to its terms, it had no force as a contract between the parties until it was submitted to and accepted by the plaintiff at West Minneapolis, Hopkins Post Office, Minn. On June 27, 1903, the defendant mailed by registered letter at the post office in Parkston, S. D., a revocation of said proposal to the plaintiff at Minneapolis, Minn. The plaintiff received this revocation at West Minneapolis, Hopkins Post Office, Minn., prior to the attempt of the plaintiff to communicate its acceptance of said proposal to the defendant, unless the facts hereinafter stated change the relations of the parties. On June 29th, at Sioux Falls, S. D., an officer of the plaintiff (N. A. Wiff), who had authority to accept the proposal of defendant, saw the proposal in the hands of one of the agents of the plaintiff, and Wiff testifies that he accepted said proposal then and there. The undisputed evidence shows, however, that the proposal was accepted by the company either by a letter dated July 3, 1903, at West Minneapolis, Minn., Hopkins Post Office, and signed, "The Minneapolis Threshing Machine Company, By N. A. Wiff, Superintendent of Agencies," or by said N. A. Wiff at the farm of the defendant, in South Dakota, on the morning of June 30, 1903. If the proposal could not be accepted at any other place than at West Minneapolis, Minn., then the revocation mailed by the defendant was received by the company before any attempt was made to communicate an acceptance by the company of the proposal to the defendant, and the proposal was thereby revoked, and no recovery can be had in this action. If the proposal could be accepted at any place by the proper officer of the plaintiff (and in this case it appears that N. A. Wiff was such officer), then it becomes necessary to inquire whether any revocation of the proposal was communicated to and received by him prior to the time that he told the defendant at his farm, near Parkston, S. D., on the morning of July 30, 1903, that the company would

ship the machinery, and hold the defendant liable. The evidence as to the acceptance of the proposal by Wiff at Sioux Falls amounts to nothing as an acceptance, for the reason that nothing whatever was done on that day towards communicating said acceptance to the defendant. It is true that Wiff testifies, and it is undisputed, that on the 29th day of June, 1903, he took the train and went to Scotland, and subsequently, either that day or the next morning, to Parkston; but it cannot be claimed, nor is it claimed, that the trip of Wiff from Sioux Falls to Parkston, and from thence out to the farm of defendant, was for the purpose of simply notifying defendant that the company accepted his proposal of June 26th. It would be idle to make such a claim in face of the fact that a simple telegram or letter written at Sioux Falls, or any other place, and deposited in the post office, would have been a complete acceptance of the proposal.

Again, Wiff is asked on cross-examination, when he was testifying as a witness in this case:

"Q. What caused you to go out to see Mr. Evans on his farm on June 30th?

A. On our arrival at Parkston, S. D., our dealers there, Lobe & Leichsner, informed us that Thomas Evans was trying to countermand his order."

It thus appears that the officer of the company who had power to accept the proposal learned from the agents of the company that the defendant was trying to countermand his order or proposal. There had been no acceptance on the part of the company, as yet, of said proposal. On learning this, Wiff goes to the farm of defendant; and, as to what was said at the farm, Wiff testifies as follows: After testifying that he arrived at Scotland, S. D., in the evening of June 29th, he was asked the question:

"Did you subsequently see the defendant, and, if so, when and where? A. I saw him at his farm on the morning of the 30th of June, 1903. Q. State whether or not you had any conversation with the defendant on that occasion, and, if so, state the same in full? A. I asked him why he tried to countermand his order for the threshing outfit, and he told me that the reason of his trying to countermand the order was that our traveler, E. A. Borneman, was trying to get more money out of him for an outfit than for one he had sold to a neighbor."

The witness then being interrogated was asked:

"Q. Was that all? Go on and state fully. A. I tried to reason with him, and told him the difference in the price in the blower as ordered by him, and the swinging stacker ordered by his neighbor, and also the fact that we were getting a horse power in trade from his neighbor, while his was a straight sale, and no trade. He further stated that he did not want the machine, and I stated to him that we would make shipment of the outfit according to order, and would expect him to settle for it on its arrival at Parkston, S. D."

The letter written by Wiff, as an officer of the company, at West Minneapolis, on July 3, 1903, and mailed July 4th of the same year, was an acceptance of the proposal, and the statement made by Wiff to the defendant on his farm, June 30, 1903, that the machinery would be shipped, was an acceptance; but both of these acceptances were subsequent to the receipt by the company of notice on the part of Evans that he revoked his proposal. This being the case, it necessarily results that there can be no recovery in this action, and it is so ordered.

In re POORE.

(District Court, M. D. Pennsylvania. August 4, 1905.)

No. 667.

**BANKRUPTCY—VENDOR AND PURCHASER—CONDITIONAL SALE OR BAILMENT—
RIGHT TO RECLAIM PROPERTY FROM TRUSTEE.**

The delivery of a safe to a bankrupt, under a written contract by which he agreed to turn over an old safe, make a cash payment, and execute notes at 3, 6, 9, and 12 months for the balance of the price, it being further agreed that upon payment of the same the safe was to be his, under the law of Pennsylvania constituted a conditional sale, and not a bailment, notwithstanding it was further provided that the payments were to be considered rent, and that title should not pass until the full amount stipulated for had been paid; no term being fixed during which the property was let or hired, nor any provision made for its return at the end of that time, nor any rate per week, month, or otherwise agreed upon, at which it was to remain. In such case the reservation of title was void as against creditors, and gave the seller no right to reclaim the property from the trustee in bankruptcy, into whose hands it had passed from the bankrupt.

In Bankruptcy. Sur petition of the Cary Safe Company to reclaim certain property.

W. W. Baylor, for petitioner.

F. K. Tracy, for trustee.

ARCHBALD, District Judge. The petitioners ask for an order on the trustee to turn over a safe delivered by them to the bankrupt upon the following writing:

"Scranton, 7/21 1904.

"Cary Safe Co.

"Buffalo, N. Y.

"Please send as soon as convenient, one No. 26 Fire Proof Safe, approximate size inside, 40 inches high, 32 inches wide, 15 inches deep, as per illustrated catalogue, or plan on back hereof, if any, necessary alterations allowed. Ship via — from Buffalo N. Y., and rent same to undersigned on following terms, F. O. B. my office, notes \$125 and my O[ld] S[afe] as follows: \$25 and my O. S. on arrival of safe, balance in 3, 6, 9, and 12 months. Subject to approval [of] Cary Safe Co. The above mentioned safe is now at St. Mary's, Pa., and was formally [formerly] sold to Parsons & Son.

"It is agreed [that the] above sums are to be paid as rent for said safe. When the full amount of \$25 and O. S. is paid, you are to give me a bill of sale of safe. If note is not forwarded to you at the expiration of twenty-five days from date of invoice all rent shall become due at the expiration of thirty days from date of bill, and [I] agree to accept and pay draft of amount mentioned below, and am not to countermand or attempt to annul this contract. It is agreed that the title of said safe shall not pass until notes are paid, or safe paid for in cash, but shall remain your property until that time. In default of payment of said rent, you or your agent may take possession of and remove said safe without legal process; all claims for damages arising from such removal being hereby waived. You are to retain any payments made for use of safe. Nothing but shipment or delivery constitutes an acceptance of this contract. It is also hereby expressly agreed and understood that the foregoing embodies all the agreements made between us in any way, hereby waiving all claims of verbal or other agreements of any nature not embodied in this contract. The receipt of a duplicate hereof is hereby acknowledged.

"AGENTS NOT AUTHORIZED TO MAKE COLLECTIONS.

"Amount \$125 and O. S.

"Truly yours,

J. B. Poore."

The old safe called for by this paper was delivered, and the first three payments of \$25 each were made, leaving \$50 due at the time of bankruptcy. Just prior to that an agent of the petitioners called

on the bankrupt, and asked for the safe, but it was not turned over to him, although, as it is claimed, it was promised.

Taking the writing, which was executed by the bankrupt, as defining the rights of the parties, the question is as to its legal effect; that is to say, whether it is to be treated as a bailment or a conditional sale. This court has recently considered the general question as to what is necessary to make out a bailment (*In re Tice*, 139 Fed. 52), and there is no occasion to repeat what is there said. The present case is to be classed, in my judgment, with *Farquhar v. McAlevy*, 142 Pa. 233, 21 Atl. 811, 24 Am. St. Rep. 497, *Ott v. Sweatman*, 166 Pa. 217, 31 Atl. 102, and *Morgan Electric Co. v. Brown*, 193 Pa. 351, 44 Atl. 459, in each of which the writing was held to constitute, not a bailment, but a conditional sale. It is argued for the opposite of this that the bankrupt in the writing requests that the property shall be leased to him, and agrees that the sums which he is to pay shall stand as rent, and that the title shall not pass until the amount stipulated for is fully paid. The latter provision, however, is of no effect (*Thompson v. Paret*, 94 Pa. 275; *Brunswick v. Hoover*, 95 Pa. 508, 40 Am. Rep. 674; *Peek v. Heim*, 127 Pa. 500, 17 Atl. 984, 14 Am. St. Rep. 865); and, having regard to the general tenor of the instrument, the others are little more so. No term is fixed during which the property is let or hired, nor is any provision made for its return at the end of that time; neither is there any rate per week, month, or otherwise, at which it is to remain. The bankrupt simply agrees to pay for the property, in addition to turning over his old safe, the sum of \$125, of which \$25 is to be in cash and the balance in installments at three, six, nine, and twelve months. The legal effect of this is not to be disguised. By express agreement the safe is to become the property of the bankrupt upon payment of the price named, and this is practically all there is to it, which makes it nothing more or less than a sale. And neither the calling of the payments rent, nor the provision that title shall not pass, nor the other conditions by which the transaction is supposed to be hedged about, are able to make it anything else. There is no occasion to be astute in upholding such instruments, which in nearly every case are intended to get around the law, and, for the mere purpose of securing the payment of the price, make that out a bailment which in the real negotiations between the parties was understood and intended to be a sale. The suggestion in the present instance that, before the bankrupt had filed his petition, on demand made upon him, he agreed to turn over the property to the petitioners, is of no account. He did not in fact surrender it, and remaining, as it did, in his hands, it was liable to be seized by creditors, and that fixes the rights of the trustee.

The petition is dismissed.

MILLER v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, S. D. New York. June 20, 1905.)

**EVIDENCE—COMPELLING PRODUCTION OF DOCUMENTS BY ADVERSE PARTY—
OMNIBUS SUBPŒNA DUCES TECUM.**

A court will not punish a party for contempt for failure to obey a subpoena duces tecum requiring the production of a large list of books and papers, many of which apparently can have no bearing on the issues raised by the pleadings, but the party applying will be required to take out separate subpoenas, each of which may then be considered on its merits.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 40.]

On Motion to Punish for Contempt.

Keating & Walradt, for the motion.

Frank H. Platt, opposed.

LACOMBE, Circuit Judge. This court did, as counsel for complainant suggests, heretofore lay down the rule that a subpoena duces tecum should be first obeyed by bringing the documents into court, and that thereupon the court would inspect them to see if they were relevant or material, and such as might be offered in evidence. *Edison Electric Light Co. v. U. S. Electric Lighting Co.* (C. C.) 44 Fed. 294, 45 Fed. 55. That decision had reference, of course, to the concrete case then before the court. It was not expected that any such grotesque subpoena duces tecum as we have here would ever be taken out, calling for apparently a cart load of books and papers, nearly all of which, so far as their description indicates, have nothing whatever to do with the issues raised by the pleadings. The motion to punish for failure to obey this omnibus subpoena is denied. If in this long enumeration there are a few items which possibly might have some bearing on the controversy, complainant may take out new and separate subpoenas for them. The court will then look into the merits of each separate application to produce. To undertake a recitation of this mass of irrelevant material would be a useless waste of time. This decision on the subpoena as a whole will not be taken as an adjudication against any individual item. Each will be considered when presented in some convenient shape, but from a cursory examination of the list called for it would seem that as to most of them complainant would be wasting his time in making further effort to lug them into a controversy with which they have nothing to do.

ROYAL TRUST CO. et al. v. WASHBURN, B. & I. R. R. CO.

PIKE v. FROST.

(Circuit Court of Appeals, Seventh Circuit. February 11, 1905.)

No. 876.

1. CONTEMPT OF COURT—SUIT TO ENJOIN EXECUTION OF DECREE—FEDERAL AND STATE COURTS.

Persons who instituted a suit in a state court to enjoin a receiver of a federal court from enforcing its order directing him to tear up the track of a railroad, of which it had acquired jurisdiction and possession in foreclosure proceedings, did not thereby commit an act of contempt against the federal court; the state court having the right to determine whether and to what extent it had jurisdiction and power to grant the relief prayed for, short of actual physical interference with the possession of the federal court.

[Ed. Note.—Restraining proceedings in federal courts, see note to *Clapp v. Otoe County*, 45 C. C. A. 591.]

2. SAME—FORCIBLE INTERFERENCE WITH EXECUTION OF DECREE.

A federal court, having acquired possession through its receiver of the property of a railroad company in a suit to foreclose a mortgage thereon, had the right to enter such orders as it deemed within its power in respect to the property, and to execute such orders without actual and physical interference by others, and any one forcibly interfering with their execution is guilty of a contempt of court, under whatever authority he may assume to act.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

For opinion below, see 113 Fed. 531.

The original case—the Royal Trust Company and Horace Oakley, Trustees, v. Washburn, Bayfield and Iron River Railroad Company—was a suit brought in December, 1898, to foreclose a trust deed upon the property of the railroad company, to secure bonds to the extent of five hundred thirty-five thousand dollars, of which two hundred thirty-seven thousand dollars had, before the suit was brought, been duly certified by the trust company. The suit was based upon the default, July 1st, 1898, of interest due, and A. C. Frost was appointed receiver in aid.

The plaintiffs in error were held guilty of contempt of court on the petition of Frost as receiver, and were fined each, except McLeod and Lien, two hundred and fifty dollars, with imprisonment in the county jail of Dane County, Wisconsin, until such fine was paid; McLeod and Lien being sentenced to imprisonment in the same jail for the period of sixty days. 113 Fed. 531.

The hearing upon the contempt matter was upon the petition of the receiver, and the answers of the respondents. These, read together, show that by July 5th, 1901, the receiver had already expended on the property, two hundred twenty thousand, five hundred eighty-one dollars and thirty-four cents, for which receiver's certificates and notes had been issued; and that on that date, a decree in foreclosure was entered, decreeing that unless such amount, together with the further amount of two hundred seventy-nine thousand, one hundred sixty-one dollars and twenty-five cents due upon the mortgage, and interest, were paid within a time therein named, the mortgage should be foreclosed. The decree ordered that the property should be sold as an entirety, and fixed the upset price at not less than two hundred twenty-five thousand six hundred dollars.

Three months later—October 12th, 1901—on the petition of the holders of receiver's certificates, the order of July 5th, 1901, so far as it decreed the sale of the property as an entirety at the upset price named, was annulled. In this later order, the court found that it was impossible to sell the property as an entirety; that the operation of the railroad was a losing venture, not

meeting operating expenses; that the deficit in operation during the receivership alone, was fourteen thousand, three hundred twenty-two dollars, and eighty-four cents, exclusive of interest on the receiver's certificates; that there was no prospect of a decrease in such deficits in the future; that the rails, motive power and equipment were constantly depreciating in value; that there were no funds available to further continue the operation of the road; that there was no such public interest or business in the territory tributary to the road, as would justify its continued operation; and thereupon, the receiver was authorized and directed forthwith, to take up the rails and fastenings of the road, and to sell such rails, along with the motive power, rolling stock, equipment, machinery, tools, furniture, fixtures and other personal property, at public or private sale, for the best price that could be obtained.

The county of Bayfield had projected this road, donating to its construction two hundred thousand dollars of county bonds, in exchange for a like amount of stock. Upon the entry of the order in the United States Court just named, Pike, Sprague, Jacobs, Lemke, Hirsch, Maxey and the County of Bayfield by McLeod as District Attorney, filed their petition in the Circuit Court of Bayfield County, in which the proceedings, in the Circuit Court of the United States above named, were set forth—it being averred that the County of Bayfield had appeared to resist the entry of the order named, but was not permitted to be heard—the prayer of the petition being that a peremptory writ of mandamus issue from the Bayfield Circuit Court, requiring the railroad company, and Frost, as receiver, to continue to operate the railroad, to continue to maintain the track and road bed, and to refrain from tearing up any part of the track and road bed.

On this petition a writ as prayed for was issued, and put into the hands of Lien, plaintiff in error, as sheriff, to serve. The writ commanded the railroad company and Frost, receiver, from the time of the service of the writ, to continuously operate the railroad, for the carriage of freight and passengers, and to continue to maintain the track and road bed, and to refrain from tearing up any part of the track or road bed, or from selling or removing any part or portion of it. Thereupon Lien served the writ upon the agents of the receiver engaged in tearing up the track; and on their persisting in their work—Lien “with divers other persons,” as Frost’s petition states it, “whose names are unknown to the petitioner, but who were and are, as your petitioner believes, deputy sheriffs of said Bayfield County, violently and with force of arms, prevented the agents, employees and servants of your petitioner from proceeding with said work, and seized and arrested the said agents, employees and servants, and took them to Washburn, under the pretended authority of the said writ of injunction, and now restrains them and threatens to treat similarly any other agents, employees or servants of your petitioner.”

This is not denied by Lien. On the contrary it is justified, as having been done under, and by virtue of the peremptory writ of mandamus, and the injunction in his hands, and by virtue of the further fact that such agents were committing, in his presence, a crime against the state of Wisconsin, and its laws.

Neither the petition, nor answers, show that either of the other plaintiffs in error were present, or abetted in these transactions, (they took place on the seventh of January, 1902) except as the issuance of the writ may be said to be in aid of such transactions.

The further facts are stated in the opinion.

A. W. McLeod, for plaintiffs in error.

M. F. Gallagher, for defendant in error.

Before GROSSCUP and BAKER, Circuit Judges, and SEAMAN, District Judge.

GROSSCUP, Circuit Judge (after stating the facts as above), delivered the opinion:

It is not seriously contended, in argument, that the acts of the agents of the United States Court, acting under the order of that court, were a crime within the provisions of Section 4386 of the Revised Statutes of Wisconsin. That statute was wholly directed to another purpose. But it is urged in argument by the plaintiffs in error, that the Circuit Court of the United States was without power to take up the rails, or discontinue the operation of the road; that the rails, once laid, became a part of a public highway, was mortgaged as such a highway; and as such highway could be dismembered or discontinued only by authority or consent of the state.

On the other hand it is argued by the receiver, that the order of the Circuit Court of Bayfield County was beyond its power; that the railroad having gone into the possession of the United States Court, the State Court was without power to do anything that would hinder or interfere with the United States Court's exercise of such possession; and that the institution and pendency of the proceedings for mandamus, and the issuance of the writ was such hindering and interference; and, therefore in contempt of the order, jurisdiction and possession of the United States Court.

We do not find it necessary to pass on either of these questions as abstract legal propositions. Whether it was within the power of the United States Court, under the circumstances named, to discontinue the operation of the road, and tear up the rails, we need not determine. It is enough that the question of such power was triable in the United States Court, having the property in its possession—that the court had jurisdiction, to the extent at least of determining whether under the laws of Wisconsin it had the power in question.

Whether it was within the power of the State Court to forbid such discontinuance of the railroad as a public highway, notwithstanding that the acts forbidden were being done by employees and agents of the United States Court, is a question we need not determine. Here, again, it is enough to say that the question of such power was triable in the State Court—the State Court having jurisdiction to determine, for itself, whether it had such power. The point at which interference with the possession of the federal court begins, is not the invoking in the State Court of its power in that respect, but the attempt to exercise such power, to the extent that the exercise of such power would interfere, actually and physically, with the possession of the property by the United States Court. The United States Court, being in possession of the property, had the right, without actual and physical molestation by others, to enter such orders as it deemed within its power in the premises, and to execute such orders. The State Court had the right, without molestation by others, to determine for itself, how far it had power to forbid or prevent the discontinuance of the railroad, or the tearing up of the rails. The limit of the State Court's power, possession being in the United States Court, was that it should not actually or physically interfere with such possession. If it be said that the concurrent exercise of these two juris-

dictions, though they stop at actual physical conflict, are necessarily incompatible and antagonistic, the answer is, that in the end, the jurisdictions flow together, both streams coming finally within the jurisdiction and determination of the Supreme Court of the United States.

The case thus divides itself, as to the several plaintiffs in error, into two aspects. As to Lien, it shows acts and conduct in contempt of the jurisdiction, orders and possession of the United States Court. Had Lien been content to serve the writ, reporting to the State Court for its final action, the disobedience of those on whom it was served, he would have remained within his right as the executive officer of the State Court. But he was not thus content. He seized the agents and employees of the United States Court, carried them away from their work, and threw them into prison. In the doing of this there was actual and physical interference with the possession of the United States Court, and therefore contempt of its jurisdiction, order and possession.

As to the other plaintiffs in error, it is not shown—it is not even averred in the petition—that they did anything further than to institute the suit in the Bayfield Circuit Court, and obtain the order culminating in the writ. If by advice, presence, or other means, they encouraged or abetted Lien in his subsequent physical interference with the agents of the United States Court, the fact is not brought out. We find nothing, therefore, either in the petition, or record, that justifies the judgment that they were in contempt of the United States Court.

The judgment of the Circuit Court as to Lien, is affirmed, and as to Pike, Sprague, Jacobs, Lemke, Hirsch, Maxcy and McLeod, is reversed, with instructions, as to them, to dismiss the petition.

**WESTINGHOUSE ELECTRIC & MFG. CO. v. MONTGOMERY LIGHT
& POWER CO.**

(Circuit Court of Appeals, Second Circuit. May 3, 1905.)

No. 171.

PATENTS—INFRINGEMENT—ELECTRICAL CONVERTERS.

Infringement of the Stanley patent, No. 469,809, for a system of electrical distribution, *held* not sufficiently established by the ex parte proofs on the hearing of a motion for a preliminary injunction to warrant the granting of such injunction.

Appeal from the Circuit Court of the United States for the Northern District of New York.

For opinion below, see 131 Fed. 86.

A. C. Fowler and M. B. Phillipps, for appellant.

J. Edgar Bull, for appellee.

Before WALLACE and TOWNSEND, Circuit Judges.

PER CURIAM. The court below granted the order for a preliminary injunction, which is now under review, upon the consideration that the only question open for decision, except that of infringement, in view of the former decision of this court in *Westinghouse Co. v. Saranac Lake Co.*, 113 Fed. 884, 51 C. C. A. 514, was whether the length of the wire in the primary coil of the defendant's transformer is substantially the same as it would be if such length were determined by the so-called "Stanley rule." In other words, the court held that the defendant's system of electrical distribution infringed the first and third claims of the Stanley patent, whether the length of the primary coil of its transformer had been ascertained by applying the Stanley rule or by some method of which Stanley was not the discoverer. To this extent we agree with the court below. The decision of this court in *Westinghouse Co. v. Saranac Lake Co.* was in effect that Stanley contributed to the prior art the discovery that the automatic and constant regulation of the pressure of the alternating current at the secondary terminals depended upon the co-ordination of the transformer to the generator and the invention that this could be effected by means of a primary wire of suitable length; that the first and third claims of the patent were for combinations which broadly included his invention; and that, because in order to instruct those skilled in the art how to ascertain the length of the primary wire he had formulated in his patent one rule for doing so, the rule was not to be regarded as an element of the combinations. We are unable, however, to agree with the court below that infringement by the defendant was so clearly established by the depositions used at the hearing as to justify a preliminary injunction.

We are not convinced that in the Wagner transformer used by defendant there is the length of the primary wire required by the Stanley patent, nor that as the primary and secondary coils are disposed in the Wagner transformers the Stanley length would not be destructive of their commercial value. This is a question of too much difficulty to be decided upon the ex parte opinions of experts. The depositions deal with an abstruse and recondite subject, and present conflicting theories, which cannot safely be accepted without the searching elucidation which a cross-examination of the experts may afford. The experts are in flat contradiction upon the question of infringement, and, in view of the large importance of the controversy, the rights of the parties should be reserved for decision until the final hearing of the cause.

- The order is reversed.

AUTOMATIC SWITCH CO. OF BALTIMORE CITY v. CUTTER-HAMMER
MFG. CO.

(Circuit Court, S. D. New York. March 3, 1905.)

PATENTS—INVENTION AND INFRINGEMENT—REGULATOR FOR ELECTRIC MOTORS.

The Whittingham patent, No. 499,769, for a regulator for electric motors having an electric magnet of the solenoid form, discloses patentable invention. While the parts separately were old in an allied branch of the prior art, the combination of the patent was novel, and accomplished a new and useful result, and marked a distinct advance in the machines to which it was applied over those of the prior art. Claims 4 and 5 *held* infringed. Claims 6, 7, and 8, in so far as they make an iron cap on the solenoid, the function of which is described, an element of the combination claimed, must be limited to the specific construction shown, and, as so construed, *held* not infringed.

In Equity.

Philip Mauro, C. A. L. Massie, and Elisha K. Camp, for complainant.
Seward Davis and Jones & Addington, for defendant.

TOWNSEND, Circuit Judge. Complainant by its bill seeks an injunction and accounting, alleging infringement of its patent No. 499,769, granted June 20, 1893, to G. H. Whittingham for a regulator for electric motors.

The specification states that the alleged invention—

"Relates to an automatic switch for protecting the armature of an electric motor, when the current is shut off and suddenly turned on again. If a full current be turned into a motor when at rest, the quantity of current will be so great as to burn the insulation by heating the wires of the armature, and the armature rendered unfit for use. To prevent this, various devices have been designed to throw into the armature circuit an artificial resistance, when the current is first turned on, and then automatically reduce this resistance as the counter electro-motive force of the armature, which increases with its speed, has become great enough to counteract the tendency of the current to heat the conductor and burn the insulation of the armature."

The patent in suit is for an improvement of the patentee's prior patent No. 415, 487 for an automatic device designed to obviate the objections stated above:

"The object of the invention described herein is to supply for use in the armature branch of an electric motor a switch, which will protect the armature under all circumstances, and which requires no attention whatever from the person operating the motor. The current is turned on to the motor by an ordinary snap switch which any one can operate without the slightest effort, and this invention is brought into play by the passage of the current and does its work without the attention of any one. On the other hand, if for any reason the current on the line should be shut down without the knowledge of the person attending the motor, this device will automatically introduce the artificial resistance into the armature circuit, just in proportion as it is required by the reduction of the counter electro-motive force of the armature, and the resistance will be again automatically removed from the circuit when the current is turned on again from the generator."

This device is brought into operation when an electric motor is started, and is known as a motor starter, or "self-starter."

The electric motor is of the shunt motor type, in which the armature and field windings are connected in shunt—that is, in separate and individual circuits—as distinguished from the series motor, where the windings are in series, so that the current passes first through one and then through the other winding. The latter, or series motor, is operated by hand, and is used, in connection with a gradual resistance switch, on trolley cars and automobiles; the former, when connected with a constant potential circuit (that is, a circuit in which the pressure between the two mains is maintained practically constant), and when provided with an armature of low resistance, is self-regulating (that is, maintains a constant speed under varying loads), and is used for running elevators, driving tools in shops, etc.

The claims in suit are as follows:

"(4) The combination of a solenoid of low resistance and a conductor of high resistance connected thereto, a reciprocating iron core within the solenoid, means for holding the core at any predetermined point within the solenoid when it reaches it, until the current is shut off, and which will automatically release the core when this occurs, a circuit closer controlling the conductor of high resistance, and means operated by the reciprocating core for closing the circuit and throwing the conductor of high resistance into circuit with the solenoid of low resistance, substantially as described.

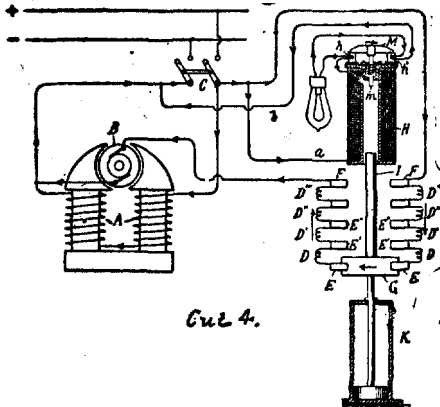
"(5) The combination of a solenoid of low resistance, a conductor of high resistance connected to the solenoid, means for short-circuiting the conductor of high resistance or throwing it into circuit with the solenoid, a reciprocating core within the solenoid which co-operates with the short-circuiting device of the conductor of high resistance, so as to throw said conductor into circuit with the solenoid when the core reaches any predetermined position within the solenoid, substantially as described.

"(6) The combination of a solenoid of low resistance, a conductor of high resistance connected to one of the terminals of the solenoid, a short-circuiting device for short-circuiting the conductor of high resistance, an iron core reciprocating within the solenoid, an iron cap upon the solenoid, and means connected with the short-circuiting device of the high resistance conductor which is operated by the reciprocating core to break said short circuit and throw the conductor of high resistance into circuit.

"(7) The combination of a solenoid of low resistance, a conductor of high resistance connected to one of the extremities thereof, an iron cap located upon the top of the solenoid, a short-circuiting device for short-circuiting the conductor of high resistance, an iron core reciprocating within the solenoid, means operated by the reciprocating core to break the short circuit of the high resistance conductor and throw it into circuit with the solenoid, and a governor connected to the core and controlling its motion.

"(8) The combination of a solenoid of low resistance, a conductor of high resistance connected to one of its extremities, an iron cap upon the solenoid a portion of which protrudes within the solenoid, an iron core reciprocating within the solenoid, two terminals mounted upon the top of the solenoid in which the conductor of high resistance terminates, and a bridge connecting said terminals, and means whereby said bridge is lifted and a short circuit between the terminals of the coil of high resistance broken when the core reaches the desired point within the solenoid."

The following diagram shows the apparatus comprising the starter of the earlier patent combined with the improvement of the patent in suit:



A, B, is the shunt motor; the field coils being marked A, and the revolving armature B. C is the main switch, at which current is admitted from the mains above. At the right, D, D', etc., E, E', etc., are, respectively, coils and contact plates constituting a series of resistances or rheostat in the armature circuit; G is an arm or switch, which controls the resistance of the rheostat, and K is a dashpot, a drag or governor, for retarding the operation of I,

the core of H, a solenoid or hollow coil of wire, adapted to be traversed by an electric current. This portion of the apparatus is covered by said earlier Whittingham patent. The metallic conductor or bridge, M, resting on the insulated blocks or binding posts h, h', which serve to short-circuit the lamp, L, and the pin, m, and cap, N, resting on the solenoid, constitute the combination introduced by the patent in suit.

The patentee describes the operation of the device as follows:

"When the current is turned onto the line, a portion of the incoming current passes to the resistance coils and armature, while another portion goes to the field, and a third portion passes to the shunt in which the solenoid is included. The bridge being in contact with the blocks, h, h', the high resistance coil will be short-circuited, and the current will flow freely through the low resistance coil, thereby exerting a large amount of power upon the core so as to lift it freely and easily. The solenoid and core are considerably longer than the rheostat, so that the core may rest at all times a considerable distance within the solenoid, far enough to cause the core to be saturated with the magnetic force of the solenoid as soon as the current is turned on, after which the motion of the core will be regular and uniform. As the core rises toward the top of the solenoid, it is attracted by the magnetic force of the iron cap, N, which has itself become magnetized under the influence of the induction of the solenoid, and the last half inch of its motion will therefore be much stronger and faster than the preceding portion. This rapid motion serves an important function. The end of the rod, m, protrudes below the inner side of the cap, N, and when the core, I, rises to the top of the solenoid it will strike this rod and force it upward and break the contact between the bridge piece, M, and the blocks, h, h'. To do this properly and perfectly requires more force than the solenoid alone will exert. Hence the attraction of the cap is important to the successful operation of the device."

Thus, the current coming from the main line passes by three paths to the armature, B, field, A, and solenoid, respectively, as indicated by the arrows. The bridge, M, short-circuits the high resistance lamp, L, and permits the current to flow freely through the low resistance solenoid windings, and to cause a strong pull

to be exerted on the core, which draws it upward within the solenoid coil and brings it within the influence of the magnetized cap, N. By reason of this attraction, it rises much faster toward the end of its upward movement and, striking the pin, M, breaks the contact between the bridge, M, and the blocks, h, h'. The flow of current is thus greatly reduced because it is now compelled to pass both through the solenoid and through the high resistance of the lamp circuit.

The advantages claimed for this construction are, *inter alia*, the following: When the current is first turned on and the full force is required to start the motor, the solenoid, becoming energized, pulls the core upwards; the drag of the dash pot making the pull a gradual one. As the core passes upward it successively cuts out the pairs of resistances, thereby graduating the flow of current to the armature and preventing overheating of its wires. The automatic double function of the solenoid, in lifting the core and introducing the extra resistances into its circuit, economizes the amount of current through the solenoid, serves to protect it, and permits a cheaper construction of solenoid. The iron cap, co-operating with the solenoid, assists the solenoid in the latter part of its upward pull, in holding the core in place at the top of its travel, and thus permits a still greater reduction of current. When the current is shut off, the device automatically returns to its original condition. The elements of the patented combination are old, but the device is of marked utility.

Complainant's contention is well stated by his counsel, as follows:

"We claim that our invention lies in making the movement of the solenoid core remove a number of resistances in succession from the armature circuit of the motor, and then at the predetermined position (i. e., not haphazard) introduce a separate resistance into its own independent separate circuit. The present invention is the first to introduce resistance automatically into the circuit of an electro-magnet (or solenoid) which already had other work to do, and thus is called on to perform a double function. It is the first apparatus to control definitely two independent resistances in two independent circuits at definitely co-ordinated intervals of time."

And his expert explains the utility of the invention in suit in economy of construction and operation as follows:

"The improved apparatus is not merely the earlier apparatus plus a device for injecting a resistance, but a device modified in structure and behavior, owing to the introduction of the resistance injecting feature. The apparatus has to be structurally modified in order to inject the resistance. It becomes capable of being made cheaper and more compact by reason of employing the resistance, because a cheaper and more economical winding can now be used, and the apparatus with the resistance automatically introduced at the end of its stroke necessarily behaves in a different way to the apparatus without resistance so introduced."

The decision of this case does not turn upon disputed issues of fact. Counsel agree that the question involved is one of law, namely, "whether there was invention in applying the Smith resistance insertion tool to the electro-magnet in the form of a solenoid, or coil-plunger, electro-magnet, when it had already been applied to the electro-magnet of the ordinary form," and when, as thus

applied, it showed how to make the electro-magnet operate effectually and economically both as a pulling and holding magnet by the automatic insertion of said tool.

Counsel for the complainant stated the question thus:

"Was there patentable invention involved in discovering the necessity for, in realizing the possibility and advantages of, and in then actually producing, the combination of the 'self-starter' of Whittingham's earlier patent (or of Blades') and the extra resistance device?"

The answer of defendant's counsel to this question is supported by an exhaustive review of what he aptly terms the "primary electric tools" of the prior art, showing the development of the simple, hand-operated, electrical switch into one having an automatic, gradual, or variable resistance, in combination with a dash pot operating in connection with either an ordinary electro-magnet or one of the solenoid type. In this review was included prior resistance insertion devices or tools, for the purpose of automatically cutting down the strength of the current flowing through the electro-magnet after it had completed its pull and when it was acting merely as a holding magnet.

The position of defendant is stated as follows:

"(1) That the claims of the patent in suit, if construed broadly, are void as constituting a mere analogous or double use of an old and well-known device of the prior art; and

"(2) That the defendant's structure is so radically different in construction and operation from the structure shown in the patent in suit, and so nearly like structures of the prior art, that defendant does not infringe."

A further defense of aggregation was not pressed. It is clear that the parts of the apparatus constitute a co-operating device.

The patents chiefly relied on to support the denial of invention are Smith patent, No. 137,730, Pope patent, No. 140,790, both of 1873, and Timmins & Currie patent, No. 383,502, of 1888. The counsel for complainant has not discussed these patents in his brief. The review of the prior art establishes the fact that it was old and well known to use the solenoid type of electro-magnet and to introduce resistance into the circuit of an electro-magnet.

The Smith patent is described as covering "an improvement in means for economizing wear of battery and reducing spark in circuits operating electro-magnets," and although there shown in connection with a telegraph sounder the patentee states that it "may be used in connection with all circuits operating electro-magnets. The object of the invention is to economize battery and to diminish the electric spark between the points used to open and close the circuit." It comprises a structure with a resistance so associated with the electro-magnet that it is cut out while the magnet is pulling the arm, so as to let a relatively large amount of current flow until the contact arm has nearly ended its stroke, when an automatic switch controlled by said arm causes a resistance to be inserted, and the current is cut down and so remains until the circuit is again interrupted. The claim broadly covers any construction effecting this result, and subsequent patentees seem to have accepted this patent

as a disclosure of the broad invention of such a resistance insertion device.

The Pope patent shows such a device applied to railway signal apparatus, and the Timmins & Currie patent employs it in a switch controlling an electric lighting circuit. Other patents, such as Pope patent and Cummings patent, both of 1884, show a further development of the Smith pioneer invention. But none of these patents show this invention applied to the solenoid form of electro-magnet, to which the patent in suit is limited, and it does not appear that the ordinary electro-magnet could be used in the combination of the patent in suit.

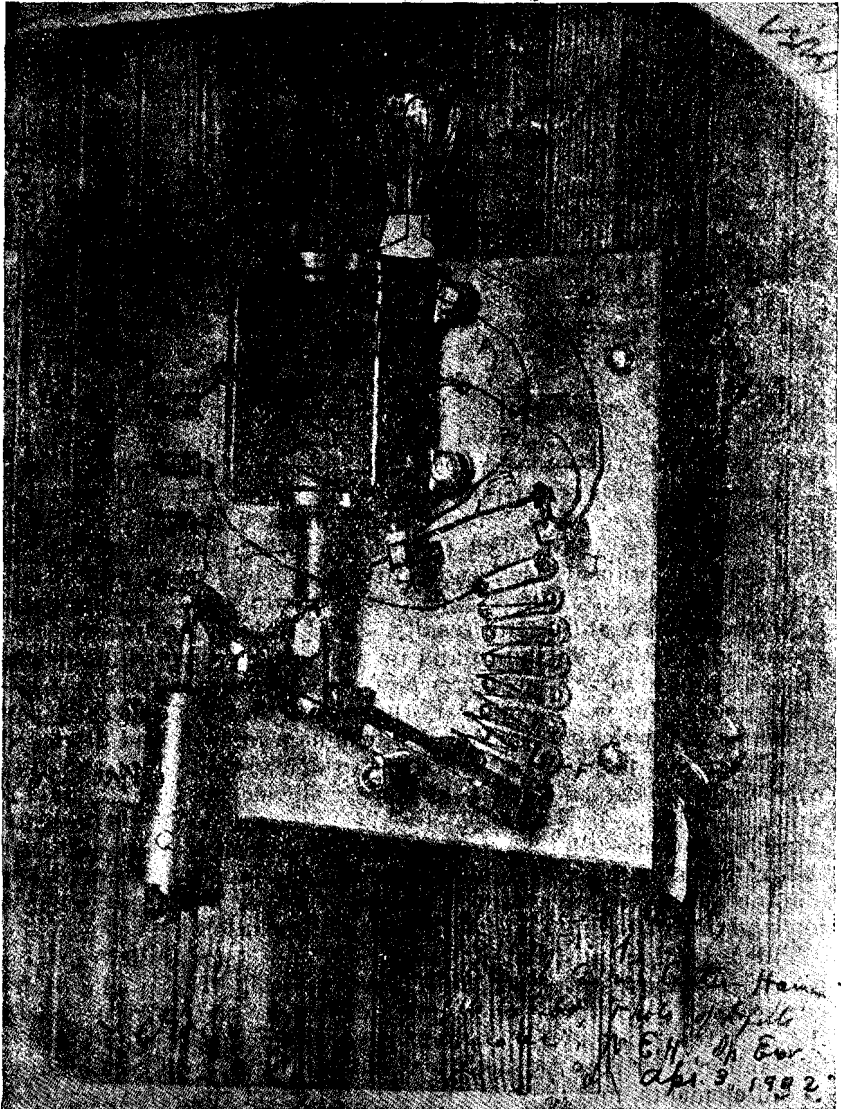
The prior Whittingham patent was not pressed by counsel for defendant. While it was of the solenoid type, it was not provided with any appliances or devices for accomplishing the objects of the device of the patent in suit. The solenoid required was one which should be capable of discharging the two functions of providing for the strong pull with full power and the light grip with economy of power. The device in suit provided such a solenoid, and combined with it the principle of the Smith switch, brought into the circuit of the solenoid when its core neared the top of its movement, thus practically supplying two solenoids, more efficient because of the light grip caused by the high resistance lamp, and with resultant protection of solenoid windings, and simplicity and economy in its construction and operation.

In the disposition of this question of invention, it may be assumed that the patentee's sole contribution consisted in the conception that it was possible to select from a somewhat remote, but allied, branch of the prior art well-known tools, which were capable of accomplishing these functions, and of so combining and adapting them as to secure new and useful results. It is forcibly argued that the conception of this possibility and its practical accomplishment was obvious, and involved the exercise of mere mechanical skill and development. But when it appears that Smith and Pope in 1873, and Timmins & Currie in 1888, and Whittingham in 1889, had disclosed to the art the devices now relied on to defeat the claim, and that with the manifest and urgent call for a device possessing the advantages admittedly possessed by the patented device, it did not occur to any one till 1892 to suggest such a combination, and that the progress of the art had stopped until the patentee brought out his apparatus, we have presented one of the strongest arguments for, and one of the most decisive tests of, invention.

This invention consisted in the conception of a possibility of changing power for a strong pull into power for a light grip, and of securing these two functions in one solenoid by the introduction of the high resistance, with resultant cheaper construction and operation and greater efficiency. It was realized by a novel combination of old elements, mutually co-operating to effect the same result by means of the double function of the solenoid core operating, first on the low resistance rheostat, and then on the high resistance lamp, in

connection with the co-operation of the cap, which produced new and useful results possessing advantages which had never been previously accomplished.

Defendant's device is shown by the following copy of a photograph:



A is the solenoid; B the lamp; D the iron cap; J, E, K, the device for short-circuiting the lamp; C the solenoid core. F is the pin on the contact arm, which engages with the switch, E, to break the short circuit of the lamp, B.

This construction comprises a combination of the motor of the Blades patent, No. 453,032, owned by defendant, with a switch of the type shown in the Smith and Pope patents of 1873. The Blades patent covered automatic switch mechanism; but, although later than the first Whittingham patent, it failed to show a solenoid or any improvement in the line of invention here under consideration upon the earlier Whittingham apparatus. Although the switch is electrically connected with the top of the solenoid, it is not mounted therein or arranged with a pin and spring as in the patent in suit. The switch short-circuiting device, therefore, is the old one described in connection with the Smith patent, where the switch is operated by means of a pin on the contact arm and the resistance thus inserted as the contact arm approaches the end of its travel.

But the patentee, in the patent in suit, did not confine himself to means described for short-circuiting. Thus, he says:

"It will also be readily seen that the peculiar method described of short-circuiting the conductor of high resistance is a simple mechanism which may be varied at will. This device is a simple and convenient one for automatically throwing the conductor of high resistance into or out of circuit. I therefore do not confine myself to the structure of these details, but employ them only as means to accomplish the mechanical portions of my combination, which may be varied without affecting or changing the real operation of my invention."

This statement is abundantly justified by the state of the art. The Smith short-circuiting device was well known and in common use, and the patent had expired; but the patentee, recognizing that his invention resided, not in the form of switch, "a simple mechanism which may be varied at will," but in the novel combination and adaptation with new and better results, merely states his preferred form as the one best adapted to secure the results to be accomplished.

It is impossible to determine whether the defendant's cap discharges the important function claimed for the iron cap of the patent in suit, namely, the contact-breaking rapid motion of the core at the end of its upward travel. Its cap is provided with a conically recessed plug, so extending into the solenoid that the upper end of the core, being of a corresponding conical shape, coacts with it; the result being a uniform pull during the whole range of travel of the core. The quick movement at the end of the stroke is secured in defendant's device by a form of dash pot, not necessary to be explained here, wherein the retarding effect is removed as the core approaches the limit of its travel. The experts support their conflicting claims by statements and by experiments, the effect of which cannot be satisfactorily proved. But in view of the specific statement of the patent as to the construction and function of the cap, and of the limitations of the prior art, it is thought that the patentee should be confined to the claims covering the precise details of such

construction, and that said claims cannot be broadened to include the defendant's device.

The conclusion reached is that claim 6, for an iron cap upon the solenoid, and claim 7, for such cap with a specific form of conducting governor, and claim 8, for such a cap and two terminals mounted upon the top of the solenoid, are not infringed.

The question as to the infringement of the other claims, as already shown, depends upon whether complainant's invention was of such a character as to permit him to cover the construction which includes the Smith resistance insertion device. In this aspect, we may accept defendant's argument of the question of infringement, and treat the Smith device as a well-known electrical tool which any one had the right to adopt. That it remained ready at hand for nearly 20 years, and that Blades and Whittingham and other inventors failed to see its adaptability to their apparatus, is most persuasive evidence of invention, in connection with the other evidence discussed. Therefore, as the patentee was the first to discover the new and undeveloped possibilities of adaptation, combination, and result, and merely illustrated his preferred form, and stated it, as above, he should not be deprived of the benefit of his invention by reason of the existence of this obvious and well-known equivalent.

The patent responds to the following tests of invention: It is novel, the first apparatus which "controlled definitely two independent resistances in two independent circuits at definitely co-ordinated intervals of time." It is of great utility. With other inventors in the field, all striving for the same end, the patentee was the first to conceive the possibilities of such a combination. The question of law propounded must be answered, therefore, in the affirmative. Claims 4 and 5 are infringed. Claims 6, 7, and 8 are not infringed.

Let a decree be entered for an injunction and an accounting in accordance with this opinion, and for complainant to recover one-half its costs.

B. F. AVERY & SONS v. J. I. CASE PLOW WORKS.

(Circuit Court, E. D. Wisconsin. July 17, 1905.)

1. PATENTS—CONSTRUCTION OF CLAIMS—EFFECT OF FORMULA "SUBSTANTIALLY AS DESCRIBED."

Where a patent contains specific claims in which certain features described in the specification are expressly claimed, and also broad claims from which such features are omitted, they cannot be read into the broad claims because of the closing formula "substantially as described," for the purpose of narrowing such claims to avoid anticipation.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 241.]

2. SAME—INFRINGEMENT.

Where a patentee in a claim for a combination specifies any element as entering into the combination, he makes such element material to the combination, and it cannot be held immaterial by the court for the purpose of finding infringement.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 253.]

3. SAME—EQUIVALENTS—APPLICATION OF DOCTRINE TO IMPROVEMENT PATENT.

In applying the doctrine of equivalents, the courts discriminate in favor of a primary patent, and a narrower rule is applied to a patent which is merely for improvements upon an old mechanism, in which case the doctrine is applied only to changes which are palpably colorable.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 374, 379.]

4. SAME—INFRINGEMENT—PLOW.

The Avery patent, No. 650,771, for a double moldboard plow, claims 2 to 6, inclusive, which are broad claims, are void for anticipation in the prior art; claims 7 and 8, which cover a specific combination of old elements, including "brace rods rigidly secured to the moldboard," and attached at the other end to the runner, which perform the function of bracing and strengthening the moldboard, disclose invention, and are valid, but are limited by such specified elements, and are not infringed by a construction in which the braces from the runner are not attached to the moldboard, and do not, therefore, perform such function.

In Equity. Suit for infringement of letters patent No. 650,771 for a plow, granted to George C. Avery May 29, 1900. On final hearing.

This is an action in equity, predicated upon alleged infringement of letters patent No. 650,771 for an improvement in the "double-moldboard" or "middle-burster" plows. The bill is in the usual form. The answer denies that the patented structure discloses any patentable invention in view of the state of the art; avers that complainants' invention had been anticipated by United States letters patent No. 410,218, issued to Ira W. Sylvester September 3, 1889. Infringement is also specifically denied.

The original verified application of the patentee contained four claims, which are found at pages 89 and 90, defendant's record. The second claim was rejected on the Ward patent No. 604,814. (Defendant's record, page 178.) Thereupon the second claim was canceled, and the attorneys for the patentee reconstructed the application, and substituted the present claims Nos. 2, 3, 4, 5, and 6 in place of the canceled claim. Original claims 3 and 4 became 7 and 8 in the amended application. Thereupon the amended claims from 2 to 6, inclusive, were again rejected, on Billups' patent, No. 123,858, and Sylvester's patent, No. 410,218. Reconsideration was asked by the patentee's attorney on the ground that the essential feature of each of such claims (2 to 6) was the pivoted runner and rudder, and that the Billups and Sylvester patents did not pivot their depth-runners so as to admit of a double adjustment. On the basis of this construction the patent in suit was issued.

The first claim is not in issue here. Omitting the elements "standard, share, and moldboard," which are common to all the claims, the elements of the several claims in controversy are as follows:

Second claim: "A depth-runner pivoted at its forward end to the standard, a knife or rudder pivoted at its forward end to the depth-runner, and means for independently adjusting the rear ends of the depth-runner and rudder."

Third claim: "A depth-runner pivoted at its forward end to the standard, a knife or rudder pivoted at its forward end to the depth-runner, and means for adjusting the height of the depth-runner and clamping the rear end of the rudder thereto."

Fourth claim: "A depth-runner comprising two sections pivoted at their forward ends upon opposite sides of the standard, means for adjusting the height of their rear ends and a knife or rudder pivoted at its forward end between the sections of the depth-runner."

Fifth claim: "A depth-runner comprising two sections pivoted at their forward ends upon opposite sides of the standard, means for adjusting the height of their rear ends, a knife or rudder pivoted at its forward end between the sections of the depth-runner, and means for adjusting the height of its rear end independently of the adjustment of the depth-runner."

Sixth claim: "A depth-runner comprising two sections pivoted at their forward ends on opposite sides of the standard, a knife or rudder pivoted at its

forward end between the sections of the depth-runner, and means for adjusting the height of the rear ends of the depth-runner and clamping the knife or rudder between its sections."

Seventh claim: "A depth-runner, comprising two sections of similar shape, applied side by side and pivoted at their forward ends to each side of the plow-standard, the said sections having vertical slots at their rear ends, brace-rods rigidly secured to the moldboard and extending toward the runner, a bolt passing through eyes in said rods and through the slots in the runner, and a knife or rudder pivoted between the said depth-runner sections, whereby the said runner may be clamped in different adjusted positions between the runner sections."

Eighth claim: "A double-moldboard plow, comprising a standard, a double frog, a double share secured thereto, and a double-moldboard secured to the same, a depth-runner arranged beneath the moldboard and formed of two sections having their forward ends curved forwardly and pivotally attached on each side of the plow-standard, the said runner-sections being provided with vertical, elongated slots at their rear ends, laterally-extending flanges formed upon the lower edges of the said sections to provide a broad-bearing surface, a knife-plate or rudder pivoted between the sections of the runner, the said rudder being curved at its forward ends of the runner-sections, rigid brace-rods extending from the moldboard to each side of the runner, a clamping-bolt passing through eyes upon the said brace-rods and through the elongated slots in the runner-sections so as to clamp the runner in different adjusted positions, the knife or rudder being thereby clamped between the said sections in different adjusted positions."

Each of said claims contained at the end the formula, "substantially as described."

The defendant offered in evidence as anticipatory devices the following patents: Burke (1858), No. 22,013; Billups (1872), No. 123,858; Brantly (1881), No. 248,569; Lawrie (1882), No. 261,001; Laughlin (1884), No. 297,815; Robertson (1885), No. 326,591; Moore (1887), No. 366,597; Landauer (1888), 383,982; Sylvester (1889), No. 410,218; Holsclaw (1891), No. 459,204; Montgomery (1891), No. 459,410; McMillan (1896), No. 555,327; Dean (1896), No. 563,752; Ward (1898), No. 604,814; Ankarstolpe (1898), No. 607,207. Also the structure shown on page 22, Avery Catalogue 1899-1900; also Avery's Advance double moldboard plow, Avery Catalogue 1899-1900, page 23; also Avery's 'Lone Star' plow, page 99, Avery Catalogue 1899-1900.

Spooner & Rosecrants and Mason, Fenwick & Lawrence, for complainant.

Peirce & Fisher, for defendant.

QUARLES, District Judge. The first proposition to be considered is the validity of the broad claims 2 to 6 (both inclusive). It requires but a casual inspection of the plows introduced in evidence to determine that defendant's structure infringes each of said claims, if such claims are valid. This was freely admitted at the hearing by defendant's counsel. To pass upon the validity of these claims intelligently, we must consider the prior state of the art. What is claimed here is a combination. Each of the elements is old. The standard, share, and moldboard are as old as the plow structure. The depth-runner or shoe was well known in the art, operating as a fulcrum in handling the plow and controlling the angle at which the point entered the ground. It appears in numerous early plows under various names. The knife or rudder, likened by reason of its function to the centerboard of a boat, was long before complainant's patent employed on land side as well as double-molded plows. It has appeared in many shapes and under various names, attached and adjusted by various contrivances.

Long before the complainant's patent the desirability of raising or lowering the rear end of the depth-runner and adjusting the rear end of the knife so as to take up wear and to keep the plow steady while in motion were fully appreciated, and various means were resorted to for that purpose. The bolt and slot device had also been used as a means of adjusting both runner and knife. As early as 1858 Burke devised a "middle-burster" plow having a rudder, which he calls "a knife-shaped guide pivoted to the bedplate, its rear end adjusted by means of a set-screw located on the rear of the beam." In 1872 Billups patented an improvement in a double-moldboard plow, wherein a prominent feature was a rudder called by him a "guide-coulter," which was pivoted in a cavity of the shoe or runner, and was vertically adjustable by means of a series of holes and a bolt or pin. In 1888 Landauer patented "an adjustable heel for plows," which was pivoted at its forward end to the land side, contained a vertical slot at the rear end, operated with a heel bolt. In 1884 Laughlin patented a plow structure having a runner and rudder each independently adjusted by a slot and bolt device, wherein the parts performed the same functions as in the complainant's patent. Therefore, if there be patentable novelty in the complainant's structure, it must be because of a new arrangement of well-known elements.

It is unnecessary to take each of these claims separately through the field of the prior art. The sixth claim embodies all the features found in claims 2, 3, 4, and 5, except that it is silent as to an independent adjustment called for by claims 2 and 5. If, therefore, this claim, combined with the feature of independent adjustment, has been anticipated by any of the constructions embraced in the references, such fact will be conclusive as to each of the broad claims.

Now, take the Lone Star plow. (Defendant's Record, 193.) It clearly presents the following elements: Standard; share; moldboard; a depth-runner comprising two sections, pivoted at their forward ends upon opposite sides of the standard; a knife or rudder pivoted at its forward end between the sections of the depth-runner; independent means for adjusting the height of the rear ends of the depth-runner and rudder and for clamping the knife or rudder between said sections. The slot and bolt device is employed in each adjustment. This amounts to a complete anticipation. The sixth claim may also be read onto the Sylvester plow in the same way with like results. The Sylvester structure, which was in actual use by the inventor, and which is in evidence, differs in detail from his patented structure, in that the "adjustable braces," which are not specifically developed in the patent, appear and are operated by a slot and bolt device and the runner sections are pivoted at their forward ends to the standard. If this Lone Star plow or the Sylvester plow had appeared subsequent to the date of complainant's patent, each would be a clear infringement; and the rule is familiar that that which infringes if later, will anticipate if earlier. *Knapp v. Morss*, 150 U. S. 228, 14 Sup. Ct. 81, 37 L. Ed. 1059. Sylvester left it to the judgment of the mechanic to adopt for the

runners any adjustable brace then known to the art. A substitution of either of the well-known devices for adjusting the runner being applied to the Sylvester structure will meet every call in the broad claims of the complainant's patent. This is well illustrated by the drawing offered by the defendant upon the hearing. It will be observed that neither of these claims 2 to 6 specifies any mechanism for adjusting either the runner or rudder. Complainant's expert in his testimony (complainant's record, 33) substantially concedes that inasmuch as the second, fourth, and fifth claims do not specify the precise means of adjustment, but treat it broadly and without modification, therefore such claims would cover any and all suitable means for such adjustment.

Construction of Claims 2 to 6.

The complainant insists upon a construction which will narrow claims 2 to 6, and import into them the specific structure shown by the drawings and particularly described in claims 7 and 8. This claim is based upon the formula "substantially as described," which is made an appendage to each of the broad claims. The contention is that this language virtually incorporates into the claim the subject-matter of the specification and the specific device shown by the drawing. The effect, of course, would be to limit the claims to the bolt and slot contrivance for adjusting both runner and rudder, whereby both functions are imposed upon a single heel bolt. In an early case it was held that these words "substantially as described" are always implied and that the construction of a claim must be the same whether this phrase be used or not. *Matthews v. Schoneberger* (C. C.) 4 Fed. 635-638; *Robinson on Patents*, § 577. The force of this formula "substantially as described" has been destroyed by the Supreme Court in *Hobbs v. Beach*, 180 U. S. 399, 21 Sup. Ct. 409, 45 L. Ed. 586. After reviewing the authorities, the court say:

"Without determining what particular meaning, if any, should be given to those words, we are of opinion that they are not to be construed as limiting the patentee to the exact mechanism described."

The court do not say in express terms that this language is meaningless, but, what amounts to the same thing, they say they are unable to determine what it does mean.

In our judgment, the complainant's construction is untenable. These claims must be construed with reference to the other claims with which they are associated, and in view of the history of the case. When the original broad claim 2 was canceled, these claims 2 to 6 were substituted instead thereof. There can be no doubt as to the scheme and purpose of the patentee in framing these claims. It was clearly his purpose originally to employ one broad claim (2) and two narrow claims (3 and 4). For prudential reasons, understood by every lawyer, whether drafting counts in an indictment or claims in a patent, it is desirable to state the case sometimes broadly, and sometimes with precise detail. It is evident that claims 2 to 6 were intended for broad, general description

of a combination, referring generally to means or adjusting, etc., for the purpose of showing an operative device, while the function of claims 7 and 8 was to describe specifically the mechanism suggested by the patentee to embody the principle of the discovery. Any construction which would make each of these eight claims a duplicate of every other would defeat the manifest purpose of the inventor. The Patent Office twice challenged the broad claims, but in neither instance made objection to the specific claims 7 and 8. It seems to be settled that when certain features are expressly set up in certain claims and entirely omitted in others, the court cannot read them into the claims where the inventor has omitted them. *Wilson v. McCormick Harvester Company*, 92 Fed. 167, 174, 34 C. C. A. 280. The bolt and slot contrivance for adjusting both runner and rudder is specifically claimed in the seventh and eighth claims, and is wholly omitted in claims 2 to 6. In *McCarty v. Railroad Company*, 160 U. S. 110, 116, 16 Sup. Ct. 240, 242, 40 L. Ed. 358, it was suggested that a feature of construction described in the specification should be read into the claim for the purpose of sustaining the patent. The court held otherwise, saying:

"While this may be done with a view of showing the connection in which a device is used and proving that it is an operative device, we know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement. The difficulty is that, if we once begin to include elements not mentioned in the claim, in order to limit such claim and avoid a defense of anticipation, we should never know where to stop. If, for example, a prior device were produced exhibiting the combination of these claims plus the springs, the patentee might insist upon reading some other element into the claims—such, for instance, as the side frames and all the other operative portions of the mechanism constituting the car truck—to prove that the prior device was not an anticipation. It might also require us to read into the fourth claim the flanges and pillars described in the third. This doctrine is too obviously untenable to require argument."

In *Boyer v. Keller Tool Co.*, 127 Fed. 130, 134, 62 C. C. A. 244, 248, the court say:

"So far as claims 42 and 45 are concerned, no particular form of construction or mode of operation is specified in them, and none is therefore to be imposed. * * * Moreover, he has embodied in a special set of claims (49 to 51, inclusive, not involved in this suit) forms of valves corresponding with the specifications, to which, so far as concerns the mechanical combinations there described, the inventor is, of course, confined. But these are not to be written into other claims, which, in order to avoid the duplication that would otherwise result, if for no other reason, are to be taken and interpreted as they stand."

Stearns v. Russell, 85 Fed. 218, 29 C. C. A. 121.

In *Penfield v. Potts*, 126 Fed. 475, 483, 61 C. C. A. 371, 379, the court say:

"We know of no authority for reading into a claim features which have been omitted, although shown in the specifications. We may, beyond doubt, look to the specifications and drawings for the purpose of understanding the claims, or that we may see whether the device is useful or operative, and sometimes for the purpose of limiting a claim to the particular device described; but we may not enlarge a claim by including therein elements which are not claimed as such."

In *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 368, 3 C. C. A. 562, the third claim omitted any description of particular devices, but concluded with the words "substantially as described," while the second claim described such mechanism in detail. The court say:

"It cannot be restricted to all or any of the devices used in the mediate connection between the series of keys and the drawer holder, not only because they are not even specified in the third claim, but also because they are expressly claimed in the second claim. There is nothing upon this record which would warrant us in attributing to the patentee the folly of having presented, and to the Patent Office the improvidence of having allowed, two claims for the same thing. The distinction between them must be maintained that both may be given effect."

Canda v. Michigan Malleable Iron Co., 124 Fed. 486, 61 C. C. A. 194; *General Fire Extinguisher Company v. Mallers*, 110 Fed. 529, 49 C. C. A. 138.

The view we have taken seems to be re-enforced by the history of the case in the Patent Office. When these broad claims 2 to 6 were rejected on the Billups and Sylvester patents, the patentee announced in seeking a reconsideration that in every such claim (2 to 6) it was the combination of the pivoted depth-runner and rudder pivoted to the runner which was the essential feature, calling attention to the fact that the depth-runners in the patents referred to were not pivoted; that the complainant's structure permitted a double adjustment, which is impossible in the construction shown in the references. There was no suggestion as to the novelty of the means of adjustment, or that the bolt employed in the adjusting mechanism is for the first time to discharge a dual function. The Patent Office evidently acquiesced in this explanation, and the patent was issued on the strength of it. Now, to prevent anticipation, it would better suit the purpose of the patentee to make the slot and bolt device the essential feature of these broad claims by mere intentment, in order to subject another to a charge of infringement. This change of front the court cannot indulge. *Metallic Extraction Company v. Brown*, 110 Fed. 665, 49 C. C. A. 147.

In passing it may be noticed that the limited construction now sought to be imposed upon claims 2 to 6 is negatived by the testimony of complainant's expert (complainant's record, p. 40), where he swore that he did not regard the claims of the Avery patent as limiting the connection between the braces and the rudder to a single bolt, the said claims covering means broadly for adjusting the height of the depth-runner and clamping the rear end of the rudder thereto. He also testified that in his judgment the plow shown in defendant's cross-exhibit (defendant's record, 201) would fall within each of the claims 2 to 6 of complainant's patent, notwithstanding the fact that such plow has no slotted runners, and the rudder and runner are not adjusted by the same bolt (complainant's record, pp. 37 to 39).

For these reasons we are of opinion that claims 2 to 6 (both inclusive) have been anticipated by the patents cited, and are therefore invalid.

We now pass to consider the validity of claims 7 and 8. The novelty claimed for the structure specifically described in these claims is that the parts are brought into a new relation by means of the slotted runner, so that both runner and knife may be adjusted at the same point by means of a single bolt; that its utility is apparent, because it involves a less number of parts, and results in a saving of time in adjusting the apparatus. We are inclined to the opinion that the patentee has done more than to produce an aggregation of old elements, and that a certain degree of invention is involved in bringing the parts into a new relation. Conceding the validity of claims 7 and 8, the serious question presented by the record is whether such claims have been infringed by the defendant's structure. It is a familiar principle that a combination is an entirety. If one of the essential elements is wanting, the combination disappears entirely. Walker on Patents, § 349. It is also elementary that if, in such a claim, the patentee specify any element as entering into the combination, he makes the same material to the combination, and it cannot be held immaterial by the court. *Shepard v. Carrigan*, 116 U. S. 593, 598, 6 Sup. Ct. 493, 29 L. Ed. 723.

The combination suggested by the seventh claim includes "brace-rods rigidly secured to the moldboard and extending toward the runner." In the eighth claim we find the same element described as "rigid brace-rods extending from the moldboard to each side of the runner." In the drawings the brace-rods, 13, 13, firmly bolted to the moldboard and extending to the opposite sides of the runner are a prominent feature. In the specification, classified among the important features of his invention, we find this statement:

"The rear ends of the runner-sections are provided with vertical elongated slots, 14, through which a bolt may be passed, securing the rear ends to rigid brace-rods, as 13, 13. The other ends of the said brace-rods are securely bolted to the moldboard 5."

An examination of the file wrapper and contents shows that the bracing of the moldboard was made an equally prominent feature in the original specification and claim. These braces were carried well up on the wings of the moldboard, and were attached where they would give strength and rigidity to that part of the structure which is subjected to the greatest strain and pressure when the plow is in operation. The defendant has employed lateral braces attached on either side of the depth-runner, but running to ears on the frog, and not in any way attached to the moldboard.

This brings us to the question whether the brace-rods in the defendant's structure are a mechanical equivalent of the brace-rods, 13, 13, in the patent in suit. The true test to be applied in such a case seems to be whether the brace-rods of the defendant perform the same function as the rods 13, 13. If the rods as used by the defendant omit to discharge any material function which were devolved upon them in complainant's patent, that would amount to a strong circumstance against infringement. Walker on Patents, § 352; *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup.

Ct. 76, 35 L. Ed. 800. We are inclined to the opinion expressed by Mr. Bates, sworn as an expert on behalf of the defendant (defendant's record, p. 68):

"The brace-rods in defendant's plow do not brace the moldboard at all, any more than they would if they were connected to the standard. These brace-rods run to the ears on the frog, and have no more effect on the moldboard than if they ran to the standard."

It is true that on cross-examination this witness admitted, so far as the adjustment of the runners is concerned, that it is immaterial at what point in the plow structure the upper ends of the brace-rods are attached. Counsel for defendant in argument treat the question as though this were a patent for an improved runner with lateral braces, instead of a combination culminating in a complete plow. The double-moldboard is as essential an element as any in the combination. It breaks the furrow, and turns the soil to either side. It sustains enormous pressure when the plow is driven through heavy soil, and the inventor evidently had in mind the reinforcement of this part of the mechanism and gave due prominence to the same, both in his specifications and claims. Burke employed similar braces "to stiffen the moldboards and prevent them from springing." A brace lending support to the moldboard is discharging a most important function. Another brace, similarly related to the runner, which furnished no support to the moldboard, can hardly be said to be a mechanical equivalent. It appears in evidence that by changing the upper point of attachment of these brace-rods, as the defendant has done, it is enabled to dispense with the moldboards and use the plow as a sweep, while the frog discharges the function of a moldboard. In light soils this is advantageous, because less power is required to operate the plow. The complainant's mechanism will not admit of such adjustment. This circumstance would not of itself furnish an escape from infringement, but it may relieve the defendant of the suspicion of mere colorable invasion.

In applying the doctrine of equivalents the courts discriminate in favor of a primary patent, while in a patent like the one in suit, where the inventor is merely an improver upon an old mechanism capable of performing the same results, a narrower rule of construction is applied. *Morley Machine Co. v. Lancaster*, 129 U. S. 274, 9 Sup. Ct. 299, 32 L. Ed. 715; *Miller v. Eagle*, 151 U. S. 207, 14 Sup. Ct. 310, 38 L. Ed. 121. In view of the state of the art, the law would not permit the complainant, who is a mere detail improver of a common and familiar mechanism, to invoke the doctrine of equivalents, except in a case of palpable invasion. *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344.

The "middle-burster" plow has been in common use for a quarter of a century. Its improvement has progressed step by step. Avery has in the patented structure gathered all the improved features into a combination, with certain alleged improvements. In such a combination patent the terms "brace-rod rigidly attached to the moldboard" amount to a limitation which he cannot now escape

for the purpose of making out an infringement. It will be observed that, if the broad construction contended for by complainant were to be adopted, then the element "brace-rods rigidly secured to the moldboard" would cover all lateral braces attached to the runner sections, no matter in what part of the plow structure such rods might terminate. It is idle to claim that the brace-rods in defendant's plow lend support to the moldboard because they connect with the frog and because the frog is bolted to the moldboard. A glance at the plow will show that the ears on the frog are not so related to the wings of the moldboard as to give any rigidity or strength to the latter. This case falls within the doctrine of *Knapp v. Morss*, 150 U. S. 221, 230, 14 Sup. Ct. 81, 84, 37 L. Ed. 1059, where the court say:

"If the Hall patent was a valid pioneer invention, the doctrine of equivalents might be invoked with regard to the sliding blocks and rests, and thus a different question would be raised, but, being confined to the specific elements enumerated by letters of reference, it is neither entitled to a broad construction, nor can any doctrine of equivalents be invoked so as to make the appellants' device an infringement of the second claim in controversy."

For these reasons we are constrained to hold that claims 2 to 6 of the complainant's patent have been anticipated by the prior art, and that the defendant's structure is not an infringement upon claims 7 and 8, and therefore the bill must be dismissed, with costs.

HARTMAN v. FEENAUGHTY et al.

(Circuit Court, W. D. New York. July 11, 1905.)

DEPOSITIONS—FEDERAL COURTS—EXAMINATION OF PARTY.

A defendant in an action at law pending in a Circuit Court of the United States, who resides out of the district, and more than 100 miles from the place of trial, may be examined as a witness by the plaintiff, under Rev. St. § 863 [U. S. Comp. St. 1901, p. 661].

At Law. Motion to compel Charles H. Loveland, one of the defendants, to answer questions propounded to him as a witness, under section 863 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 661].

Frank F. Reed, for the motion.

A. D. Wales, opposed.

COXE, Circuit Judge. This is an action of replevin pending in the Western District of New York. The witness, whose testimony is desired, is Charles H. Loveland who resides at Binghamton, in the Northern District of New York, more than 100 miles from Buffalo, the place of trial. No controversy arises here as to the competency or materiality of the questions asked the witness, as he refused to answer any of them on the ground that, being a defendant and interested in the result, he cannot be examined under oath prior to the trial except as provided by section 870 et seq. of the Code of Civil Procedure of the state of New York.

So that, the sole question is can a witness, who is also a defendant in an action at law pending in a circuit court, who resides out of the district and more than 100 miles from the place of trial, be examined under section 863 of the Revised Statutes [U. S. Comp. St. 1901, p. 661]? That section provides:

"The testimony of any witness may be taken in any civil cause depending in a District or Circuit Court, by deposition *de bene esse* when the witness lives at a greater distance from the place of trial than one hundred miles."

Mr. Loveland is a witness in such a cause and he lives at a greater distance than 100 miles from Buffalo, the place of trial. The facts, therefore, bring the case within the express language of the statute.

It is not deemed necessary to enter upon an extended discussion of the propositions argued, for the reason that the precise point has been decided adversely to defendants' contention. *Lowrey v. Kusworm* (C. C.) 66 Fed. 539.

It is argued that under the act of March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664], providing for an additional mode of taking the depositions of witnesses in the courts of the United States, the testimony of a party must now be taken pursuant to the provisions of the state code. In support of this contention defendants cite the following cases: *Tooth Crown Co. v. Hanks* (C. C.) 101 Fed. 306; *Tooth Crown Co. v. Carter* (C. C.) 112 Fed. 396. These cases have been overruled in *Hanks Dental Ass'n v. International Tooth Crown Co.*, 194 U. S. 303, 24 Sup. Ct. 700, 48 L. Ed. 989, where the Supreme Court decided that:

"The courts of the United States are not given discretion to make depositions not authorized by federal law, but, in respect of depositions thereby authorized to be taken, they may follow the federal practice in the manner of taking, or that provided by the state law."

In other words, it was decided that proceedings like the present cannot be taken under the state law but must be taken under section 863.

It is argued that the action is based upon an untenable theory and cannot be maintained; this may be so but these are questions for the trial court to determine.

The motion is granted.

THE EDITH L. ALLEN.

(District Court, S. D. New York. June 30, 1905.)

1. SALVAGE—AMOUNT OF COMPENSATION—SAVING WRECKED AND ALMOST DERELICT SCHOONER.

A four-masted schooner, bound from a Florida port to New York in December, with a cargo of lumber in her hold and on her deck, when about 12 miles off Hatteras Light, in the night, struck some object which tore a large hole in her bottom, causing her to fill until her deck load was under water, and the crew were obliged to stay on the roof of the deckhouse. The schooner was anchored, and on the afternoon of the next day the large passenger and freight steamer *Sabine*, bound for New York, came to her rescue in response to her signals of distress. The master

and crew, who were without food, and with their clothing wet and frozen, abandoned the schooner and went on board the steamer. After consultation the steamer sent men on board the schooner, who cut her anchor chain and made fast a towline, and, with considerable trouble and some danger to the steamer, she was safely towed to New York; the steamer being delayed two days by the service. The saved value of the schooner cargo and freight was \$25,000, and the value of the Sabine \$300,000. *Held*, that while the schooner was not, strictly speaking, a derelict, she might justly be considered such for salvage purposes, and that in view of such fact, and that the lives of the crew and of the master's daughter, who was on board, were in peril, and were probably saved by the Sabine, the latter was entitled to an award of \$8,000, besides reimbursement for her losses and expenses.

[Ed. Note.—Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

2. SAME—ELEMENTS OF AWARD—SAVING OF LIFE.

The saving of life forms an essential ingredient where the question of compensation for salvage services is under consideration.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, § 57.]

In Admiralty. Suit to recover for salvage services.

Butler, Notman & Mynderse, for libellants.

Avery F. Cushman, for claimant.

ADAMS, District Judge. This action was brought by The New York & Texas Steamship Company, the owner of the steamship Sabine, and the master and crew thereof, to recover salvage compensation for services rendered to the schooner Edith L. Allen, her cargo of lumber and freight, in December, 1904. The saved value of the schooner, cargo and freight was stipulated to have been \$25,000 and of the Sabine \$300,000. It is not denied that salvage services of considerable merit were rendered and the dispute is concerning the amount of compensation to which the libellants are entitled, they claiming that the schooner was substantially a derelict and a compensation of 50% of the saved value, together with disbursements, should be allowed. The claimant contends that the schooner was not a derelict, and that 10% of the saved value, with disbursements, will be ample.

The Allen was a large four masted schooner, 182 feet long, 39 feet beam and 21 feet depth of hold. She was bound from Fernandina, Florida, to New York, with a cargo of about 800,000 feet of lumber, stowed in her hold and on deck, the latter being about 198,000 feet in quantity. Her draft was 18 feet 6 inches. She left Fernandina on the morning of the 12th of December, fully manned with a crew of 9 men, which included the master. The latter's daughter was also on board. All went favorably until Saturday, the 17th of December, when she ran into bad weather off Hatteras, which obliged her to reef. About 8.45 o'clock P. M., when about 12 miles S. S. E. from Hatteras Light, the schooner struck some submerged object, thought to be a wreck or a rock, which so injured the bottom of the vessel that shortly afterwards she was making water rapidly and soon took in such a large quantity that it was feared when she filled entirely, she would turn over. Her master thereupon concluded to anchor. Soundings were taken and it was

found that she was in 15 fathoms of water. The anchor was cast over, signal lights were set in her rigging and her halyards cut in order to get her sails down. Her whole anchor chain, some 135 fathoms in length, ran out. She soon thereafter filled so that her upper deck was from 2 to 3 feet under water and those on board were obliged to take refuge on the roof of the deck house, where they were not, however, able to keep dry. The sea came over the deck load and frequently drenched those on board, who were soon in a truly pitiable condition. Their provisions were substantially destroyed and the only food they could get was a little bread, wet with the salt water, and some cheese. It subsequently appeared that the vessel had received a very serious wound by the ripping off of her keel, leaving an opening in her bottom of about a foot wide and 30 feet long. She was only kept afloat by her cargo. She displayed signals of distress but though several schooners and steamers were sighted none came to her relief until the Sabine appeared the next day.

The Sabine was a powerful passenger and freight steamer, 317 feet long and 2,479 tons net register. She had triple expansion engines, developing 5,500 horse power, and was running on schedule time between New York, Mobile and other South Atlantic ports. She left Mobile on a voyage to New York, via Brunswick, Georgia, at 12:30 o'clock A. M. Friday, December 16, with a full cargo of lumber, naval stores and cotton, besides carrying from 10 to 20 passengers. She was due in New York Monday, the 19th, late in the afternoon. She sighted the Allen on Sunday afternoon, the 18th, shortly after 1 o'clock. The distress signals of the Allen were observed and the steamer changed her course so as to approach within $\frac{1}{4}$ to $\frac{1}{2}$ a mile. It was then seen that the schooner was lying deck to the water and that the crew were on top of the after house. One of the steamer's life boats was sent to the schooner and the persons aboard were found wet and their clothing frozen. The master of the schooner in response to an enquiry from the mate in charge of the boat said that the whole crew were going to leave and that he could not stay alone but would be obliged to leave also. The captain of the schooner had asked the crew if any one would stay aboard, but all refused, even the first mate, who said that he did not think it was safe to remain. It was said by the crew that the weather was very cold and bad, that they had nothing to eat or drink and could not stay. Thereupon the captain and crew of the Allen left her, the captain and crew in the schooner's boat and the captain's daughter in the steamer's boat. When the schooner's crew reached the steamer, some discussion took place as to what should be done. In response to the captain of the steamer, the captain of the schooner reiterated his description of her condition and upon being informed by the other that she was in the track of vessels and constituted a dangerous menace to navigation, intimated his willingness to have her destroyed by fire if the captain of the steamer thought it necessary.

The captain of the steamer did not, however, give up hope of saving the vessel and after consulting with his first officer and chief

engineer, decided to send a boat's crew to investigate her condition and ascertain whether it was practicable to cut her anchor chain and then tow her north. When those sent reached the schooner, they found water washing over her deck load and that she was 4 or 5 feet by the head. Her main deck was 2 feet or more under water and the main rigging broken on the port side. It was determined to cut the chain and try the towing. It was necessary to cut a hole through the deck to reach the place where the chain was fastened. Two hours of hard labor were required to get the vessel free from the anchor. This was effected by men from the steamer. The master of the schooner was aboard of her during the operation but apparently took no active part in it or subsequent operations. The rest of the schooner's crew remained aboard the steamer and thereafter all necessary work was done by the steamer's crew. While the chain was being cut, a new 200 fathom 10 inch manila hawser was prepared on the steamer for towing use, and when the anchor chain was cut, was run on board of the schooner and made fast around her foremast. All then went aboard the steamer and the towing began, about 5 or 6 o'clock in the evening, but owing to the schooner's bad yawing, and the consequent danger to the hawser, no success could be made of it. It was then determined to put a crew of an officer and 2 men aboard from the steamer to aid in the steering. The steering gear was intact but though she towed better she still sheered badly, and took water aboard almost constantly, causing the steering crew to get wet, so that it was thought advisable to serve liquor to them in such quantities as they wished.

About 4 o'clock Monday morning, the 19th, when they were proceeding, at the rate of about 5 or 6 knots per hour, owing to the surging and heavy strain of the schooner, the hawser parted about 15 fathoms from the stern of the steamer, carrying away the port bitts and tearing up the steamer's deck. The steamer waited till daylight, then ran the same line, shortened 35 or 40 fathoms by the break, to the schooner again and the towing proceeded. Thereafter, until in the vicinity of Sandy Hook, the weather was favorable for the venture, although the submerged schooner towed badly. Early in the morning of the 21st of December, they arrived off Sandy Hook, but there encountered a heavy head wind and notwithstanding the steamer dropped an anchor and kept her engines working ahead, the schooner dragged her 4 or 5 miles to sea. A tug then came and offered assistance, which the steamer was disposed to accept but the weather was so rough that the tug gave up the attempt. Later, about 11 o'clock, the tug *President*, which had been specially dispatched by the steamer's New York agents, arrived and with her assistance the schooner was safely delivered in New York about 7 o'clock. A watchman was then placed aboard to take care of the property but the vessel was taken charge of by several policemen, sent to her from New York. The steamer lost two days in the service which disarranged her schedule time for some subsequent trips.

The first point in controversy is whether or not the schooner was a derelict. The testimony shows that she was not actually abandoned when the steamer took charge of her but her condition was such that an abandonment was imminent if an opportunity were afforded for the crew to escape. She had a small boat to which they could have resorted in case of danger but it was not suitable in character or size for use except in case of absolute necessity. There was no help for the schooner excepting from such assistance as could be rendered by a powerful steamer and there seemed to be no other than the Sabine immediately at hand. The lives of her crew were in peril and the arrival of the steamer was very timely. Two other steamers, able to assist, came after the Sabine took charge but there is nothing to indicate that either of them would have undertaken the venture, which was not at all certain in its results and necessarily involved some hazard to the steamer, as ocean towing of this kind generally does, especially in connection with the breakage of towing lines, when there is a possibility of getting the steamer's end thereof in her propeller. Such a danger arose in this case but was averted by the careful handling of the steamer, which had her engine stopped until the steamer's end of the broken hawser was safely on board. While the schooner was not a derelict in the strict sense, she was apparently in a hopeless condition, except for such assistance as was rendered here. It seems to be a case in which she might justly be considered a derelict for salvage purposes.

A moiety is not always, however, allowed in derelict cases. The award necessarily depends upon the circumstances of the case under consideration. Where there is a large saved value and small risk to the salvaging vessel, it would be manifestly unjust to deprive the owners of half their value in the property. My recent decision in *The Theta* (D. C.) 135 Fed. 133, is strongly urged upon me by the libellant as a case in point but there the vessel was actually a derelict, the saved value was less than half the amount here involved and the vessel was drifting helplessly not very far from the entrance to New York Harbor. The necessity of holding out a large reward, which it seemed to me existed there, does not appear here as this vessel was not drifting and it is not by any means correct to say that she would ever be, in that sense, a menace to navigation. If she was not saved by some steamer, she would eventually doubtless have sunk where she was anchored and until then could, as long as her lights lasted, be seen by night as well as day, and avoided by vessels, of which, while she was in the track of navigation, there were not as many likely to go as where *The Theta* was drifting. Of course, she would as a sunken vessel have been dangerous but what would have happened in such a case is too much a matter of conjecture to be seriously considered. No doubt it was expedient to remove or destroy her and the Sabine is entitled to great credit for accomplishing the former result and bringing her to port but it does not seem to me that the same rule should be applied as in *The Theta*.

In arriving at an award, another matter is to be taken into consideration. If there were danger in towing the vessel, then it was proper to terminate the risk as soon as possible. That could have been done by taking her into Newport News, where she could have been taken care of. The steamer with her in tow could have reached that place some time Monday afternoon and, having left the schooner, arrived at New York the following night. She therefore would have saved considerable time as well as risk. Of course it would not have been as convenient as taking the schooner to New York, where the steamer was bound, but the question is what was best for the schooner.

On the other hand, it is to be remembered that here the lives of the crew of the schooner were probably saved, which forms an essential ingredient where the question of compensation is under consideration. The *Thomas Fielden*, 32 *Law Journal*, 61, 62; *The Toledo* (D. C.) 136 Fed. 959.

Having all these matters in view, it seems to me that an award of \$8,000 will be proper.

The libellant, The New York & Texas Steamship Company, claims recovery of the following damages and expenses, viz.:

Hawser destroyed	\$ 387 10
Towage by tug <i>President</i>	225 00
75 extra tons of coal consumed.....	262 50
Extra provisions for crew.....	150 00
Repairs to steamer's bits and deck.....	88 90
	<hr/>
	\$1,113 50

The claimant objects to the allowance of \$387.10 for the hawser and \$225 for the services of the *President*.

The sum claimed for the hawser is disputed. It is contended that while it is testified for the steamship company that it still has the hawser, because it is considered that more should be obtained for it than old junk, which it could be sold for, bringing \$62.90, it is actually worth more. It does not appear though how it is worth any more. The cost is shown as \$450 and the present value as \$62.90, leaving a deficit of \$387.10, fairly attributable to the service in towing.

The towage charge is criticised because it is not shown how it was earned. The *President* was employed in the regular course of business and when her bill of \$225 was rendered, it was paid without question because it was regarded as moderate. It seems to have been so. The tug was a large and powerful one and went outside for the purpose of assisting in bringing in the schooner into port. She was at first towed by the *Sabine*, with the tug acting as a rudder; finally the tug took charge of the wreck, and did all of the towing. There is nothing before me to show that the charge was in any way improper under the circumstances. I think the steamship company was justified in paying the bill and making the amount a charge in the case.

The salvage awarded above will be divided between the owner of the steamship and her crew in the proportions of 75 and 25 per cent.

The crew's share will be divided according to their wages, the master and those who went on the schooner to steer her to have double shares. The engineer who worked on the anchor chain to have one and a half shares.

Decree for the libellants accordingly.

NEW YORK & C. MAIL S. S. CO. v. ANSONIA CLOCK CO.

(District Court, S. D. New York. July 10, 1905.)

SHIPPING—RIGHT OF SHIP TO SHARE IN GENERAL AVERAGE—HARTER ACT.

Although the Harter act of February 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], relieves a shipowner from liability for the negligence of his servants in the navigation and management of the vessel, it does not, either expressly or by implication, render valid a contract which entitles him to share in a general average made necessary by such negligence, and a stipulation therefor in a bill of lading is void.

[Ed. Note.—General average, see note to *Pacific Mail S. S. Co. v. New York, H. & R. Co.*, 20 C. C. A. 357.]

In Admiralty.

Wing, Putnam & Burlingham, for libellant.

Butler, Notman & Mynderse, for respondent.

ADAMS, District Judge. This action was brought by the New York & Cuba Mail Steamship Company to recover from the Ansonia Clock Company, the sum claimed to be due to the former under an average bond given by the latter on the 31st day of May, 1901. The steamship Yucatan, belonging to the steamship company, negligently stranded on the 28th of May, 1901, on the Mexican Coast, between Campeche and Vera Cruz. She was hauled off the 29th of May and towed into the harbor of the latter port. Some salvage claims which became due from the steamship and cargo were adjusted and the goods were delivered to the various shippers upon the execution and delivery of average bonds. The respondent gave such a bond to the libellant, whereupon its goods were delivered to it. Subsequently the respondent's share of the salvage, amounting to \$117.49, was paid without contest, but payment of a claim of \$54.47, alleged to be due under the bond, was refused, hence this action which was brought to enforce payment.

The question involved is whether a clause contained in the bill of lading, seeking to avoid the effect of the decision of the supreme court in *The Irrawaddy Case*, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130, is valid. Such clause provided:

"If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at the time of shipment, or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General

Average, or for any special charges incurred, but, with the shipowner shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent, or other defects or unseaworthiness."

The clause was intended to supply by contract what the law was deficient in, with respect to average contributions, as shown by *The Irrawaddy Case*. There can be no doubt that the clause was sufficient to secure such a result if it was valid. The respondent contends that the said clause is unlawful and invalid under the statute of the United States known as the Harter Act and hereinafter quoted.

The stranding in this case being admittedly negligent, nevertheless it is sought to make the cargo contribute to the ship for a part of her losses, incident to such stranding.

Concededly, such a result is not permissible unless the Harter Act makes provision to that effect. Before the Act, it was well settled in this country that ship owners could not protect themselves against the effect of negligence by contract. In *The Irrawaddy*, it was said (page 190 of 171 U. S., page 832 of 18 Sup. Ct., 43 L. Ed. 130):

"And it is the well-settled law of this court that a common carrier by sea cannot, by any stipulation with a shipper of goods, exempt himself from responsibility for loss or damage arising from the negligence of the officers or crew; that it is against the policy of the law to allow stipulations that will relieve a carrier from liability for losses caused by the negligence of himself or his servants. *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788."

It simply remains to consider what effect the Harter Act had upon the situation. The Act, so far as it is necessary to be considered here, is as follows (Act Feb. 13, 1893, c. 105, 27 Stat. 445, 2 Supp. Rev. St. pp. 81, 82 [U. S. Comp. St. 1901, p. 2946]):

"Chap. 105.—An act relating to navigation of vessels, bills of lading, and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted, &c., That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners,

agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

It is urged by the libellant that the object of the Act was to bring to ship owners in this country a relief already enjoyed by competing ship owners in Europe, through liberty to contract against negligence, and that as the ship owner is absolutely absolved by the Act for such negligent stranding as is here in question, he can now resort to a stipulation to protect him from the average results of such negligent navigation as caused by the loss.

The argument is plausible and would be entitled to serious consideration, if it did not change the policy of law with respect to the effects of negligence and allow the ship owner to obtain indirectly a relief which the Act seemingly does not give directly. I find nothing in the Act tending to show that Congress intended to go beyond its explicit provisions in changing the policy of the law and as this loss was the result of negligence, the effects of it must seemingly rest as they were before the enactment. As the Act now stands, there is very little in the way of legal liability for loss of or damage to cargo requiring care on the part of navigating officers in the management of vessels under their charge. Congress, in its wisdom, has seen fit to relieve vessels and their owners from all damage or loss resulting from faults or errors of navigation or in the management of vessels, but it has not gone to the extent of saying that notwithstanding negligence, affirmative relief may be had in such cases, by allowing stipulations to be made providing for the recovery of general average contributions. It seems to me that the case is one for legislative relief. It was said in *The Irrawaddy* (pages 193, 194 of 171 U. S., page 833 of 18 Sup. Ct., 43 L. Ed. 130):

"But we think that for the courts to declare, as a consequence of this legislation, that the ship owner is not only relieved from liability for the negligence of his servants, but is entitled to share in a general average rendered necessary by that negligence, would be in the nature of a legislative act. The act in question does, undoubtedly, modify the public policy as previously declared by the courts, but if Congress had intended to grant the further privilege now contended for it would have expressed such an intention in unmistakable terms. It is one thing to exonerate the ship and its owner from liability for the negligence of those who manage the vessel; it is another thing to authorize the ship owner to do what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew."

It is urged by the libellant that the Harter Act in not forbidding such a contract as is now set up impliedly allows it, but, in my opinion, while there is no definite provision in the Act repugnant to the desired construction, there is nothing to warrant it, and in the absence of explicit authority in the act for such contract provision as is now desired to be validated, the old law, forbidding contracts

tending to overcome the effect of negligence, still remains in force and must be applied here.

It is further urged by the libellant that since the decision in *The Irrawaddy*, a matter pertinent here which was regarded as doubtful under the English authorities, has since been approved by the courts there. It was said in *The Irrawaddy* (page 194 of 171 U. S., page 834 of 18 Sup. Ct., 43 L. Ed. 130):

"It is said that it has been decided by the English courts that when, by a contract in the bill of lading, the ship owner is exonerated from liability for loss caused by the fault of the master or crew, he is entitled to share in a general average contribution.

An examination of the cases cited has not convinced us that there has been any such final decision by the English courts. * * *

The case particularly referred to was *The Carron Park*, 15 P. D. 203, 6 Asp. Mar. Law Cas. 543. The approval will be found in *Milburn & Co. v. Jamaica Fruit Importing & Trading Co. of London*, 2 Q. B. 540, 9 Asp. Mar. Law Cas. 122.

It does not seem important, however, that the English ruling is thus strengthened. It was said in *The Irrawaddy*, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130 (page 195 of 171 U. S., page 834 of 18 Sup. Ct., 43 L. Ed. 130):

"But whatever may be the English rulings as to the effect of contract immunity from negligence as entitling the ship owner to claim in general average, we do not think the cases are parallel. By the English law the parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit. Very different is the case where a statute prescribes the extent of liability and exemption."

The libel is dismissed.

In re HAMMOND et al.

(District Court, S. D. New York. August 3, 1905.)

CORPORATIONS—ELECTION OF DIRECTORS UNDER NEW YORK STATUTE—ADJOURNMENT OF MEETING.

Under New York Stock Corporation Law (3 Heydecker's Gen. Laws N. Y. p. 2905, c. 36) § 20, which requires notice to be published of a meeting for the election of directors, but authorizes a corporation to adopt by-laws, a by-law which provides for the adjournment from time to time of any stockholders' meeting at which a quorum is not present, and the transaction of business at such adjourned meeting without further notice thereof, is valid, and directors may legally be elected thereunder at an adjourned annual meeting of which due notice was given as required by the statute.

In Bankruptcy. On motion to confirm referee's report.

William Woodward Baldwin appearing specially for motion to set aside service of subpoena, etc.

John D. Fearhake, for petitioning creditors.

Hornblower, Byrne, Miller & Potter, for alleged bankrupt.

ADAMS, District Judge. This is a motion to confirm the report of the referee in bankruptcy to whom was referred the question of setting aside the service of the subpoena on the ground that the same was not served upon a person duly authorized to accept the same and that the attorneys who appeared for the bankrupt were not duly authorized.

The determination of the question depends upon the construction of the Stock Corporation Law of New York which provides as follows (3 Heydecker's Genl. Laws N. Y. p. 2905, c. 36):

"Sec. 20. Directors.—The directors of every stock corporation shall be chosen from the stockholders at the time and place fixed by the by-laws of the corporation by a plurality of the votes of stockholders voting at such election. * * * Notice of the time and place of holding any election of directors shall be given by publication thereof, at least once in each week for two successive weeks immediately preceding such election, in a newspaper published in the county where such election is to be held, and in such other manner as may be prescribed in the by-laws. * * *"

The by-laws of the corporation provide as follows (pages 3 & 4 of commissioner's report):

"Section 1: Annual Meeting. The annual meeting of stockholders for the election of directors for the ensuing year and for such other business as may properly come before the meeting shall be held at the office of the Company in the City of New York, Borough of Manhattan, on the last Thursday of April of each year at 2:30 o'clock in the afternoon of that day, and should said day fall upon a legal holiday then upon the first day thereafter not a legal holiday.

The Secretary shall serve personally or send through the Post Office at least ten days before such meeting a notice thereof addressed to each stockholder at his last known post-office address and public notice thereof as required by law.

At all meetings of stockholders, except where it is otherwise provided by law, it shall be necessary that stockholders representing in person or by proxy a majority of the capital stock shall be present and constitute a quorum. In case a quorum shall not be present at any meeting, a majority of those pres-

ent may adjourn the meeting to some future time not less than eleven nor more than twenty days later, and the Secretary shall thereupon mail or serve written notices of such adjourned meeting to each stockholder of record of the Company as hereinbefore provided."

This by-law was subsequently amended on the point of notice as shown below.

The Special Commissioner describes the facts as follows:

"In the year 1904, the last Thursday of April was the 28th. Notice of this regular annual meeting for the election of directors for that day was duly and regularly given, as provided by the charter and by-laws and by law (p. 10). Only two persons were present at that meeting, viz: James Douglas Campbell, secretary of the company, who was not a stockholder, and Ralph W. Ashcroft, who owned ten shares of stock, and nothing was done except to adjourn to May 18, 1904, and then said meeting was subsequently adjourned from time to time to September 1, 1904, at which meeting William B. McGann and four other persons were voted for as directors; but a notice was never given by publication of this meeting of stockholders for September 1st, 1904, or in any other manner. The board of directors which was elected for the last Thursday of April, 1903, known as the hold-over board, did on the 29th day of December, 1904, authorize the calling of a special meeting of the stockholders of the company for Thursday, February 2, 1905, for the purpose among other things of electing a board of directors (pp. 141-144), and written notices were sent to all the stockholders of record by the secretary, dated December 30, 1904 (p. 146) and published in the Evening Post, a newspaper published in New York County, on January 16, 23 and 30, 1905 (pp. 147-8), calling a meeting of the stockholders of the company for the purpose of electing directors for Thursday February 2nd, 1905. And on said 2nd day of February, 1905, said meeting was called to order and five persons were voted for by the stockholders for directors, one of whom was R. D. Hanna; and immediately thereafter said five persons voted for the usual officers of the company and Mr. R. D. Hanna was chosen as vice-president and accepted both of said positions; and said R. D. Hanna is the same person who was served with the subpoena herein.

As above appears, the by-laws of the company followed the suggestion of section 20 of the Stock Corporation Law and fixed the last Thursday in April of each year at 2:30 p. m. as the time for electing directors by the stockholders, and the meeting was regularly called and advertised for that day in 1904; but directors were not elected on that day. Section 24 of the Stock Corporation Law of the State of New York (3 Heydecker's Gen. Laws, p. 2860, c. 35) provides:

'If the election has not been held on the date so designated (that is, by the by-laws), the directors shall forthwith call a meeting of the members of the corporation for the purpose of electing directors, of which meeting notice shall be given in the same manner as the annual meeting for the election of directors.'

And as if anticipating such emergencies, section 23 provides:

'If the directors shall not be elected on the day designated in the by-laws or by law, the corporation shall not for that reason be dissolved; but every director shall continue to hold his office and discharge his duties until his successor be elected.'

It is practically conceded that on the 28th day of April, 1904, Mr. Ashcroft with his ten shares could have legally elected a board of directors, in spite of the by-laws which required him to have a majority of the stock. Matter of Rapid Transit Ferry Co., 15 App. Div. 533 [44 N. Y. Supp. 539]."

It was held that the service was valid and the appearance of the attorneys legal and binding.

It is well settled that provisions in statutes and by-laws requiring the election of directors to be held on a specified day are regarded as directory and the election if not held on the regular day, may

be held on a later day. Further that if there be no other irregularity or infirmity in their title they will be directors de jure. *Beardsley v. Johnson*, 121 N. Y. 224, 228, 24 N. E. 380. The commissioner apparently recognizes this to be the law and does not rest his decision upon the fact that the election was not made by the stockholders on the 28th of April, 1904, but upon what he considers defective notice of the adjourned meeting, which, it is contended, and I think correctly, should be regarded as simply a session of the regular meeting of which proper notice was duly given to stockholders. The by-laws, as amended, provided in this connection:

"In case a quorum shall not be present at any meeting a majority of those present may adjourn the meeting from time to time not exceeding thirty days at any one time until a quorum shall be present and the business of the meeting accomplished, and of such adjourned meeting no notice need be given."

The commissioner has proceeded upon the theory that as the Ashcroft (?) board never again republished any notice of a new day for electing directors subsequently to the 28th of April, 1904, at 2:30 P. M., the voting which took place September 1st 1904, was not a valid election of directors, and this is based on lack of notice to members of the corporation.

The law does not in terms designate a day for such elections. By the General Corporation Law, p. 2855, § 11, authority is given to corporations as follows:

"5. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and the transfer of its stock, if it has any and the calling of meeting of its members. * * * By-laws duly adopted at a meeting of the members of the corporation shall control the actions of its directors. * * *"

Section 20 of the Stock Corporation Law, quoted above, provides for the election of directors and the amended by-laws provide, as shown above, that if a quorum be not present that a majority of those present may adjourn the meeting from time to time until a quorum shall be present and of such adjourned meeting no notice need be given. Proceeding accordingly, due notice having been given for the annual meeting of April 28th 1904, at 2:30 o'clock P. M., the meeting was convened and adjourned from time to time until September 1st 1904, when it elected directors. The commissioner says that in his opinion the by-laws were broader than the statute when they declared that the meeting for the election of directors could be adjourned without giving new notice by publication and as the Ashcroft board never again republished any notice of a new day for electing directors subsequently to the 28th of April, 1904, the election which took place September 1st 1904, was not a valid election of directors.

This presents the whole controversy. I find that I can not agree with the learned commissioner in his conclusion. The contrary view seems to be well established. It is said in *Cook on Corporations* (4th Ed.) § 599:

"A stockholder may expressly or by his acts waive his right to have a notice of a corporate meeting duly served upon him. * * *"

The same author also says (section 601):

"An adjourned meeting is but a continuation of the meeting which has been adjourned; and when that meeting was regularly called and convened and duly adjourned, the shareholders may, at the adjourned meeting, consider and determine any corporate business that might lawfully have been transacted at the original meeting. * * * Where the original meeting was duly called and convened, the stockholders are not entitled to any other notice of the adjourned meeting than that which is implied in the adjournment. * * *"

It does not appear why the stockholders should not arrange the matter to suit their own convenience, as long as they do not infringe the law, and no form of agreement could be more effective than duly adopted by-laws of the corporation. In the absence of a binding authority to the contrary, I am inclined to adopt this view, which I believe is in conformity with the general understanding and practice.

I think the September election took place at a properly adjourned session of the annual meeting and that the directors were then duly elected and they have not by any other attempted subsequent election been legally ousted from their offices.

The motion to confirm the commissioner's report is denied and the motion to strike out the alleged service of the Plasmon Company and to strike out the general appearance of the attorneys therefor is granted.

THE CITY OF LOWELL.

(District Court, S. D. New York. August 11, 1905.)

1. COLLISION—STEAMER AND FERRYBOAT—FOG.

A collision occurred in East river in the early morning between a ferryboat crossing from Brooklyn and a steamer passing down the river, in which the ferryboat was sunk. There was a fog so dense that a vessel could be seen only a few feet distant, and the ferryboat had stopped, or nearly so, to locate the position of her slip, when she was struck by the steamer with such force as to cut a hole several feet deep. *Held*, that the steamer was in fault (1) for being near the Manhattan shore, instead of in the middle of the river, and (2) for excessive speed in view of the fog, which made it dangerous to move at all unless at a speed so slow that the vessel could be stopped almost instantly. Also *held* that the ferryboat was not in fault.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 170, 172, 184.

Collision rules as to speed of steamers in fog, see note to *The Niagara*, 28 C. C. A. 532.]

2. SAME—RIGHT OF FERRYBOAT TO NAVIGATE IN FOG—CROSSING VESSELS.

A ferryboat running between Brooklyn and Manhattan has the right to navigate prudently and maintain steerageway even in a fog, and when nearing her slip the starboard hand rule for crossing cannot be invoked against her by another vessel.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 205.]

In Admiralty. Suit for collision.

James J. Macklin and La Roy S. Gove, for libellant.
Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. This action was brought by the Union Ferry Company of New York and Brooklyn to recover the damages sustained by its ferryboat Columbia from a collision with the steamer City of Lowell, about 7 o'clock in the morning of the 4th day of November, 1904, in the East River about off Wall Street. The tide was the first of the ebb and a dense fog prevailed. The Lowell, bound down the river, struck the Columbia, bound across the river, on the starboard side, just forward of the wheel and penetrated the hull.

The Columbia, a side wheel wooden ferryboat, 165 feet long, built 40 odd years ago, but kept in good condition, was making her first trip of the day from Brooklyn to Manhattan and left her slip at the foot of Montague Street, a little before 7 o'clock. Lying in the slip, she was heading about N. W. by W. and when she had gone out about 3 or 4 lengths, she turned somewhat to the starboard, so that she headed about North intending to make the upper slip at Wall Street, which required a change to the Westward somewhere near the end of the passage. She started under a jingle bell but reduced speed after clearing the slip so that she did not thereafter make more than about 3 miles per hour and when she reached the vicinity of Manhattan, as her navigators judged by the sounds heard by them coming from there, she stopped. Hearing the sounds of a vessel in her immediate vicinity, she backed but before her engines had much effect the collision occurred.

The Lowell was a twin screw steel passenger vessel, built in 1894 322 feet long, with a sharp stem. She had left New London the previous night, on a regular trip to pier 40 North River, New York. She met with some fog in the vicinity of New York, which delayed her a little. After passing through Hell Gate about 6:24 o'clock, where her speed was reduced, she proceeded at full speed again to the vicinity of 10th Street reef. Both sides of the river could then be seen, but on rounding Corlears Hook she encountered a dense fog, in which objects could not be seen more than about 100 feet. Her engines were stopped and fog signals sounded; in about a minute she proceeded again under one bell, but after making a few turns of her engines, she was again stopped and suffered to drift; such manœuvres were repeated and before reaching the Brooklyn Bridge, she exchanged signals of one blast with a ferryboat, presumably belonging to the Catherine Ferry, and passed under her stern; the bridge being reached, she passed, it is claimed, under the centre of it, probably a little on the Brooklyn side; she was then given a compass course of S. W. by W. $\frac{1}{2}$ W., her engines being stopped and then given a few turns ahead. She then heard a whistle, rather on her starboard bow, of a ferryboat apparently bound for Brooklyn and being very close, the Lowell's engines were backed; the ferryboat passed from the Lowell's starboard to port, without even her loom being seen. This boat has since been identified as the Fulton of the Fulton Ferry Line, which was bound for New York, and having missed the New York slip she desired to make, backed out, the pilot going to the pilot house on the Brooklyn end. It was

while this manœuvre was being made that she crossed the bow of the Lowell under the signals of one whistle. After the Fulton had in such way passed the Lowell, the latter put her engines ahead again, when a whistle was heard twice on the port bow and the sound of paddles and the Lowell's engines were put at full speed astern and were in that motion for an estimated period of $\frac{3}{4}$ of a minute, when the outlines of the Columbia appeared a little to port of ahead and perhaps 40 feet distant.

The collision happened almost immediately, the Lowell striking the Columbia on the starboard side of the New York end, making a V shaped wound about 25 feet deep on the forward part and 16 feet on the after part, where the break was about 8 feet forward of the wheel. The cut ran in to the hull from $1\frac{1}{2}$ feet below the water line to above the deck. At the deck it went in about 6 feet and at the lowest point $7\frac{1}{2}$ feet down, to 8 inches wide, where it went considerably less, owing to the cutting away of the Lowell's stem and the turn of the Columbia's bilge. The angle of the collision, as shown by the wound, was about $5\frac{1}{2}$ points or 60 degrees.

The Lowell kept her stem in the wound by moving ahead and the boats were held together by a line. They remained together about 40 minutes, during which time the Lowell pushed the Columbia till she sank near the Atlantic Avenue Ferry, Brooklyn. During this time the passengers and crew of the Columbia were taken on the Lowell and then landed, after which the Lowell proceeded to her own pier.

The amount involved is large and the controversy between the parties has been strenuously contested. They charge each other with faults as follows:

As against the Lowell:

1. That she had not a proper competent and sufficient lookout.
2. That she was navigating at an excessive and unreasonable rate of speed.
3. That she did not sound the whistles required by law.
4. That she came down the river close to the piers on the Manhattan side, instead of proceeding in the middle of the river.
5. That she did not stop and back in time.

As against the Columbia:

1. That she had the Lowell on her starboard hand and was bound to avoid her and the burden of exculpation is upon her.
2. That she had no proper lookout.
3. That her pretensions regarding slowing her speed and stopping are not entitled to credit.
4. That the collision was in mid river and not close to the New York slip.
5. That she did not sound proper whistles.

To determine the fault or faults which lead to a collision in such a dense fog as prevailed here is difficult but I think the circumstances indicate that the principal fault was with the Lowell in navigating nearer to the Manhattan shore than was prudent or justifiable. Of course she contends that she was not near the shore but

had taken a S. W. by W. $\frac{1}{2}$ W. course from the bridge and thus kept in the middle of the river. It appears that the Columbia had gone across until those on her heard the shore sounds, the voices of men on the docks, the noise of hoisting engines on the shore or on the vessels loading or discharging at the piers, and the squeak of the fog bell, and estimated therefrom that she was within a short distance of the shore. Her contention in this respect is sustained by the testimony of the pilot of the Fulton, which on her first attempt to make her slip reached within about 75 feet of the Manhattan piers and thereby finding herself out of position, backed off so that she was perhaps two lengths, or about 330 feet from the ends of the piers. It was after she had stopped backing that the Lowell passed between her and the Manhattan shore. This witness particularly impressed me with the truthfulness of his statements and in view thereof and the testimony of those on the Columbia, the conclusion necessarily follows that the Lowell was in a place in the river prohibited by law in being so far away from the middle. The Hartford (D. C.) 125 Fed. 559, affirmed March 7, 1905. It is possible that even if the Lowell had passed under the centre of the bridge, as her witnesses testify, that she was thereafter set over to the Manhattan side by the ebb tide, perhaps when she was under slight headway, without the knowledge of those navigating her, but whatever the fact may be in such connection, there seems to be no reasonable doubt that she was there and so violating the law, thus producing the collision.

In arriving at this conclusion, I have not overlooked the claimant's argument:

(1) That the angle of collision indicates no change of course by either vessel, i. e., the Columbia not having changed her heading of North and the Lowell hers of S. W. by W. $\frac{1}{2}$ W.

It is true that the Columbia was heading North but the indicated heading of the Lowell is not inconsistent with a position near the shore although it is with her own contention that she passed under the Brooklyn side of the bridge and kept the stated course. It seems that she was either mistaken in the view that she passed under such part of the bridge, or in having kept her course. If she were set over by the tide, while keeping her heading, it would perhaps account for and reconcile the apparent discrepancies. But in any event, there does not seem to be anything in the argument tending to overcome the credible testimony about the position of the Columbia, near the Manhattan shore.

(2) That the time of the collision precludes the Columbia's claim.

It appears that the collision occurred shortly after 7:09 but that would have given the Columbia, having left Brooklyn a little before 7 o'clock, ample time to have reached the vicinity of her Manhattan slip at the time of the collision at slow speed. Her ordinary time in crossing to Manhattan in the ebb tide during clear weather is about 7 minutes. On this occasion, she probably occupied 12 or 13 minutes, so that although there was not as much time, occu-

pied in crossing, as she claimed, there was enough time to permit her to come over at the speed it appears she was navigated in.

Another fault of the Lowell was her speed. Taking the dense fog into consideration she should have gone at a much lower rate or not at all. While she was being navigated with a certain degree of care and caution, which might have sufficed to avoid accidents in ordinarily foggy weather, the condition of the atmosphere this morning precluded navigation except at such a very low rate of speed that the headway of a steam vessel could be almost instantly stopped. Vessels could only be seen a short distance away, estimated at 40 feet at the time of collision. It is obvious that the Lowell going at the rate she probably was, was moving at great risk to other vessels with passengers and herself. She was going ahead until the Columbia was made out and then her reversing did not have much, if any, effect upon her headway, as shown by the extent of her penetration of the substantial woodwork of the Columbia and by the considerable listing of the latter to port, caused by the contact, notwithstanding a reversal of her engines at full speed for an estimated period of $\frac{3}{4}$ of a minute. It seems clear that the Lowell was moving ahead faster than was prudent under the circumstances.

The respective lookouts are criticised but I see no reason to place any fault upon either vessel for any such defect. If the lookouts had seen and reported more than they did, it would doubtless have been more in accord with some of the decisions, but they seem to have been fairly able men properly stationed and performing their duties with reasonable efficiency.

The signals of the vessels are also criticised but they do not seem to have any bearing upon the collision. There does not appear to be any authority or excuse for the Lowell to have given signals of three blasts when drifting, according to her claim, but they did not mislead the Columbia in any way, nor did the latter's signals of four blasts to her bell man on the pier in New York mislead the Lowell. Both gave sufficient fog signals, which the other heard in due time. It is not necessary in view of such fact to consider the matter further.

Both vessels reversed before the collision. The Columbia was substantially stopped when the Lowell appeared and her reversing had little effect owing to the short period during which it prevailed. The Lowell reversed, her witnesses say, $\frac{3}{4}$ of a minute before the collision, nevertheless her headway was not then completely stopped, indicating, as I have above found, a greater degree of speed than she should have been running at under the circumstances. The delay in reversing is doubtless a fault but is merged in that of proceeding too fast.

It only remains to consider the fault charged against the Columbia of not avoiding the Lowell under the starboard hand rule. It appears that the Columbia had had ample time to get fully across the course of the Lowell if the latter had been in the proper part of the river. The Columbia can scarcely be deemed in fault for

being in the way of the Lowell, when near her Manhattan slip. She was not, under the circumstances, subject to the rule invoked.

The Columbia had a right as a ferryboat to navigate prudently and maintain steerage way even in a fog—The Orange (D. C.) 46 Fed. 408, 410; The Whitehall (D. C.) 68 Fed. 1022; The Chicago (D. C.) 134 Fed. 1013, 1014—and I fail to see that she neglected her duty in any way.

Decree for the libellant, with an order of reference.

THE SAGINAW AND THE HAMILTON.

In re CLYDE S. S. CO.

(District Court, S. D. New York. August 2, 1905.)

1. ADMIRALTY—ACTION FOR WRONGFUL DEATH UNDER STATE STATUTES—MEASURE OF DAMAGES.

In enforcing in a court of admiralty a right of action for wrongful death in a collision on the high seas, which is given by the statute of the state to which the vessels belonged, the measure of damages is governed by the law of such state.

2. COLLISION—RECOVERY FOR DEATH OF MEMBERS OF CREW—EFFECT OF VESSEL'S FAULT.

The first officer of a vessel sunk in a collision is not chargeable with negligence because of her improper navigation, where he acted in all that he did under the orders of the master; and the fact that such vessel as well as the other was in fault for the collision does not affect such officer or members of the crew so as to preclude a recovery of full damages for their deaths from the fund paid in by the other vessel in proceedings for limitation of liability.

3. SAME—PLEADING.

A claim for damages by reason of the death of a person in collision, filed in proceedings in admiralty for limitation of liability by the administratrix of the deceased, but based on a state statute which gives the right of recovery to the widow, is sufficient to authorize a recovery where it discloses that the claimant is also the widow of the deceased, and an amendment making the claim in that capacity may properly be allowed.

4. WRONGFUL DEATH—MEASURE OF DAMAGES—USE OF LIFE TABLES.

Mortality tables prepared for life insurance purposes afford little aid in determining the duration of life in actions to recover damages for wrongful death, and especially where the deceased was a colored person.

In Admiralty. Suits for limitation of liability on account of collision. On exceptions to commissioner's report.

Wing, Putnam & Burlingham, for the Old Dominion Steamship Company.

Robinson, Biddle & Ward, for the Clyde Steamship Company.

Convers & Kirlin, Hunt, Hill & Betts, A. Leo Everett, and Arthur L. Fullman, for various claimants.

ADAMS, District Judge. These are exceptions to the commissioner's report made in consequence of the decision of this court on the merits of the applications of the owners of the steamships

Hamilton and Saginaw to limit their liability. See *In re Clyde S. S. Co., etc.* (D. C.) 134 Fed. 95.

The report is as follows:

"The interlocutory decree directed me:

'(1) To take proof as to the amount, validity and priority of all claims for property losses to which exceptions shall be filed as aforesaid, and to report upon the total damages sustained by the two colliding vessels, as well as by the loss and destruction of the cargo and effects upon the Saginaw.

(2) That as to such claims as are already filed to recover for personal injuries and for loss of life of the persons who may have perished by or in consequence of said collision, the Commissioner report the amount of damages in each case with all evidence taken, or introduced, before him, touching such claims so as to enable the court thereafter to determine the amount of damages.

(3) That such report also state the facts and amounts showing the proper ultimate apportionment and adjustment of all collision claims and liabilities, as between the two petitioners herein.'

I. All of the claims for loss of cargo have been compromised and settled and the total amount thereof is stipulated before me to be the sum of..... \$110,633 39

All of the claims for loss of personal effects, and all of the claims for personal injuries, including the claim for the death of Eliza Jones, S. B. Kenney, administrator, have been settled and the amount thereof has been stipulated before me in the sum of.. 9,679 06

making a total of..... \$120,312 45

All of these amounts were paid by the Old Dominion Steamship Company or by the underwriters for its account.

One-half of that amount is chargeable against the Clyde Steamship Company \$ 60,156 22

In addition the Clyde Steamship Company should bear one-half of the damage to the steamship 'Hamilton'. The amount thereof, including demurrage, is stipulated at the sum of \$11,083.08, one-half of which is..... 5,541 54

making a total charge against the Clyde Steamship Company of \$ 65,697 76

Brought forward \$ 65,697 76

On the other hand, it is stipulated that the total loss of the steamer 'Saginaw' is the sum of \$90,000, with one-half of which the Clyde Steamship should be credited, namely..... 45,000 00

leaving a balance due the Old Dominion Company of..... \$ 20,697 76

Releases from various claimants, together with the statements and receipts of the adjustment and settlement of the cargo claims are in evidence before me giving in detail the names of the shippers, the values of their respective shipments, and the amount paid in settlement and adjustment of their claims.

The result of this adjustment is that there are left pending before me only the claims for loss of life.

The following are the death claims:

(1) Primus Gilmore, as administrator of Alfred Gilmore, deceased.. \$10,200

(2) Alvin Lee Joseph, as executor under the will of Edward S. Goslee, deceased 20,000

(3) Sallie T. Morris, as administratrix of William Morris, deceased.. 15,000

(4) Mary Swanson, as administratrix of Peter Swanson, deceased.. 12,000

(5) Mary Anderson, as administratrix of Sarah Elam, deceased.... 15,000

(6) Joseph Lawson, as administrator of Edmund Page, deceased.... 8,100

(7) Luther Hawley, as widower of Mary Hawley, deceased..... 10,000

(8) Maurice G. Belknap, as administrator of Laura Hawley, deceased 10,000

In assessing damages, and in passing upon the question of contributory and imputed negligence, the law to be applied is the law of Delaware if the courts of that state have pronounced upon the question; if they have not, the federal law is to be applied.

It will be remembered that the various claimants are in this court in invitum. These are proceedings to limit liability and the court has issued an injunction against proceedings in any other forum, or by any other proceedings than the present. It is therefore manifestly just that the claimants should not be deprived of any benefits which they might have received, in case the law of Delaware is more favorable to them than the law of the Federal Courts; but on the other hand if there are any principles of law enunciated by the Delaware courts more favorable to the steamship than the law as announced in the Federal Courts, the ship may likewise claim the benefit of them.

That the law of Delaware applies is settled in the case of Northern Pacific Company against Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 954. In that case the contract of employment was made in Montana and the accident occurred in that state; the action was brought in Minnesota; there was a difference in the statutes of the two states as to the amount which the plaintiffs in such cases might recover. The court said, (page 197, 154 U. S., page 980, 14 Sup. Ct., 38 L. Ed. 958):

'The question which those assignments of errors present is, was the amount of damage to be controlled by the law of the place of employment and where the accident occurred, or by the law of the forum in which the suit was pending?'

And at page 199 of 154 U. S., and page 981 of 14 Sup. Ct., 38 L. Ed. 958:

'We think there was no error in holding that the right to recover was governed by the *lex loci*, and not by the *lex fori*.'

In *Slater v. Mexican National Railroad Co.*, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900, the court said at page 126 of 194 U. S., and page 583 of 24 Sup. Ct., 48 L. Ed. 900, as follows:

'Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught. * * *'

And on page 127 of 194 U. S., and page 583 of 24 Sup. Ct., 48 L. Ed. 900:

'As the cause of action relied upon is one which is supposed to have arisen in Mexico under Mexican laws, the place of the death and the domicile of the parties have no bearing upon the case.'

In *Railroad Co. v. Babcock*, supra, the court at page 197 of 154 U. S., and page 980 of 14 Sup. Ct., 38 L. Ed. 958, quoted with approval from *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771, the following:

'In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought.'

In the case of *Boston and M. R. Co. v. McDuffey*, 79 Fed. 934, at page 937, 25 C. C. A. 247, at page 250, the court held as follows:

'The question whether or not an injured servant shall have the right of action for damages against a negligent master, when such master's negligence has been committed through the instrumentality of another servant, is one which deals with the right of action itself, not with the remedy.'

See, also, *Maier v. Union Pacific, D. & G. R. R. Co.*, 106 Fed. 309, at page 310, 45 C. C. A. 301, at page 302, where the court applied the law of the place where the collision of railway trains occurred, as settling the liability of the defendants to the plaintiffs for their negligence. See, also, *Stewart v. Baltimore & Ohio R. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537.

The cases of *the Steamboat Company v. Chase*, 16 Wall. 522, 21 L. Ed. 369, and *City of Norwalk (D. C.)* 55 Fed. 98, cited in the brief for the Steamship do not negative the conclusions above stated. The former case came up to the Supreme Court of the United States by writ of error to the Supreme Court of Rhode Island, in whose courts a right of action for death upon the tidal waters between Providence and Newport, within Rhode Island, sustained by the state courts, was likewise sustained by the Supreme Court, the conclusion being that the right of action given by the state statute for such a death, does not interfere with the exclusive jurisdiction of the District Court con-

ferred by the Constitution and the judiciary acts. While in the City of Norwalk (D. C.) 55 Fed. 98, the court held that the state statute does not create a cause of action but that it creates a new right and liability, and the court in that case held that the law of imputed negligence of the state applied so far as to defeat the right of the deceased to recover against his own ship.

The law of Delaware, in regard to the law of damages, is stated in the case of *Williams v. Walton & Whawnn Co.*, 9 Houston, 322, 32 Atl. 726, as follows:

'If the jury shall find a verdict for the plaintiff, then if she is entitled to damages, they are to estimate the reasonable probabilities of the life of the deceased, and give the plaintiff such pecuniary damages, not only for past losses but for such prospective damages as a jury can find she has suffered or will suffer, as the direct consequences of the death of said deceased.'

In *Maxwell, administrator, v. Wilmington Street Railway Company*, 1 Marvel, 199, 40 Atl. 945, the court said, at page 208 of 1 Marvel, and at page 947 of 40 Atl.:

'The measure of damages is such a sum as the deceased would probably have earned in his business during life, and would have gone to his next of kin, taking into consideration the age of the deceased, his ability, disposition to labor, habits of living and expenditure.'

In the case of *Reed v. Queen Anne's R. R. Co.* (Del. Super.) 57 Atl. 529, the court, at page 532, said:

'If you find for the plaintiff it should be for such a sum of money as will reasonably compensate her for any and all damages that she has sustained or may hereafter sustain by reason of the death of her said husband, basing your verdict upon the number of years the deceased would probably have lived had he not been so killed. In measuring damages in this case you are not to be governed by what would probably have been the gross earnings or income of the deceased, but by what portion of the gross earnings or income the plaintiff would probably have received from the deceased as his wife, if he had lived.'

In *Cox v. Wilmington S. R. Co.* (Del. Super.) 53 Atl. 569, the court said:

'If you find for the plaintiff it should be for such a sum of money as will reasonably compensate her for any and all damages that she has sustained or may hereafter sustain by reason of the death of her said husband; basing your verdict upon the number of years the deceased would probably have lived, and have given to her the benefits of his society and support as such husband.'

In *Crocker v. Pusey & Jones Co.* (Del. Super.) 50 Atl. 61, the court said:

'If you find for the plaintiff, it should be for such sum as, in your judgment, under the evidence in this cause, the deceased would probably have earned in his business during life and left as his estate, taking into consideration the age of the deceased, his ability and disposition to labor and habits of living and expenditures.'

See, also, *Parvis v. P. W. & B. R. R. Co.* (Del. Super.) 17 Atl. 702; *Wilcox, admr. v. W. C. Railway*, 2 Pennewill, 157, 44 Atl. 686; *Tully v. P. W. & B. R. R. Co.* (Del. Super.) 50 Atl. 95; *Neal v. W. & N. C. Elect. Ry. Co.* (Del. Super.) 53 Atl. 338.

I do not find that the rule as stated in the courts of the United States differs materially from the Delaware rule. See *The Oceanic* (D. C.) 61 Fed. 339 at page 363; *Lindstrom v. The International Navigation Company*, 117 Fed. 170 at page 175, (reversed on another point [C. C. A.] 123 Fed. 475); *In re Humboldt Lumber Manufacturers' Association* (D. C.) 60 Fed. 428, 444; *Harkins v. Pullman Palace Car Co.* (C. C.) 52 Fed. 724, affirmed 55 Fed. 932, 5 C. C. A. 326; *Ross v. Texas & Pac. Railway Co.* (C. C.) 44 Fed. 44; *Nickerson v. Bigelow* (D. O.) 62 Fed. 900; *Cheatham v. Red River Line* (D. C.) 56 Fed. 248; *Boden v. Demwolf* (D. C.) 56 Fed. 846; *Ladd v. Foster* (D. C.) 31 Fed. 827; *Central Trust Co. v. Wabash, etc.* (C. C.) 34 Fed. 616; *Whiton v. Chicago, etc.*, 2 Biss. 282, Fed. Cas. No. 17,597; *O. L. Hallenbeck* (D. C.) 119 Fed. 468; *The Elizabeth* (D. C.) 114 Fed. 757; *Voelker v. C., M. & St. P. R. R. Co.* (C. C.) 116 Fed. 867; *The Dauntless* (D. C.) 121 Fed. 420; *Killien v. Hyde* (D. C.) 63 Fed. 172; *Middleton v. Compagnie Transatlantique Co.* (D.

C.) 110 Fed. 1001; *Memphis Consolidated Gas and Electric Co. v. Letson* (C. C. A.) 135 Fed. 969.

Of the eight persons, claims for whose deaths are before me, Goslee and Swanson were white; Morris, Gilmore, Page, Mrs. Elam, Mrs. Hawley and Laura Hawley were colored. They were all upon the Saginaw and were drowned. Swanson, Gilmore, and Mrs. Hawley and her child were passengers; the other four were members of the crew. In the cases of Morris and Swanson objection is made to the allowance of any amount upon the ground that each left a widow and that the action is brought by the personal representatives. The Statute of Delaware (13 Del. Laws 1866-67, pp. 28, 29, c. 31; 31 Del. Laws 1901, p. 500, c. 210) provides that 'the widow or widower of such deceased person, or if there be no widow or widower, the personal representatives may maintain' &c. The interlocutory decree, however, in this case directs me as follows:

'2. That as to such claims as are already filed to recover for personal injuries and for loss of life of the persons who may have perished by or in consequence of said collision, the commissioner report the amount of damage in each case, with all evidence taken or introduced before him touching such claims, so as to enable the court thereafter to determine the amount of damages'.

In the Swanson case the claim as presented reads as follows: 'The claimant, Mary Swanson, administratrix of the estate and widow of Peter Swanson, deceased, alleges as follows' and then recites that she is the widow of Swanson and also that letters of administration have been issued to her.

In the case of Morris, the claim is in the form of an affidavit by Sallie T. Morris which recites that she is the widow and executrix of William Morris, and that she claims her damages not reciting the capacity in which she asserts the claim. The court, by order entered May 27, 1905, permitted the filing of the claim, nunc pro tunc, in an amended form.

I am in considerable doubt as to whether I have the right, under the order of reference herein, to reject these claims for the reason stated by the proctors for the Hamilton, and hence, I have considered the amount of damages leaving the matter of the right of the claimants to assert their claims for consideration by the court.

All the claims for death were asserted against the Hamilton; the claims for the death of William Morris, Edward S. Goslee, Mrs. Hawley and Laura Hawley were also asserted against the proceeds of the Saginaw.

I. The Claim of Primus Gilmore as Administrator &c. of Alfred Gilmore. Alfred Gilmore was 18 years of age at the time of his death. He was a waiter in constant employment and received from \$5.50 to \$6 a week in addition to board and lodging. He was unmarried and left surviving him his father, Primus Gilmore, who files the claim as administrator, his mother and several sisters and brothers. He had contributed to some degree to the support of his father who also received assistance from others of the children, and who was a farmer and teamster at Fayetteville, North Carolina. The father was 59 years of age and the children were from about 25 years of age to 5 years. Alfred Gilmore, according to the proof before me, was steady and industrious and of good habits but not of a saving disposition. He sent to his father small sums of money amounting to perhaps \$50 in one year. His expectation of life, according to the mortality tables, 20 Am. & Eng. Encyc. 885, was a little over 43 years. I think the sum of Three thousand five hundred dollars (\$3,500) should be allowed upon this claim.

II. The Claim of Alvin Lee Joseph as Executor Under the Will of Edward S. Goslee, Deceased. Goslee was a man of 60 years of age and the first officer of the Saginaw. He was in vigorous health, a man of good habits, of thrifty disposition, having accumulated real estate and personal property of the value of \$10,000 or \$11,000. His wages were \$67 per month, including an allowance for board. His expectation of life was 15 years.

The proctors for the Hamilton asked for the dismissal of this claim upon the grounds: 1st, that Goslee, claimant's testator, was negligent; and 2nd, on the ground that his estate can not recover because of the negligence of

Tunnell, master of the vessel, and of the other officers concerned in her navigation. I find as a fact that Goslee was not personally negligent and that the only negligence was that of Tunnell, the master of the vessel; and inasmuch as the claim is asserted practically only against the Hamilton, the proceeds of the Saginaw being so small as to be negligible, I find as a matter of law that the defense is not available against the Hamilton, even if it could be raised in behalf of the Saginaw.

I find that the claim should be allowed in the sum of Seven thousand five hundred dollars (\$7,500).

III. The Claim of Sallie T. Morris as Administratrix of William Morris, Deceased. William Morris was the steward on board the Saginaw, a position which he had held for some time. He was forty years of age and had been married a year and ten months before his death. His wages were \$35 a month and his board and lodging on board the steamer for which the company made an allowance of \$17 per month, making his earnings in reality \$52 per month. His wife, shortly before his death, had opened a restaurant in Richmond, and Morris was accustomed regularly to send money to her; she testifies that he sent her \$50 a month. He was industrious, sober and of good habits. He left no children. His expectation of life was twenty-eight years. I am of opinion that she should be allowed Four thousand five hundred dollars (\$4,500).

IV. The Claim of Mary Swanson as Widow and Administratrix of Peter Swanson. Swanson lived in Philadelphia and was a shoemaker by trade, but occasionally went to sea. He had been in hospital in Norfolk in consequence of an accident on the Saginaw some two months before he started to return by the same ship to Philadelphia. He came as a passenger. He was 42 years of age and his earnings were about \$600 per year. His wife, and his son of 12 years of age, had been dependent upon him for support. He appears to have been a man of good health and of sober and industrious habits. His expectation of life was twenty-seven years. I think the claim should be allowed in the sum of Four thousand two hundred and fifty dollars (\$4,250).

V. The Claim of Mary Anderson as Administratrix, &c. of Sarah Elam. Sarah Elam was the stewardess on the Saginaw. She was 53 years of age and a widow, and the administratrix is her daughter; there are two other daughters, both unmarried, the youngest of the three being twenty years old. Her wages were \$10 per month, which with the allowance above stated, amount to \$27 per month. The three children were more or less dependent upon her for support. She had been thrifty and had saved some money. Her expectation of life was nineteen years. I allow this claim in the sum of Two thousand five hundred dollars (\$2,500).

VI. The Claim of Joseph Lawson as Administrator of the Estate of Edmund Page, Deceased. Page was the first cook on the Saginaw, his earnings being from \$500 to \$600 per year; he had dependent upon him for support his mother, Lucretia Stokes, well along in years, who, since his death, has fared poorly. His age was between 31 and 35 years, and his expectation of life was thirty-two years. He had been in the habit of sending his mother from \$13 to \$15 a month. He left also a sister and a brother. I allow this claim in the sum of Four thousand two hundred and fifty dollars (\$4,250).

VII. The Claim of Luther Hawley, as Widower of Mary Hawley, Deceased. Mary Hawley was sixteen years of age at the time of her death. She was the wife of Luther Hawley, who was a laborer earning from \$7 to \$13 a week, and she took care of his housekeeping arrangements. She was healthy and vigorous, and her expectation of life was forty-five years. I think the claim should be allowed in the sum of Three thousand five hundred dollars (\$3,500).

VIII. The Claim of Maurice G. Belknap as Administrator of the Estate of Laura Hawley, Deceased. Laura Hawley was an infant in arms, only about a month old, but according to the testimony, was a healthy and vigorous child. Her expectation of life was about 36 years. I allow Seven hundred and fifty dollars (\$750) on this claim.

A tabular statement of the ages, expectations, yearly wages, occupations and amount allowed by me, is as follows:

Name.	Age.	Expectation.	Yearly Wages.	Occupation.	Amount.
Gilmore	18	43	\$360	Walter	\$ 3,500
Goslee	60	15	924	Chief Officer	7,500
Morris	40	28	624	Chief steward	4,500
Swanson	42	27	600	Shoemaker	4,250
Sarah Elam	53	19	324	Stewardess	2,500
Page	35	32	550	Cook	4,250
Mrs. Hawley	16	45		Wife of Luther Hawley	3,500
Laura Hawley	1 month	36		Infant	750
Total					\$30,750

One half of this amount, namely \$15,375, should be chargeable against the Saginaw; which, together with the amount of \$20,697.76 due the Old Dominion Company as already stated, makes a balance due of \$36,072.76.

I have not credited the amount of the proceeds of the Saginaw in this report in the thought that this amount, together with the apportionment of the costs &c., should be a matter for the final decree."

The exceptions are 27 in number but the proctors for the exceptant, the Old Dominion Steamship Company, state in their brief that they raise four general questions, as follows:

"1st. The error of the Commissioner in following the law of Delaware, not only as to the liability of the petitioners, but even in the method of ascertainment of the amount of damages.

2d. The error of the Commissioner in dealing with the claims of the crew of the Saginaw, (a) as to the personal negligence of the mate Goslee, and (b) as to the right of any members of the crew to recover against the Hamilton more than 50 per cent. of the damages otherwise recoverable by them.

3d. Regarding the claims presented by administratrices, and not by widows.

4th. Generally in the assessment of damages following reported verdicts of juries, based on mortality tables, and not according to Admiralty precedents."

1.

The argument for the exceptions in this connection is substantially that while the court may, under its ruling that the vessels were parts of the territory of Delaware, determine if an action lies and as to the point of time when a suit may be brought, its award should not be governed by the views of Delaware juries but should follow recognized precedents in the admiralty courts. As I read the decisions, they do not determine that the verdicts rendered by juries shall in any way be binding or influential upon the decision of this court in reaching the amounts which should be awarded as damages but merely that the measure of damages shall be ascertained according to the law of the place. The courts in admiralty must determine the amounts in practically the same way as juries would reach them, i. e., follow the ordinary methods in assessing the damages which they would instruct juries to adopt if the cases were tried in that way, but the amounts found by juries in particular cases can not be regarded in any way as precedents for other cases. It was recently said by the Circuit Court of Appeals for the Fifth Circuit, *Quinette v. Bisso* (C. C. A.) 136 Fed. 825, 841:

"Administering a Louisiana statute as to a wrong occurring within its borders, involving its own citizens, we think we should be governed in the measure of damages by analogy to the decisions of its highest court under similar circumstances."

2.

It appears that the mate Goslee was not personally negligent with respect to the speed of his vessel. That was regulated by the master, who was responsible for the general conduct of his ship and it would be anomalous to hold the chief officer personally liable for acts committed under the instructions of the master. The latter came to the vicinity of the wheel some time prior to the collision and although he was not there just before the contact, having gone forward to obtain a better view, nevertheless he was giving orders for the movements of his vessel up to the end.

As to the right of the representatives of any member of the Saginaw's crew to obtain against the Hamilton more than 50% of the damages otherwise recoverable, it appears that the decedents were not so identified with their vessel that they could be regarded as participating in her faults and for that reason be excluded from any part of a recovery. The commissioner's determination in this respect is apparently correct.

3.

The claims as originally presented were made by the libellants as administrators. Subsequently some of the parties, when apparently necessary, presented their claims as widows and amendments were allowed to that effect. It is objected that the amendments were too late under the Delaware statutes, as they provide, (29 Delaware Laws of 1897, c. 594, p. 712):

"Section 1. That from and after the passage of this act no action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of one year from the date upon which it is claimed that such alleged injuries were sustained."

Seemingly, the original libels were sufficient to properly present the claims to the court. No harm, at least, was done by the amendments. I think the rights of the parties have been preserved.

4.

This has been partly considered above and it only remains to take up the question of the use of mortality tables.

Such tables are very useful in insurance matters, but seem to afford little real aid in determining the duration of life in such cases as are now presented and I think the commissioner has erred in adopting them for the purpose of absolutely determining the probable duration of the lives of many of the persons, whose deaths have to be considered here. Judge Simonton has said in this connection, *The William Branfoot* (D. C.) 48 Fed. 914, 917:

"Counsel for libellant press upon the consideration of the court tables, prepared by insurance agents, showing the expectancy of life at various ages,—35 years if libellant is 30, and 32 years if he is 35,—and ask that he be allowed the sum of his daily wages for this period. This would be securing for libellant compensation for a certain period when we are dealing with the most uncertain thing in the world,—human life. I have no confidence in, and less respect for, these tables made up by insurance agents, in which, of course, large allowance must be made for heavy commissions, expenses, and profit."

And this is especially true where colored persons are concerned. Mr. Hoffman in his "Race Traits and Tendencies of the American Negro" says (pp. 57, 58):

"The great difference in the expectation of life for the two races is brought out with scientific accuracy in the following life table, abstracted from the census of 1880. No official life tables have been compiled since that year.

Comparative Expectation of Life for White and Colored Persons in Four Southern Cities in 1880.¹

Washingt'n, D. C. 1880			Baltimore, Md. 1880		Charleston, S. C. 1880		New Orleans, La. 1880	
Ages.	Whites. Years.	Col'd. Years.	Whites. Years.	Col'd. Years.	Whites. Years.	Col'd. Years.	Whites. Years.	Col'd. Years.
0	42.86	25.25	38.18	23.26	38.34	21.82	38.10	25.56
5	51.85	44.48	51.72	44.32	48.10	40.68	47.88	40.76
10	48.71	42.13	49.66	42.40	44.24	37.96	44.16	37.50
20	40.42	35.34	41.50	36.62	36.24	31.60	35.80	30.63
30	33.64	30.22	34.74	30.64	30.08	27.14	29.35	26.98
40	27.36	24.63	28.05	24.68	24.60	21.51	23.78	22.49
50	21.06	18.90	21.27	18.92	18.80	15.72	18.62	17.78
60	15.01	13.70	15.01	13.42	13.14	11.04	13.58	13.22
70	9.98	9.19	10.24	8.87	8.81	7.90	9.43	8.90
80	6.70	6.37	7.14	6.38	6.59	5.94	6.73	6.46

¹ Census of 1880, Vol. XII, pages 773-783.

This table shows the expectation of life at ten selected ages for both races, in representative southern cities, bringing out in a forcible way the difference in the vitality of the two races. In the District of Columbia a white person at the age of thirty for instance would have a chance of living about three and a half years longer than a colored person of the same age; in Baltimore about four years, and in New Orleans two and a half years. But this is an age at which the general mortality is very low for both races. At all the earlier ages the differences are of course much greater. The excessive mortality at the very early ages of course affects the mortality at the older ages by reducing the differences between the two races. For the periods of old age the expectation of life is almost the same for both races."

I have compared the figures given with those of the census and find them to have been correctly extracted.

Under such circumstances, it does not seem to have been proper for the commissioner to use the mortality tables to the extent he has. The foregoing considerations lead me to modify his conclusions with respect to the claims as follows:

1. Primus Gilmore, as administrator of Alfred Gilmore.

The deceased was a young colored waiter on the Saginaw. The claimant was held to be entitled to \$3,500. I think in view of the fact that the deceased was earning but small wages, with board, and did not, nor was likely to, contribute much to his father's support, that the amount allowed was excessive and that the sum of \$2,000 will amply compensate the claimant for any loss that he may have suffered by the death.

2. Alvin L. Joseph, executor of Edward S. Goslee.

The deceased was a white man and the chief officer of the Saginaw. He was 60 years of age and earning \$67 per month with board. The claimant was allowed \$7,500. I think the commissioner ruled correctly as to the claimant being entitled to recover

the full loss arising from the death, but in view of the decedent's age and limited earning capacity, I consider that the award should be reduced to \$6,000.

3. Sallie T. Morris, as administratrix and widow of William Morris.

The deceased was a colored steward on the Saginaw, earning \$35 per month and board worth \$17 per month, making his earnings practically \$52 per month. The claimant was allowed \$4,500. It is not probable that the deceased would have been able to send his wife much of his earnings. In any event, she was able to and did earn her own living, partially at least. I think the allowance should be reduced to \$3,000.

4. Mary Swanson, as administratrix of Peter Swanson.

The deceased was 42 years of age. He was a shoemaker by trade earning about \$600 per year. On this occasion he was making a trip on the Saginaw as a passenger. He had a wife and son, the latter, about 12 years of age, dependent upon him for support. The claimant was allowed \$4,250. Barring consideration of the decedent's expectation of life as shown by the mortality tables and adopted by the commissioner, the deceased was not in sound physical condition, having been injured while working on the Saginaw as a sailor. It does not appear that he worked at his trade very steadily and in view of his impaired physical condition, I think the commissioner's award is excessive. It should be reduced to \$2,750.

5. Mary Anderson, as administratrix of Sarah Elam.

The deceased was a colored stewardess on the Saginaw. She was 53 years of age and earned \$10 per month with board. The latter was worth to her about \$17 per month. She left three children who were more or less dependent upon her for support. The claimant was allowed \$2,500. In view of the age of the deceased and her small earning capacity, I think the award was excessive and should be reduced to \$1,500.

6. Joseph Lawson, as administrator of Edmund Page.

The deceased was the first cook on the Saginaw earning \$500 or \$600 per year. His age was between 31 and 35 years. He left a mother and a brother and sister surviving him. He had been in the habit of sending his mother from \$13 to \$15 per month, but was irregular in doing so. She was between 60 and 70 years of age. An allowance of \$4,250 was made. It seems that no one but his mother had any expectation of aid from him and in view of her advanced years and the small and irregular amounts that he contributed to her support, I think the award should be reduced to \$3,000.

7. Luther Hawley, as widower of Mary Hawley.

The deceased was but 16 years of age. She was the wife of the claimant, a laborer earning from \$7 to \$13 per week. He very

quickly married again. He had a child by the deceased born about the 1st of April, 1903. An allowance of \$3,500 was made. The widower's loss was not great and the award seems to be excessive. It should be reduced to \$2,000.

8. Maurice G. Belknap, as administrator of Laura Hawley. The deceased was an infant about a month old but healthy and vigorous. The value of this life is exceedingly problematical. I think the award is excessive and it should be reduced to \$400.

The death claims as allowed are as follows:

1. Primus Gilmore, as administrator of Alfred Gilmore, deceased,	\$ 2,000.
2. Alvin L. Joseph, as executor of Edward S. Goslee, deceased,	\$ 6,000.
3. Sallie T. Morris, as administratrix and widow of William Morris, deceased,	\$ 3,000.
4. Mary Swanson, as administratrix of Peter Swanson, deceased,	\$ 2,750.
5. Mary Anderson, as administratrix of Sarah Elam, deceased,	\$ 1,500.
6. Joseph Lawson, as administrator of Edmund Page, deceased,	\$ 3,000.
7. Luther Hawley, as widower of Mary Hawley, deceased,	\$ 2,000.
8. Maurice G. Belknap, as administrator of Laura Hawley, deceased,	400.
	<hr/>
	\$20,650.

The exceptions are overruled save as here indicated and the report as modified will be confirmed.

SIEGERT et al. v. GANDOLFI et al.

(Circuit Court, S. D. New York. August 4, 1905.)

1. TRADE-MARKS—RIGHT TO NAME—"ANGOSTURA BITTERS."

Complainants, manufacturers of bitters at Port of Spain, Trinidad, under the firm name of "Dr. J. G. B. Siegert and Sons," *held* on the evidence not entitled to the exclusive use of the name "Angostura" as a trade-mark or trade-name in connection with their product, but the firm of C. W. Abbott & Co., of Baltimore, manufacturers of bitters sold by defendant, *held* entitled to use such name in the way it does use it, on evidence showing that such firm and its predecessors have continuously used it in connection with their product for more than 50 years.

2. UNFAIR COMPETITION—RIGHT TO PROTECTION IN EQUITY—FRAUDULENT REPRESENTATIONS.

A manufacturer of bitters, which in its advertisements to the public sets out what purports to be certificates of chemists and medical experts stating that they have analyzed such bitters, that they contain no ingredients which are harmful or intoxicating, and recommending them for use by invalids, both adults and children, when in fact such bitters contain more than 40 per cent. of alcohol, is guilty of fraudulent misrepresentation, and is not entitled to invoke the aid of a court of equity to protect its product against alleged unfair competition.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 94.

Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

3. SAME—EVIDENCE CONSIDERED.

Evidence considered, and *held* not to establish fraudulent conduct on the part of a manufacturer, or any acts constituting unfair competition in trade, which would entitle complainants to equitable relief.

Suit in equity to enforce the alleged rights of the complainants to the use of the word "Angostura" as a trade-name for the bitters of their manufacture, and to restrain alleged unlawful competition by defendants in putting up and selling bitters in such close imitation of complainants' goods, name, packages, labels, etc., that persons desiring to purchase complainants' goods, bitters, are deceived into purchasing bitters made by one Cornelius W. Abbott. It is not extravagant to say that substantially all the defenses known to the law are pleaded.

Arthur Furber (William M. Copeland, of counsel), for complainants.

John Brooks Leavitt, for defendants.

RAY, District Judge. It appears from the evidence that at some time prior to 1830, or about that time, one Johannes G. B. Siegert, a German, and probably a physician and surgeon, settled at Angostura, Venezuela, South America. Here he commenced the manufacture of certain bitters. After a time—it is impossible to fix any definite date—these bitters were sent out of the country, Venezuela, and were called and labeled "Aromatic Bitters," a purely descriptive name. As these bitters were made at, and sent out wherever there was a market for them, from Angostura, they

undoubtedly came to be known as "Angostura Bitters." In 1875 the factory for manufacturing these bitters was removed from Angostura, then Ciudad Bolivar, to Port of Spain, Trinidad. J. G. B. Siegert was now dead, and the business was carried on by Carlos D. and Alfredo C., two sons, who took in a third in 1876. About this time one Meinhard registered in England the name "Angostura Bitters" for bitters made by him, whereupon complainants changed their label so that the headings of the panels of the descriptive matter wrapped about the bitters which had read "Aromatic Bitters, prepared by Dr. Siegert at Angostura" (now Ciudad Bolivar), were made to read "Aromatic Bitters or Angostura Bitters, prepared by Dr. Siegert at Angostura, now in Port of Spain, Trinidad." Between 1881 and 1886, in consequence of a decision of the courts of Maryland that this label misrepresented as to the person by whom the bitters were prepared, the label was changed to read "Aromatic Bitters or Angostura Bitters formerly prepared at Angostura by Dr. Siegert, and now in Port of Spain, Trinidad, by his sons and successors, under the old firm or name of Dr. J. G. B. Siegert & Hijos." It is clear from the evidence that neither Siegert nor his sons ever selected and applied the name "Angostura" to these bitters as their name or designation. The original Siegert and the sons named and sold them as "Aromatic Bitters," a purely descriptive name, until others, and more than one, had commenced to manufacture similar bitters, and name and sell them as "Angostura Bitters." Others were making and selling Angostura Bitters as early as in the 60's, and there is credible evidence that this was done many years earlier. It will be noted that as late as in the 80's these complainants were clinging to the original name of these bitters, "Aromatic Bitters." True, they say "Aromatic or Angostura," but this adding of "or Angostura" was after competitors had come into the field with bitters which such competitors called "Angostura Bitters." True, these bitters from Angostura, Venezuela, South America, had come, with those who took pains to note the place of manufacture, to be called Angostura Bitters, the same as we distinguish the Ohio buggies or wagons from the New York or New England vehicles. It was not until 1871 that the Siegerts registered a trade-mark in the United States. The first was "J. G. B. Siegert's Angostura Bitters." This recognized that there were other "Angostura Bitters" on the market, as in fact there were and had been for years. In 1873 the registration "Angostura Bitters" was made as a trade-mark. Those registrations were made in the interest of complainants. But they gave notice of a claim. They did not change any existing fact. The evidence shows some effort by the complainants to enjoin the use of the name "Angostura Bitters," etc., by others; but in one case, at least, the action failed for the reason that complainants were not in a court of equity with clean hands. It is not satisfactorily shown that the Siegert bitters were the only ones made in Angostura, or that region, even, that came to be called by the public Angostura Bitters. This court cannot find from the

evidence that complainants ever became entitled to the name "Angostura Bitters" as their trade-mark or trade-name. Until in the 80's, as said, they did not give their goods that name, except to show that they were the same as "Angostura Bitters." Prior to that the name was "Aromatic Bitters," the alternative name "Angostura Bitters." Why this alternative name? Evidently to show to the public they were the same as the bitters on the market known as "Angostura Bitters." But the claim was not made that this was the name. There is an aromatic bark coming from Venezuela known as "Angostura bark." There was a city on the Orinoco river called Angostura. Angostura is a common name in the Spanish language. One meaning is "narrow" or "contracted." At the point where the city of Angostura was and is situated the river narrows. These narrows were known as "The Angostura." While there are many places, towns, or cities in old Spain and Spanish territory named "Angostura," I have no doubt the city of Angostura on the Orinoco river was given that name because of these narrows. After all, the first settlers there may have been from Angostura, in old Spain, and may have named the place from their home town. Boatmen approaching them say, "We are coming to the angostura," meaning the narrows of the river, not the city.

There was much contention on the argument, and there is not a little in the evidence, as to how the former city of Angostura, South America, has been called of late years. In "Cram's New Unrivalled Atlas of the World," published in 1902, the map of Colombia, Ecuador, Venezuela, and British, Dutch, and French Guiana (all one map) gives "Angostura" as the name of the city. It is so shown on the map proper. The name "Ciudad Bolivar" is not on the map. In the margin, among the names of the principal cities, we find both, however. This is a sample, and shows on what frail foundation we stand, when, as in one of the decisions, we attempt to decide this controversy in favor of complainants on the ground no such place as "Angostura" in Venezuela has existed for half a century. In the "New National Encyclopedia," published in 1896, we find: "Angostura, or Ciudad Bolivar, a seaport town of Venezuela, on the Orinoco river about 240 miles from its mouth. It is built at a point or pass (angostura) where on both sides the river is narrowed," etc. In Chambers' Encyclopedia, published in 1870, we find: "Angostura, a seaport town of Venezuela, * * * on the right bank of the Orinoco," etc. There is no mention of Ciudad Bolivar. By law the name of the city was changed in 1846 to Ciudad Bolivar. But while statutes may change the name of a place for certain legal purposes, it cannot change the popular name or name by which in many instances people will know and speak of it.

Complainants' bitters are an aromatic bitters, compounded from vegetable substances dissolved in alcohol, which preserves their therapeutic properties. This is the contention of complainants. These bitters contain about 40 per cent. of alcohol. In extensively

advertising these bitters the complainants themselves, and by agents, put out circulars and represent to the public as follows:

Scientific Opinions on the Angostura Bitters of Messrs. Dr. J. G. B. Siegert & Sons.

"I have subjected the Aromatic Bitters of Messrs. Dr. J. G. B. Siegert & Sons to a very searching examination, consisting of a chemical analysis, and an investigation for determining the strength of the drugs and their physiological effects.

"The result of these investigations proves the Aromatic Bitters to be entirely free from all insalutary, over-active, acrid and intoxicating ingredients. The Bitters, on the contrary, only contain most beneficial ingredients, such as bitter, aromatic, balsamic, tonic, strengthening and antiasthenic vegetable substances, particularly those which are derived from plants which are indigenous to tropical America. For this reason the European imitations of Dr. Siegert's Bitters cannot be equal to the genuine and original American Bitters, because the corresponding extracts are never sent to Europe. The artistic combination of these excellent ingredients renders the Bitters of Dr. Siegert one of the purest and most useful hygienic liqueurs now extant, as it can be used by invalids and those in good health, by adults and by children, with equal advantage. For the public this liqueur forms an attractive social drink, and for the sick a useful remedy, which may be particularly recommended in complaints of the stomach and bowels, want of appetite, weakness of the stomach, difficult and painful digestion, complaints of the liver, jaundice, hypochondriasis, hysteria, lowness of spirits, cholera, diarrhoea, vomiting, sea-sickness, etc., and also as a safe domestic cordial.

"The foregoing I hereby certify according to the best of my knowledge and in all good faith.

Dr. Hess,

"Approved Royal Prussian Apothecary
"(1st Class), Examining Chemist,
"and Scientific Expert."

"The Angostura Bitters only contain most beneficial ingredients, such as aromatic, balsamic, tonic, strengthening and antiasthenic vegetable substances, which render this bitters one of the purest and most useful hygienic cordials now extant. They can be used by invalids, and those in good health, by adults, and by children, with equal advantage, and may be particularly recommended in complaints of the stomach and bowels, want of appetite, difficult and painful digestion, complaints of the liver, jaundice, hysteria, lowness of spirit, etc.

Dr. Hess,

"Examining Chemist and Scientific Expert."

"The Aromatic Bitters of Messrs. Dr. J. G. B. Siegert & Sons is doubtless one of the most beneficial discoveries of the present time. They possess a tendency to excite the appetite, strengthen the digestion, and promote the natural motion of the intestinal canal, and the annihilation of the food, in this manner furthering the formation of blood, so that the disturbance in these functions of the body, which produce certain indispositions, are either prevented or cured.

Dr. John Muller.

"Medical Council, Berlin."

"From a medical point of view, this essence (the Angostura Bitters) is to be recommended in the following diseases: want of appetite, complaints and cramps of the stomach, hemorrhoids, dyspepsia, malaise, cholera and cholera, and also as a preventative of contagious diseases. These bitters are the most powerful stomachic and nervine which we possess, and therefore may be warmly recommended by medical men.

A. Groyen,

"Doctor in Medicine and Surgery,

"Berlin Royal Medical Staff."

It cannot be maintained that these statements are true. I am not satisfied that Dr. Hess, examining chemist and scientific ex-

pert, ever existed. So of Dr. Groyen and Dr. Muller. Such persons may have lived, but the evidence strongly indicates that they are mythical persons as chemists, etc., and, if chemists, of little consequence or standing. There are cases holding that a certain amount of misstatement—so-called exaggeration—in advertising such concoctions is permissible. The idea seems to be that it is natural for men to exaggerate in advertising their goods, wares, and merchandise, and that courts ought to sympathize with this human weakness or natural business tendency, and sanction it as a necessary business expedient. We may be compelled to tolerate, but ought not to sanction, such measures. All this may be tolerated as necessary in carrying on our diplomatic relations, but not in our judicial system. We grant no patent rights on "exaggeration." With honest exaggeration or extravagance of statement born of zeal or overestimate of quality this court finds no fault. But when exaggeration assumes the form of intentional misrepresentation as to the uses and qualities and composition, etc., of articles of this description, the courts are bound in common honesty to refuse to sanction it in any way. Shall the courts give by judicial decree a monopoly to certain persons who represent to the public that certain bitters contain nothing intoxicating, when concededly they contain over 50 per cent. of water and over 40 per cent. of alcohol and about 8 per cent. of we know not what?

In *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, at page 227, 2 Sup. Ct. 436, at page 442 (27 L. Ed. 706), we find this language, taken from *Fetridge v. Wells*, 4 Abb. Prac. (N. Y.) 144, viz.:

"Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the frauds of others, they must themselves be free from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that by the fraudulent rivalry of others their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character."

This statement is quoted by the Supreme Court with approval, and I am not aware that that court has receded from that position. It is a doctrine that meets my hearty approval, and seems applicable in this case. In fact, in *Worden v. California Fig Syrup Co.*, 187 U. S., at page 531, 23 Sup. Ct., at page 165 (47 L. Ed. 282), the case is cited with approval, as are many others to the same effect. *Siegert v. Abbott*, 61 Md. 276, 48 Am. Rep. 101 (involving these bitters of complainants), is also cited with approval at page 528 of 187 U. S., and page 164 of 23 Sup. Ct. (47 L. Ed. 282), notwithstanding that *Brown on Trade-Marks* has questioned its authority. If in drawing the line between truth and falsehood in advertising such compounds as these, or those similar, we are to permit any misrepresentation whatever, the degree or amount of misrepresentation must rest in judicial discretion, and depend upon the malleability or flexibility or susceptibility of the conscience of

the court, of the particular judge hearing and deciding the case. It seems to me the place to draw the line is between truth and falsehood, and that actual misrepresentation is outside the protection of a court of equity.

In *Krauss v. Jos. R. Peebles' Sons Co. et al.* (C. C.) 58 Fed. 585, cited and approved by the Supreme Court of the United States (187 U. S. 532, 23 Sup. Ct. 166 [47 L. Ed. 282]), whisky, represented in labels on the bottles to be pure Pepper whisky, contained 35 per cent. of other whisky—that is, 35 per cent. of lie or misrepresentation—and 65 per cent. of Pepper whisky or truth. It was held that complainants must be denied all relief. Taft, Circuit Judge, at page 594, said:

"To bottle such a mixture, and sell it under the trade label and caution notices above referred to, is a false representation, and a fraud upon the purchasing public. A court of equity cannot protect property in a trade-mark thus fraudulently used. It is not material whether the foreign whisky mixed with Pepper's is as good or better whisky than Pepper's, or whether the mixture is better than pure Pepper whisky. The public are entitled to a true statement as to the origin of the whisky, if any statement is made at all. The complainants and Pepper are not to be protected in a deception of the public, even if it works to the advantage of the public."

The learned judge then cites *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706, *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S. 137, and 11 H. L. Cas. 523, making a pertinent quotation therefrom, and also *Buckland v. Rice*, 40 Ohio St. 526; *Palmer v. Harris*, 60 Pa. 156, 100 Am. Dec. 557; *Prince Manufacturing Co. v. Prince's Metallic Paint Co.* (N. Y.) 31 N. E. 990, 17 L. R. A. 129. He also calls attention to *Appeal of Pratt*, 117 Pa. 401, 11 Atl. 878, 2 Am. St. Rep. 676, but fails to approve the case. In fact he disapproves, as does this court, and says: "If the reasoning of Chief Justice Paxson in the case referred to were sound, the principle of *Medicine Co. v. Wood* could never be followed." This court is of opinion that it is a materially false statement to advertise these bitters of the complainants as free from "intoxicating ingredients," and fit to be given children as well as adults as a medicine and a tonic, and even as a beverage, when in fact nearly one-half of every dose taken is composed of alcohol. It may be and probably is true that certain remedies given to children contain alcohol. It may be that no harm comes of it in cases where necessity demands the giving of those remedies. It may not be so. Great harm may come to certain constitutions. The giving of alcohol to children of tender years and delicate constitutions may work disastrous results. Every purchaser and every user of complainants' bitters is entitled to know, so far as the representations actually made are concerned, the exact truth. This representation claimed to emanate from "Dr. Hess, Approved Royal Prussian Apothecary (1st Class) Examining Chemist and Scientific Expert," viz., "I have subjected the Aromatic Bitters of Messrs. Dr. J. G. B. Siegert & Sons to a very searching examination, consisting of a chemical analysis, and an investigation for determining the strength

of the drugs and their physiological effects. The result of these investigations proves the Aromatic Bitters to be entirely free from all insalutary, over-active, acrid and intoxicating ingredients. The bitters, on the contrary, only contain most beneficial ingredients, such as bitter, aromatic, balsamic, tonic, strengthening and anti-asthentic vegetable substances, particularly those which are derived from plants which are indigenous to tropical America." "Entirely free from all * * * intoxicating ingredients." "Only contain most beneficial ingredients." And they, containing over 40 per cent. of alcohol (a concealed fact), are stated to be and recommended as a safe remedy for "complaints of the liver" and "jaundice" and "hysteria," etc. "They can be used by invalids and those in good health, by adults and by children, with equal advantage." The evidence shows that given in some of the complaints for which they are recommended they would prove positively harmful. In this enlightened age but few parents would care to give to their infant children, even in small doses, a mixture containing 40 per cent. of alcohol. These statements are given out to the world as an inducement to the sick or ailing to purchase and use and give to their sick and ailing children. In *Prince Manufacturing Company v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129, cited and approved by the Supreme Court of the United States in *Worden v. California Fig. Syrup Co.*, 187 U. S. 529, 23 Sup. Ct. 164, 47 L. Ed. 282, the court said:

"Any material misrepresentation in a label or trade-mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false misrepresentation, deprives a party of the right to relief in equity. The courts do not, in such cases, take into consideration the attitude of the defendant. * * * And although the false article is as good as the true one, the privilege of deceiving the public even for their own benefit is not a legitimate subject of commerce."

In the Pepper Whisky Case, already cited, we have found that a mere substitution of one whisky for another, to the extent of 35 per cent. only, defeated recovery. In the case now under consideration we have the insertion of 40 per cent. of alcohol into bitters recommended for children, and represented to be free from all intoxicants; that is, alcohol. I cannot find that this representation is either immaterial or innocent.

So they are advertised and represented as follows: "These bitters are the most powerful stomachic and nervine which we possess, and therefore may be warmly recommended by medical men." This is given to the public as a recommendation made by one "A. Groyen, Doctor in Medicine and Surgery, Berlin Royal Medical Staff." When the complainants put out this statement, even if it was made by Groyen, and if he was what the paper represents him to have been, they vouch for the truthfulness of the statement. It is shown not to be true.

In the manufacture of the bitters sold by defendants Angostura bark is used, and defendants insist the name "Angostura" was ap-

plied to this article because of this fact. The bitters are manufactured by C. W. Abbott & Co., of Baltimore, Md., U. S. A. This firm and its predecessor have been making these bitters for about half a century. These bitters have always been named, described, advertised, labeled, and sold by Abbott as "Angostura Aromatic Bitters," which name is immediately followed on the labels and in the advertisements, etc., by a plain unequivocal statement that they are prepared at Baltimore, Md., U. S. A., giving the street and number, by (now) C. W. Abbott & Co. The heading of the label in use when this suit was commenced reads, "Angostura Aromatic Bitters, prepared by C. W. Abbott & Co., 17 S. Charles St. Baltimore, Md., U. S. A." At the very beginning of this label, and where all who look at and read the label at all must see it, is a caution notice in plain bold letters, which reads as follows, and bears the fac simile signature C. W. Abbott & Co., viz.:

"Copyrighted March, 1873—Registered Dec., 1877—Re-registered April, 1884.

"Caution:—Other articles having been placed upon the market and given the name Angostura Aromatic Bitters, originally adopted by us, and sold in bottles which are enveloped in labels or wrappers so nearly resembling ours that some consumers might possibly have worthless imitations imposed upon them instead of our Angostura Aromatic Bitters. We as a better protection to the public and a guarantee of the genuineness of C. W. Abbott & Co's Angostura Aromatic Bitters wrap each bottle with label bearing fac-simile of our signature and will have our name 'C. W. Abbott & Co., Baltimore,' blown in the shoulder and bottom of the bottle. C. W. Abbott & Co."

It is difficult to understand how any observing person paying any attention whatever to what he is purchasing can be misled into purchasing Abbott's bitters when he desires Siegert's. Both have been on the market for half a century. There has been litigation and newspaper comment and advertisements galore. It must be common knowledge—knowledge as common as that there are more than one kind of bitters extant—that Siegert makes and sells "Aromatic Bitters or Angostura Bitters," made in Trinidad, South America, and that Abbott makes and sells "Angostura Aromatic Bitters," made at Baltimore, Md., U. S. A. The labels say this, the advertisements say this, the papers say this, the litigations say this, and on the bottles containing the fluid we find the name of Siegert and Abbott respectively. The general form and size of the bottles is similar, but the evidence does not establish that Abbott copied or intends to imitate. On the whole evidence this court cannot say that the labeling, advertising, and mode of putting up and on the market the bitters of Abbott are calculated to deceive or mislead the public. It may be that in some cases individual purchasers, who are careless in making purchases, will be deceived; but such cases will be rare indeed. This court does not think that the general public inquiring for and desiring to purchase Angostura Bitters, whether consumers or dealers, have in mind the bitters made and sold by the complainants. Some do and some do not, undoubtedly; but I do not think the general or prevailing idea or impression is, or even has been, that Angostura Bitters are a

manufacture of Siegert's exclusively. Such a conclusion is not justified by the evidence. Angostura bark, which is aromatic, is one of the main ingredients of defendants' bitters.

Carefully considering all the evidence in this case, I have arrived at the conclusions: (1) That complainants are not entitled to the use of the word "Angostura" in connection with bitters made by them, or otherwise, as a trade-mark or a trade-name; (2) that C. W. Abbott & Co., the firm that makes the bitters sold by defendants, has the right to use the name "Angostura" in the way it does use it; (3) the complainants have been guilty of such fraudulent misrepresentation in advertising and selling their bitters that they are not entitled to the protection of a court of equity; and (4) that Abbott & Co., whose bitters defendants sell, has not been guilty of any fraudulent conduct, or of any acts constituting or making a case of unfair competition in trade.

The defendants are entitled to a decree dismissing the bill of complaint, with costs.

THE ETRURIA.

THE LEONARD J. BUSBY.

(District Court, S. D. New York. June 26, 1905.)

1. COLLISION—STEAMSHIP AND DRIFTING BARGE—NEGLIGENCE OF TUG.

A towing tug, which cast two barges, having neither motive power nor means of signaling, adrift near the middle of the Hudson river opposite New York City, in a fog or thick atmosphere, while delivering a third boat, *held* solely in fault for a collision between one of such barges and a steamship passing out to sea, which did not make out the barges until too late to avoid the collision.

2. TOWAGE—LEAVING TOWS ADRIFT—CUSTOM.

The practice on the part of towing vessels of casting part of their tows adrift in and in the vicinity of New York Harbor, and leaving them while attending to other tows, cannot be justified by custom, even if such custom could be shown.

In Admiralty. Suit for Collision.

Albert A. Wray, for the Wright & Cobb Lighterage Company and Leonard J. Busby.

Lord, Day & Lord and Wilhelmus Mynderse, for the Etruria.

ADAMS, District Judge. This action was brought by The Wright & Cobb Lighterage Company, the owner of the barge *Oval Brand*, to recover the damages sustained through a collision between the barge and the steamship *Etruria*, in the Hudson River about in the middle of the river and opposite Pier 25, on the 6th day of February, 1904. The claimant of the *Etruria* brought in the Leonard J. Busby, owned by the libellant, by petition.

The Busby took three barges in tow alongside in the East River for delivery at points in the Hudson River. One of them was destined for Pier 25 and when that vicinity was reached, the Busby en-

deavored to shove the tow in towards it through an accumulation of ice, but, being a low pressure boat, found it impracticable, and left two of the barges in the river while she took the third, the Hoboken, astern on a hawser, and managed to get her to her destination, leaving the others, the Masters and the Oval Brand, in the river in the outermost part of the ice, and about in the centre of the river. In delivering the Hoboken, the Busby was detained longer than she expected to be. The tide was the beginning of the flood but very little current running. There was no wind to affect the vessels.

The Etruria was lying, headed in, on the south side of Pier 51. She backed out at 9:06 o'clock A. M., and turned, with the aid of two tugs, down the river, bound to sea. As she was proceeding, she passed a railroad float about opposite Jay Street backing out from the New York shore, which required the Etruria to go more to the starboard. Before she had regained her course, the loom of the two barges was sighted slightly on the steamship's port bow, 1,200 to 1,500 feet away, and reported by the Etruria's lookouts and seen by the steamship's officers stationed on the bridge.

There is some dispute as to the condition of the weather, the libellant contending that although it was hazy, large objects could be distinctly seen for a distance of a mile or more. The claimant contends that it was foggy enough for all vessels to sound fog signals. The Government weather observer testified that the Manhattan shore was obscured from the Weather Bureau station at No. 100 Broadway, some 300 feet high, until 9:30 o'clock A. M., and the New Jersey shore until 10 A. M. From such a height and distance away, no absolutely accurate observations could be made of the fog conditions on the water, nor how far it was possible for persons there to see. It appears by the testimony that observations were possible for about 1500 feet but though objects could, in a general way, be seen that distance, it was not possible to discern with certainty what was taking place on or near the objects. It was not densely foggy, but it was an occasion on which fog signals should have been given. The Etruria was proceeding slowly at the rate of three or four knots and sounded such signals, as were other steamers navigating in the river that morning.

The barges were lying headed up and across the river towards the Manhattan shore and the collision occurred by the Etruria striking, with her stem, the after part of the Oval Brand on the port side, doing considerable damage.

The libellant urges that the fault of the collision lies with the Etruria principally because she did not have vigilant lookouts to report the presence of the barges, which were plainly to be seen a considerable distance away. She did in fact have two men stationed on the lookout bridge engaged in the performance of that duty. They have not been called as witnesses, but it appears that the men were discharged in the usual way at the end of the voyage before it was known that this claim would be made. It is shown

satisfactorily enough that the lookouts were duly stationed on the lookout bridge but their testimony is so important in a case of this kind that it should clearly appear no efforts have been spared to obtain the testimony of the witnesses. It is testified that the witnesses have disappeared from the claimant's knowledge, but not very strongly that all proper efforts have been made to find and produce them. I think it was incumbent on the steamship to keep track of the witnesses, if possible, so their testimony could be taken, but, notwithstanding such impression, I feel constrained to exonerate the steamship because of the pronounced fault of the Busby in leaving the barges drifting subject to all the contingencies of a crowded river in a fog or a thick atmosphere. It is sought by the libellant to overcome this obvious fault by alleging, and producing proof to establish, that such a method of navigation is supported by custom in New York Harbor. The testimony would indicate that vessels here do occasionally pursue such a course and some witnesses say it is customary. It does not seem to me that it has been or could be proved to be so but even if it were, it should not receive the sanction of the court. Such practice has been condemned by the Department of Commerce and Labor in a circular of which the following is a copy:

**"Department of Commerce and Labor
Steamboat-Inspection Service.**

Circular
Letter.

Office of Local Inspectors
New York, N. Y., June 2, 1904.

To Masters, Owners and Agents of Towing Steamers, Port of New York.
Gentlemen:

Your attention is called to the following circular letter addressed to this office, which explains itself. You will please call especial attention thereto of the masters and pilots of your steamers.

Respectfully,

U. S. Local Inspectors.

Circular Letter.

Office of Supervising Inspector,
2nd District,
New York, N. Y. May 31, 1904.

U. S. Local Inspectors,
Second District.

Gentlemen:

Referring to the practice which obtains among some masters of towing steamers and steam-lighters of occasionally casting adrift part of their tows and for a time leaving the vessel or vessels so cast adrift as a menace to navigation, this office has been advised that such procedure will not be sanctioned by The Honorable, The Secretary of Commerce and Labor or the Supervising Inspector-General, and that it should be condemned and discontinued.

You will please make an earnest endeavor to stop this practice wherever it exists in your district, and will advise masters of tugs and steam lighters under your jurisdiction that they must expect to face serious consequences if they continue it.

Respectfully,

Robert S. Rodie,
Supervising Inspector, 2nd Dist."

Apart from the Department instructions, even if the barges had been anchored where they were struck, and given proper signals, they would nevertheless have been guilty of fault. Navigating vessels would not naturally expect to find vessels anchored so far from the legally designated places and when, exercising due diligence, they collide with vessels so anchored, the improperly anchored vessel will be found guilty of the fault producing the collision. The *St. Louis and Mississippi Valley Trans. Co. v. The United States*, 33 Ct. Cl. 251; *Id.*, 184 U. S. 247, 22 Sup. Ct. 350, 46 L. Ed. 520. Not being anchored it was all the more incumbent upon them to give adequate warning signals of their presence. Such signals would doubtless have averted the collision. Even if they had escaped the attention of the lookouts, there were several others on the steamship who were alert to discover what was in the steamship's way. The chief officer was stationed on the forecastle head, forward of the lookout bridge. He says the weather at the time was foggy and the barges were reported by the lookout man to the bridge as soon as they came in sight. The testimony of those who were on the navigating bridge shows that they received the reports and almost immediately reversed the steamship's engines but it was too late to avoid the collision. It appears that when the barges were made out to be drifting vessels, the *Etruria* was about 500 feet away from them. It was then probably too late to stop her in time to avoid the collision.

The libel against the *Etruria* is dismissed. No recovery is sought by the libellant against the *Busby*.

PLATT v. HITCHCOCK COUNTY, NEB.

(Circuit Court of Appeals, Eighth Circuit. August 21, 1905.)

No. 2,133.

1. MUNICIPAL BONDS—INTEREST PAID MANY YEARS—VALIDITY.

Where innocent persons are induced to invest their money in the bonds or obligations of a municipality or quasi municipality, by the authorized recitals of its officers and by the commercial credit given to them by the payment of interest thereon for many years, they should be sustained, unless some insuperable legal obstacle prevents this course.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1982, 1985.

Bona fide purchasers of municipal bonds, see note to *Pickens Tp. v. Post*, 41 C. O. A. 6.]

2. SAME—RECITALS—ESTOPPEL.

The recitals of the officers of a municipal or quasi municipal corporation, who are invested with the power to perform a precedent condition to the issue of negotiable bonds and with authority to determine when that condition has been performed, that they have been issued in pursuance of the Constitution or statute which authorizes their issue, precludes inquiry, as against an innocent purchaser for value, as to whether or not the precedent condition challenged had been performed before the bonds were issued.

3. SAME.

Where, under any state of facts or circumstances which might have existed, or which the board or officers who issued the bonds and made the recital might have caused lawfully to exist, the bonds could have legally issued, a recital therein that they have been issued under authority of or in conformity to the law estops the municipality or quasi municipality, as against an innocent purchaser of the bonds for value, from asserting their falsity to defeat them.

4. SAME.

A municipality, quasi municipality, or corporation, and its officers, who by the appearance and recital of the regularity of the issue of its bonds or obligations induces innocent purchasers to invest in them, is estopped from denying their apparent validity upon the ground that in the proceedings preliminary to their execution its officers failed to comply with some requirement or rule of action relative to the mere time or manner of their procedure, with which they might have lawfully complied, but which they disregarded.

5. COUNTIES—PRECINCT BONDS—COUNTY OFFICERS—AUTHORITY, RECITALS, AND ISSUANCE.

The county officers of counties in Nebraska are invested with authority to issue county bonds for precinct indebtedness and to make the customary recitals therein.

6. SAME—PRECINCT BONDS—RECITAL OF COUNTY OFFICERS—POWER TO MAKE—CONCLUSIVENESS.

A board of county commissioners in Nebraska had authority to issue precinct bonds of the county to an amount not exceeding 10 per cent. of the last preceding assessment of the taxable property of the precinct. It issued bonds for \$18,000, and recited that they were emitted under and by authority of the laws of the state of Nebraska which were specified. If the assessment of 1889 was the last preceding assessment on June 17, 1890, the bonds were within the limitation. If that of 1890 was the last assessment, they exceeded it. The board had completed the assessment of 1890 on June 12, 1890, but it had the power until July 10, 1890, to reconsider, modify, and again complete it. *Held*, inasmuch as the officers who made the recital were invested with the power on June 17, 1890, to make

the assessment of 1889 the last preceding assessment, and to ascertain, determine, and recite that this had been or would be done, their recital to that effect conclusively estops the county, as against an innocent purchaser of the bonds or coupons, from asserting its falsity to defeat them.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

Frederick Shepherd, for plaintiff in error.

F. H. Gaines (F. I. Foss, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This is an action upon coupons cut from precinct bonds of Hitchcock county, in the state of Nebraska, which were issued on July 1, 1890, upon a favorable vote of the electors of the precinct of Culbertson at an election held on June 17, 1890. There was a directed verdict and judgment for the county.

The precinct and county were authorized to issue these bonds to an amount not exceeding 10 per cent. of the assessed value of the taxable property of the precinct at the last assessment. Comp. St. Neb. 1889, c. 45, § 14. The amount of this issue was \$18,000, and this fact appeared upon the face of each bond. The defense was that the bonds increased the bonded debt of the precinct above 10 per cent. of the assessed valuation of the taxable property in it at the last preceding assessment. If the last preceding assessment was that of 1890, the increased debt exceeded the statutory limitation; but, if it was that of 1889, it was within it. Counsel for the county contend that the date of the election, June 17, 1890, is the date which conditions the question whether the assessment of 1889 or that of 1890 was the last preceding assessment. *Chicago, B. & O. Ry. Co. v. Village of Wilber*, 63 Neb. 624, 627, 88 N. W. 660; *State v. Babcock*, 24 Neb. 640, 642, 39 N. W. 783. The bonds appear to have been issued upon the day of their date, July 1, 1890. It is immaterial to the decision in this case whether the date which conditions this issue is June 17, 1890, July 1, 1890, or some earlier date. For this reason it is conceded for the purposes of this decision, but it is not decided, that the date of the election is the determining time.

The method of making an assessment, prescribed by the statutes of Nebraska, required the local assessors to prepare lists of property and of its estimated value, and to return them to the board of county commissioners. The statutes of that state empowered and required this board to hold a session of not less than 3 nor more than 30 days, commencing on June 10, 1890, for the purpose of equalizing the local assessments of that year. They authorized this board to add to these assessments and to modify them, and they provided that upon the last day of its sitting as a board of equalization it should levy the necessary taxes for the year. Comp. St. Neb. 1893, c. 77, §§ 70, 77. The record of the board of county commissioners shows that it met and acted as a board of equalization on June 10, June 11, and June 12, 1890, that on the day last named it made a levy

of taxes for the year, and that on that day it adjourned to meet on June 16, 1890. The record in the case before us does not disclose what the record of the board on June 16th or any subsequent day portrays.

The Constitution of the state of Nebraska (article 14, § 2) declares that no bonds or evidences of debt of the character of those under consideration shall be valid, unless they shall have a certificate indorsed upon them, signed by the Auditor of Public Accounts and the Secretary of State, to the effect that they were issued according to law. The statutes of the state require the proper officers of the county to make and transmit to the Auditor of Public Accounts, as a basis for this certificate, a certified written statement of all the proceedings relative to the issue of bonds of this character and of the assessed valuation and the actual bonded indebtedness of the precinct. Comp. St. Neb. 1893, c. 9, § 20. The county commissioners and county clerk of Hitchcock county made and transmitted a certified statement of the proceedings relative to the issue of these bonds pursuant to this statute, in which they declared that:

"The taxable valuation of the precinct for county and state purposes for the year next preceding, being the year 1889, is \$216,678, and there is \$3,000 bonded indebtedness of said Culbertson precinct."

According to this statement the bonded debt, after the issue of the bonds in question, was within the statutory limitation, and the bonds were legally issued. Thereupon the Secretary of State and Auditor of Public Accounts indorsed upon each bond a certificate that they had examined the certified statement sent to them by the county commissioners of Hitchcock county, and that this statement showed that the bond was issued pursuant to law. The bonds themselves contain a recital that they were "issued under and by authority of the laws of the state of Nebraska found in" certain chapters of the publications of those laws there specified. A recital in municipal bonds that they have been issued "in pursuance of," or "in conformity with," or "by virtue of," or "by authority of," the statute or laws which authorize their issue, is in legal effect a recital that the conditions precedent to a valid issue have been performed. *City of Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613, 40 L. Ed. 760; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534.

The bonds were issued in 1890, and the county paid the interest upon them annually until the year 1900. The plaintiff purchased the coupons in suit for value, without notice of any defense to them or defect in them, in reliance upon the recital in the bonds. Where innocent purchasers are induced to invest their money in the bonds or obligations of a municipality or quasi municipality by the authorized recitals or statements of its officers to the effect that they were issued by authority of the law and by the commercial credit given to them by the payment of interest for a series of years, reason and justice alike demand that the obligors should be estopped from denying these recitals to defeat the bonds and that their payment should be enforced, unless some insuperable legal obstacle has

intervened to prevent this result. *Evansville v. Dennett*, 161 U. S. 434, 446, 16 Sup. Ct. 613, 40 L. Ed. 760.

Counsel for the county insist that it is not estopped by the recital which these bonds contain from denying their validity, because the board of county commissioners was without power to issue them, and this fact appeared by the record of the board, which showed that the assessment of 1890 was completed on June 12, 1890, five days before the election on June 17, 1890, which authorized the issue. For the purposes of this decision it will be conceded that the assessment of 1890 was completed, and that the levy based upon it was made, on June 12, 1890. But the record of the board discloses the further fact that it did not adjourn sine die on that day, but that it adjourned to meet again on June 16, 1890, and the statutes of Nebraska invested this board with plenary power to make void, to modify, and to complete the assessment of 1890 at any time between June 9th and July 10th in that year. The argument of counsel for the county would be persuasive, and would find support in the authorities they cite (*Nesbit v. Riverside Independent District*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; *Sutliff v. Lake County Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. Ed. 145; *Lake County v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; *Dixon Co. v. Field*, 111 U. S. 83, 94, 4 Sup. Ct. 315, 28 L. Ed. 360), if the assessment of 1890 had been beyond the power and control of the board when the election of June 17, 1890, was held. Inasmuch, however, as that board had the power to reconsider its action and to change and finally complete the assessment of 1890 after that day, and thereby to make the last assessment preceding the day of election that of 1889, instead of 1890, it was not without authority on June 17, 1890, to issue these bonds. If it failed to modify and complete the assessment of 1890 after June 17th and before its authority ceased on July 10, 1890, so as to make the assessment of 1889 the last preceding assessment, and for that reason the bonds were not legally issued, this defect resulted, not from a lack of lawful power in the board to issue the bonds, but from a defective exercise of the power with which the Constitution and the laws of the state had invested it. And here is the line of demarcation between the cases cited for the county in the action at bar and those of a like character in which the recitals in the bonds raise a conclusive estoppel from denying their truth in favor of one who has innocently purchased the bonds in reliance upon it.

The rule of law upon which the first class of decisions rests is that recitals in municipal bonds by the representative body that issues them, to the effect that all the requirements of the laws with reference to the issue have been complied with, will not estop the municipality from proving as against a bona fide purchaser that the representative body had no power to issue them, where no act of the representative or constituent body could make the issue lawful at the time it was made, and this fact appears from the Constitution and statute upon which the bonds are issued, the public records referred to therein, and the bonds the purchaser buys. *Dixon Co. v.*

Field, 111 U. S. 83, 94, 4 Sup. Ct. 315, 28 L. Ed. 360; National Life Ins. Co. v. Board of Education, 62 Fed. 791, 10 C. C. A. 650. But the case at bar and others of a like character are controlled by a different rule, and that is that the recitals in municipal bonds, by the officers or the representative body invested with power to perform a precedent condition to their issue and with authority to determine when that condition has been performed, that they have found that all the requirements of law necessary to authorize the issue of the bonds have been fully complied with, precludes inquiry, as against an innocent purchaser for value, whether or not the precedent condition challenged had been performed before the bonds were issued. *Clapp v. Otoe County*, 45 C. C. A. 579, 587, 104 Fed. 473, 481; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534; *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 792, 793, 10 C. C. A. 639, 651, 652; *School District v. Stone*, 106 U. S. 183, 187, 1 Sup. Ct. 84, 27 L. Ed. 90; *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Commissioners v. Beal*, 113 U. S. 227, 5 Sup. Ct. Ct. 433, 28 L. Ed. 966; *City of Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673.

The later decisions of the courts lead to the conclusion that where, under any state of facts or circumstances which might have existed, or which the board or officers who issued the bonds and made the recital might have lawfully caused to exist, the bonds could have been legally issued, a recital therein that they have been so issued estops the municipality or quasi municipality, as against an innocent purchaser of the bonds for value, from asserting its falsity to defeat them. *Evansville v. Dennett*, 161 U. S. 434, 443, 446, 16 Sup. Ct. 613, 40 L. Ed. 760; *E. H. Rollins & Sons v. Board of Commissioners*, 26 C. C. A. 91, 98, 80 Fed. 692, 699; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534. It is also a general rule, established by repeated decisions, that a municipality, a quasi municipality, or a corporation and its officers, who by the apparent legality of their obligations or by recitals of their validity have induced innocent purchasers to invest in them, are estopped from denying their legality on the ground that in some of the preliminary proceedings which led to their execution, or in their execution itself, they failed to comply with some law or rule of action relative to the mere time or manner of their procedure, with which they might have lawfully complied, but which they carelessly disregarded. *Speer v. Board of Commissioners*, 88 Fed. 749, 758, 32 C. C. A. 101, 111; *Clapp v. Otoe Co.*, 45 C. C. A. 579, 587, 104 Fed. 473, 481; *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 2 C. C. A. 174, 239, 241, 51 Fed. 309, 326, 328; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 73, 86, 82 Fed. 124, 137; *Board of Commissioners v. Sherwood*, 11 C. C. A. 507, 510, 64 Fed. 103, 108; *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272, 49 L. R. A. 534.

There were facts and circumstances which the board of county commissioners of Hitchcock county might have lawfully caused to exist under which these bonds could have been legally issued

upon the election of June 17, 1890—the facts that the board intended to, and before July 10, 1890, did, change and then complete the assessment of 1890, so that the assessment of 1889 became on the day of the election the last preceding assessment. The board failed to regularly issue the bonds in this case, not because it was without lawful power to do so, but because it erred in the time and manner of taking its proceedings, because it completed the assessment of 1890 before June 17, 1890, when it had plenary authority to complete it after that date and thereby to make the issue of the bonds lawful and regular. The Constitution and statutes granted to this board the power, and imposed upon it the duty, to ascertain, determine, and certify whether the assessment of 1889 or that of 1890 was the last preceding assessment. *Clapp v. Otoe Co.*, 45 C. C. A. 579, 104 Fed. 473. They empowered this board to make either the one or the other of them such. This board alone had the authority, and its members alone had the knowledge, on June 17, 1890, which one it would make the last assessment preceding that day. If it had certified that the assessment of 1890 was the last, it might still have changed and completed that assessment at any time before July 10, 1890, so that its certificate to that effect would have been false. It ascertained, determined, and recited that the assessment of 1889 was the last preceding one; a condition that it had lawful power to bring to pass and to keep in existence; a statement the truth of which was peculiarly within its knowledge, and which it had legal authority to make either true or false. In reliance upon this determination and recital the plaintiff invested his money and purchased his coupons, and the law does not permit the county to deny the truth of this recital in order to defeat them.

The judgment below must be reversed, and the case must be remanded to the Circuit Court, with instructions to grant a new trial. It is so ordered.

STUART v. AUGER & SIMON SILK DYEING CO.

(Circuit Court, D. New Jersey. August 3, 1905.)

PATENTS—ANTICIPATION—PROCESS AND MACHINE FOR LUSTERING SILK.

The Stuart patents, No. 705,715, for a process of intensifying the luster of silk fiber, and No. 705,716, for a machine for carrying out such process, are both void for anticipation; the former by the process of the Hendrie British patent of 1845, and the latter by a French machine from which that of the patent was copied.

In Equity. On final hearing.

John F. Kerr and James C. Chapin, for complainant.

William I. Lewis and Joseph A. Stetson, for defendant.

LANNING, District Judge. On July 29, 1902, patent No. 705,715, for a process of intensifying the luster of silk fiber, the application for which was filed January 17, 1902, and patent No. 705,716, for a machine for lustering silk, the application for which was filed January 20, 1902, were granted to the complainant. By his bill the complainant sets forth the grant of these patents, charges the defendant with infringing them, and prays for an injunction and an accounting for profits. There is no charge that the machine and the process are capable of conjoint use, but the proofs show, and the defendant's counsel on the argument admitted, that they are. The defenses set up are invalidity of the patents and noninfringement.

It will be convenient to consider first the machine patent. The defendant contends that it is invalid, because anticipated by other patents and devices. At the beginning of his letters patent the complainant declares that he has invented "certain new and useful improvements in machines for increasing the luster of silk, of which the following is a specification, reference being had to the accompanying drawings." Then follows a statement of the object of his invention and a description of the machine shown in the drawings. The machine consists of a stout frame, on the top of which, in notches made for the purpose, are supported, in a horizontal position, wooden rods. On these rods skeins of silk fiber, fresh from the hydro-extractor in which they have been placed for the purpose of driving therefrom a portion of the moisture received in the dye bath, are hung. Below each of these rods, and parallel therewith, another rod is run through the suspended skeins and allowed to hang therein. To each of these last-mentioned rods is hung by S-shaped hooks another rod, which forms the upper rod of another series of skeins, through which a lower rod is run and allowed to hang as in the upper series. Three series of skeins are thus provided for in the machine. To each of the lower rods of the third or lowest series another rod is suspended by S-shaped hooks, and to each of these suspended rods is attached a chain, the lower end of which may be wound around a fixed shaft operated by a crank-lever or ratchet-lever. By this operation, it will be observed, all the skeins of silk fiber are stretched while damp. They are maintained in that

stretched condition, in the room where the machine is located, at a temperature of 90 to 120 degrees for three or four hours while drying. The silk thus stretched and dried possesses a permanent and intensified luster, which it retains when woven into a fabric.

There are three claims in the patent, set forth in the following words:

"What I claim, and desire to secure by letters patent, is:

"(1) In a machine for increasing the luster of silk, the combination of a frame, means for suspending therefrom a series of interdependent skeins of wet silk, flexible means connecting each series with a mechanism located in the lower portion of the frame, and which is adapted to stretch the silk, and to maintain it in a stretched condition while being dried to prevent shrinkage, substantially as set forth.

"(2) In a device for increasing the luster of silk, the combination of a frame, a series of horizontal rods suitably connected and depending from said frame, said rods being adapted to hold skeins of silk stretched between each pair, flexible means connected to the lower portion of the frame, and to the lowest rod of each series for stretching the wet skeins and for preventing the contraction of the same while drying, and ratchet means for holding the said flexible means, as set forth.

"(3) In a device for increasing the luster of silk after it is dyed, the combination of a frame, horizontal rods suitably connected and depending from said frame, said rods being adapted to hold skeins of wet silk stretched around each pair, flexible means connecting the lowest rod with a mechanism in the lower portion of the frame, and such a mechanism for stretching the wet skeins and for preventing the contraction thereof while drying, substantially as set forth."

Machines for stretching and thereby increasing the luster of silk were used long before the complainant's machine was constructed or devised. The complainant does not pretend that he is a pioneer in the invention of a stretching and lustering machine. It appears that on January 9, 1900, Casper Bleuler, as agent of the complainant's employer, Emil Geering, ordered from J. E. Brizon, of Lyons, France, a machine for stretching wool, which Brizon promised to have ready for shipment in about three months. On March 5th Bleuler gave to Brizon the address of the party for whom the machine was intended as "E. Geering, Silk Dyer, Ryle Ave., Paterson, N. J." On March 26th Bleuler informed Brizon that "the Geering concern is a silk dyehouse (silk dyer) employing about 600 men." On April 6, 1900, Brizon shipped the machine, the invoice being headed, "Invoice of machine for lustering silk purchased by E. Geering, Ryle Avenue, of Paterson, N. J., from J. E. Brizon, Iron Worker, of Lyons, 118 Rue de Seze." In the body of the invoice the machine is also described as "one machine for lustering silk." There is no evidence that a wool-stretching machine of the kind sent by Brizon to Geering had ever been used for silk stretching or lustering purposes, and it is quite possible that Brizon, having learned that Geering was a silk dyer, inferred that Geering intended to make such use of the machine he had purchased, and that that inference accounts for the description contained in the invoice. However that may be, the machine reached Geering's factory in Paterson in June, 1900, and the complainant there helped to receive it—19 months before his application for the patent No. 705,716 was filed. It was promptly set up in Geering's factory, and

put to use by the complainant as one of Geering's employés. It was found to be too weak to stand the strain put upon it, and the complainant subsequently constructed two or three machines, patterned after the Brizon machine, and, finding them to be satisfactory, he, on January 20, 1902, as above stated, filed his application for a patent.

The Brizon machine has (1) a frame; (2) horizontal rods suitably connected and depending from the frame, the rods being adapted to holding skeins of wool or silk; (3) flexible means connecting each series of skeins, or the lowest rod in each series of skeins, with (4) a ratchet or mechanism in the lower portion of the frame used in stretching the wool or silk and holding it stretched for any desired time. The complainant's silk stretching machine is this Brizon wool stretching machine made stronger. The most material difference between the two machines is that in the Brizon machine a rope connects the lowest rod with the crank operated shaft for stretching the skeins, while in the complainant's machine a chain has been substituted for the rope. It is perfectly clear that every element of the machine described in complainant's patent is to be found in the Brizon machine, and that unless the complainant can by satisfactory proofs fix the date of his alleged invention between January 20, 1900, two years before he filed his application (Rev. St. U. S., § 4886 [U. S. Comp. St. 1901, p. 3382]), and June, 1900, when the Brizon machine arrived, his machine patent cannot be sustained. He says he constructed his first machine, for experimental purposes, in July, 1899, but that his invention was embodied not in it, but in a second machine, constructed in February, 1900. In the first machine damp skeins of silk were placed upon rollers, as described in the patent, and to the lowest roller of each set was connected a lever between five and six feet long having weights attached to the end of its long arm. By this apparatus the skeins of silk were kept in a stretched condition while drying. It was an imperfect apparatus, however, since mere weights attached to the lever did not prevent the shrinkage of the silk fibers as they dried. In the second machine levers were used in stretching the silk as in the first, but the long arms were fastened to a beam in the floor by means of a chain, and thus the shrinkage of the silk while drying was prevented. Before he had constructed his third machine, the Brizon machine had arrived. The complainant admits in the most explicit manner that his third, fourth, and fifth machines were constructed after the Brizon machine had been received, and before his application for his machine patent was filed, and that they were all constructed as closely as possible to the pattern of the Brizon machine, except that his machines were made stronger than the Brizon machine. In the Brizon machine and the complainant's third, fourth, and fifth machines, and in his patent, the apparatus for stretching the material placed on the rollers consists not of weighted levers or levers fastened to the floor beams, as in his first and second machines, but of fixed shafts or spindles around which chains or ropes connected with the lowest rods are

wound by means of crank-levers or ratchet-levers which are held in place by ratchet-wheels and pawls. The stretching appliance of the second machine is not described in the patent. If the patent is to be supported, it follows that the stretching apparatus of the second machine must be held to be a mere mechanical equivalent of that in the patent, and in the third, fourth, and fifth machines. The evidence does not permit this to be done, for in the spring of 1902, after the complainant had filed his application for his machine patent, and before it had been granted, he abandoned the stretching device described in that patent and in the application therefor by removing from the third, fourth, and fifth machines their crank-levers, ratchet-levers, ratchet-wheels and pawls and fixed shafts or spindles, and substituting for them the simple device of levers fastened to the floor which was contained in his second machine. On his cross-examination he testified as follows:

"Q. 187. So that there are now in operation four machines, three of them being after the pattern of the French (that is, the Brizon) machine, and the remaining one operating with levers? A. No, sir. Q. 188. Please state the facts. A. All machines, or I should rather say all four machines, in operation at the E. Geering dyeworks, are constructed with levers. Q. 189. When was the change made, on the three machines made after the pattern of the French machine, to the lever construction? A. Somewhere in the spring of 1902. Q. 190. Was that change made on those three machines at substantially the same time? A. Practically the one after the other, as time would allow. Q. 191. How long did it take to alter those three machines, removing the ratchets and supplying the levers? A. The levers were prepared before the drum and ratchets were removed—or, rather, I should say spindle instead of drum—so as less time would be required in remodeling the machine. It was only the work of about two hours' time for to remove the spindles, ratchet wheels, and pawls from one machine. It might have cost from two to three hours more to attach the hooks or claws to the side of such frames to hold the chains in connection with the levers, and also to place beams substantially fastened to the floor beams of the room to hold the chains which held the levers to any desired strain necessary to stretch the silk. Q. 192. How long were the levers which you applied in the spring of 1902? A. Five foot six inches, or as near that as possible."

The complainant has not explained why, after using in the construction of his third, fourth, and fifth machines the ratchet device described in his patent, and using that device until the spring of 1902, he abandoned it, and went back to the lever device contained in his second machine. On that subject he and all his witnesses are silent. Therefore I cannot assume that the ratchet device of the patent and of the third, fourth, and fifth machines is a mere mechanical equivalent of the lever device of the second machine. This being so, it follows that the complainant has failed to carry his alleged invention described in the patent back to the date of constructing his second machine. His third, fourth, and fifth machines, as originally constructed, are exactly described in the patent, and were admittedly modeled upon the Brizon machine after its importation. It must be held, therefore, that the patent is anticipated by the Brizon machine, and that for this reason his machine patent is invalid.

The process patent, No. 705,715, contains but a single claim, which is in these words:

"The process of intensifying the luster of silk fiber, which consists in taking the skeins directly from the hydro-extractor after dyeing, and, while still damp, stretching them and simultaneously maintaining them in a stretched condition and subjecting them in a closed chamber to dry air at a temperature of about 120° Fahrenheit, thereby preventing shrinking during the drying, as set forth."

Long before the complainant filed his application for this patent silk had been lustered by the use of stretching machines. In his application as originally filed he described his invention as one for a "certain new and useful improvement in process for giving a luster to silk and other fibers." This language was subsequently amended to read "a certain new and useful improvement in process of intensifying the luster of silk fiber." Other amendments were made changing the drying heat from "a temperature ranging from 90 to 100 degrees" to "a temperature of about 120° F.," and excluding from the amended application all reference to "other fiber, textile fabric, or finished fabric" mentioned in the original application. No drawings accompanied the original application, but when the amendments were made the drawings which now accompany the patent were furnished. These amendments were made and the drawings were furnished "in view of the suggestions at an interview had with the principal examiner at Washington." Neither the original application, the amended application, nor the patent contains any reference to the drawings, which are the same in every respect as those accompanying the above-mentioned machine patent, No. 705,716. The counsel for the defendant contends that the process patent must have a broad interpretation without reference to the drawings, they illustrating a machine not material to the process. In this contention I think they are right.

The defense is that the complainant's process is old. A British patent granted to Robert James Hendrie in 1845 is relied on as an anticipation of the complainant's process patent. The Hendrie patent was for "an improvement in the preparation of silk," and the process described is one in which dyed or undyed skeins of silk in their damp state were placed around horizontal arms capable of being moved from each other by the use of a capstan and screw. Thus the skeins of silk, as the patent declares, "become stretched and held in tension." While so stretched and held, hot air, hot water, or steam is introduced into a chamber at the bottom of the machine. The chamber being heated, "a warm atmosphere," says the patent, "will be produced about the lower parts of the machine, and, the temperature of the air being thus raised, it will gradually ascend between the radial arms, and in passing through the hanks or skeins will act upon the silk in its distended state, so as to dry it." The claim of the patent is in these words:

"Preparing silk by submitting it in tightly distended skeins or hanks, when damp, to the action of heated air or air of the ordinary temperature, in which it must remain until dry, for the purpose of producing upon its surface a luster or gloss."

This process includes everything contained in the complainant's process, unless it be that in the Hendrie patent the skeins of silk were not subjected "in a closed chamber to dry air at the tem-

perature of about 120° Fahrenheit." But it cannot be that any one skilled in the art would think of carrying on the Hendrie process in any other place than "a closed chamber," for otherwise the heat would be wasted. Nor do I think the fact that Hendrie mentions no particular temperature for drying the silk differentiates his process in any essential respect from that of the complainant. In the Hendrie process the air is artificially heated. It may be raised to 120° or more. The temperature mentioned in the complainant's patent is "about 120° Fahrenheit." This indefinite language of the complainant's patent, together with the fact that in the original application the temperature was fixed at "90 to 100 degrees," raises the presumption that the degree of heat used in the process need only be what is sufficient to dry the skeins of silk within a reasonable time. This presumption becomes a conviction when the machine patent is read. Bearing in mind that complainant's machine is used conjointly with his process, and that only three days intervened between the filing of applications for the two patents, certain language of the machine patent shows conclusively that the temperature used may be anywhere between 90 and 120 degrees Fahrenheit. That language is as follows:

"My stretching machine is erected in a close room or compartment which is capable of being heated to a temperature of 120 degrees. After the silk or other fiber is taken from the dye bath, * * * I run the temperature of my close room or compartment from 90 to 120 degrees, and leave the skeins there three or four hours in that stretched condition."

The complainant's counsel argue that the Hendrie patent cannot be considered as an anticipation of either of the complainant's patents for the reason that the Hendrie patent has never proven successful. There is no satisfactory proof that it has not been successfully used. It may be that the particular machine described in the Hendrie patent is not so well adapted to carrying out his process as some others; but in this patent he says "there may be various contrivances for carrying out" his process, and that one of them is the machine which he describes. He describes but one process, and that is, in substance, the same as the process described in the complainant's process patent. The record of the proceedings in the Patent Office, which is in evidence, fails to show that the attention of the examiner was at any time drawn to the Hendrie patent. Had it been, I think the complainant's application for his process patent would have been denied. In any event, my opinion is that the complainant's process patent is anticipated in every essential feature by the Hendrie process.

The defendant's witnesses have described other processes, known as the Weidman and David processes, which it is urged exhibit all the essentials of the complainant's process patent. Having reached the conclusion above expressed, I do not deem it necessary to consider them. Neither is it necessary to consider the evidence relating to the question of infringement of either of the patents.

The complainant's bill must be dismissed, with costs.

KITTEL v. TRUSTEES OF INTERNAL IMPROVEMENT FUND OF FLORIDA.

(Circuit Court, N. D. Florida. June 21, 1905.)

1. PUBLIC LAND—LEGISLATIVE LAND GRANTS.

The Legislature of Florida, under the act of Congress of September 28, 1850 (9 Stat. 519, c. 134), known as the "Swamp and Overflowed Land Act," had the right to deal with all swamp and overflowed lands within the boundaries of the state, and to grant the same in trust or otherwise, before identification and patent to it by the United States, subject to the right of the Secretary of the Interior to determine what lands were embraced in the provisions of said act.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 193.]

2. SAME—SWAMP AND OVERFLOWED LANDS.

The act of Congress of September 28, 1850 (9 Stat. 519, c. 134), known as the "Swamp and Overflowed Land Act," is a grant in present of the equitable title to all the swamp and overflowed lands within the boundary of any state then in existence, and to perfect the legal title thereto it was necessary that the Secretary of the Interior, at the request of the Governor, should cause a patent to be issued to the state therefor, and on that patent the fee simple to said lands was vested in the state, and which fee-simple title related back and took effect as of the date of the passage of said swamp land grant act.

3. STATES—INTERNAL IMPROVEMENT FUND—POWERS OF TRUSTEES AND OF SUBSEQUENT LEGISLATURES.

Under the act of the Legislature of Florida of January 6, 1855 (Laws 1854-55, p. 9, c. 610), known as the "Internal Improvement Fund Act," creating trustees, consisting of the Governor, Comptroller, Treasurer, Attorney General, and Secretary of Agriculture (by subsequent amendment), to hold the same in trust for the uses and purposes provided for therein by said act, it was competent for said trustees to recognize and make effective a railroad land grant passed by said Legislature in 1833, not strictly in conformity with the provisions of the internal improvement fund act, and a certificate containing a promise to make deeds when the patents were received from the United States will be enforced in a proceeding for specific performance.

4. ESTOPPEL OF RECORD.

When the trustees of the internal improvement fund of Florida have been joined as defendants in an action to foreclose a mortgage given by a railroad company, and among other property covered by the mortgage was a certificate from said trustees reciting the act of Congress relating to swamp lands, the acceptance of this act by the state of Florida, the act creating the board of trustees of the internal improvement fund, and an act of the Legislature making a grant of land in aid of the construction of said railroad, passed subsequent to the act creating the board, and a promise by the trustees to comply with the last-mentioned act by making deeds when patents to the lands set forth in said certificate (which were stated to be, in their opinion, covered by the swamp land grant act), should be received from the United States. The trustees made answer in said suit, and alleged, among other things, that it was their intention to comply with said certificate when patents for said lands should be issued to the state. *Held*, that the trustees in this suit are estopped of record from setting up that the state of Florida, and themselves as trustees, had not at the time of making said certificate any title or interest which they could convey or contract in relation to; that they are further estopped of record from asserting their lack of authority to make said certificate.

(Syllabus by the Court.)

In Equity. Argument on demurrer to bill.

The bill of complaint filed in this case primarily seeks relief by way of specific performance of a contract entered into between the trustees of the internal improvement fund of the state of Florida and the predecessor in title to complainant, the Augusta, Tallahassee & Gulf Railroad Company. Incidentally the bill seeks an injunction restraining the defendants from in any way or manner conveying the lands in controversy, or attempting to sell them, and from incumbering them temporarily as well as permanently.

The material allegations of complainant's bill may be succinctly stated as follows:

(1) The execution and delivery of a certificate (designated in the bill as a contract) by the defendants' predecessors in office, defendants holding in virtue of their office, which certificate recites the passage of an act of the Legislature of the state of Florida approved February 7, 1883, hereinafter referred to as "An act to aid the construction of the Thomasville, Tallahassee & Gulf Railroad Company" (Laws 1883, p. 114, c. 3494); the construction of the said railroad under and in conformity to the provisions of the said act of 10 miles of said road extending from Carrabelle northeasterly; that the said railroad had made application to the trustees of the internal improvement fund for a conveyance of the lands to said company; and that certain lands described in said certificate are believed and claimed to be those granted to the state of Florida by the act of Congress approved September 28, 1850 (9 Stat. 519, c. 134), but which had not been patented to the said state, and which certificate concludes with the following paragraph:

"Now, therefore, the undersigned, the trustees of the internal improvement fund of the state of Florida, in consideration of the premises, and in conformity to the acts of the Legislature aforesaid, do hereby certify that the said Augusta, Tallahassee & Gulf Railroad Company is entitled to said lands whenever the same shall have been patented to the state of Florida under the said act of Congress of September 28, 1850, and that upon the receipt of said patents by the state the said trustees, or their successors, will convey the said lands to the said company, its successors and assigns, saving the rights of actual settlers on said lands acquired at or before the date thereof," etc.

That the Augusta, Tallahassee & Gulf Railroad Company succeeded to the rights of the original grantee, the lands in question belonging to the swamp and overflowed class, under the act of Congress of September 28, 1850, but had not been patented. That the railroad had made application for conveyance thereof, and that said lands were believed and claimed to be of those granted to the state of Florida by the act of Congress of September 28, 1850.

(a) "Complainant refers in her bill of complaint to the act of the Legislature of the 6th day of January, 1855 (Laws 1854-55, p. 9, c. 610), which created the board of trustees, the defendants herein, and by express reference thereto makes such act a part of the bill of complaint."

(b) "Complainant specifically alleges that these defendants hold the lands, except as to those portions which have been from time to time conveyed by them, 'and who hold the same in the course of the administration of their trust, with full power and authority thereof.'"

(c) "Complainant specifically alleges that the Augusta, Tallahassee & Gulf Railroad Company had proceeded under the grant to it, and finished sufficient road to entitle it to 108,000 acres, 'and which railroad so constructed was investigated, examined, and approved as to its completion by the said defendants, the board of trustees of the internal improvement fund of the state of Florida.'"

(d) "That on said approval thereof said Augusta, Tallahassee & Gulf Railroad Company applied to said board of internal improvement fund for a certificate declaring, admitting, and certifying that said Augusta, Tallahassee & Gulf Railroad Company had earned said lands by the completion of sufficient road to entitle it thereto from the town or place known as Carrabelle, in Florida, northward toward Thomasville, in the state of Georgia, and thereupon a resolution was duly submitted and carried by said board of internal improvement fund commission directing said certificate to be prepared and issued."

(e) Complainant sets forth the minutes in the bill of complaint under which action was taken by the board of trustees.

It recites the application for the grant to the board; that 10 miles of road had been constructed, examined, and approved, and order for the preparation of the certificates to the road for 150,000 acres of unplanted lands lying within the territorial limit prescribed by the legislative grant to the company.

The act of September 28, 1850 (9 Stat. 519, c. 134), reads as follows:

"An act to enable the state of Arkansas and other states to reclaim the 'swamp lands' within their limits.

"Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, that to enable the state of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to said state."

"Sec. 2. And be it further enacted, that it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor of the state of Arkansas, and at the request of said Governor, cause a patent to be issued to the state therefor; and on that patent, the fee simple to the lands shall vest in the said state of Arkansas, subject to the disposal of the Legislature thereof; provided, however, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

"Sec. 3. And be it further enacted, that in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

"Sec. 4. And be it further enacted, that the provisions of this act be extended to, and their benefits be conferred upon, each of the other states of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated."

The General Assembly of the state of Florida in 1879 adopted a resolution on the subject of these lands, in part as follows:

"Resolved, (1) That the grant by Congress of the swamp and overflowed lands to the state of Florida, September 28, 1850, and the acceptance of the same by the state, imposed upon the state the trust and duty of appropriating said lands to the objects and purposes of said grant as set forth and expressed in the act of Congress granting the same.

"(2) That any appropriation or disposition of said lands to other and different purposes and uses than those expressed in the grant is a violation thereof to the extent of such misappropriation, and is an infringement of the contract between the United States and the state of Florida, and to such an extent is void."

Assembly Journal, 412.

The committee to which this resolution had been referred reported in part as follows:

"By the express terms of the act of Congress, these lands were made subject to the disposal of the Legislature, but with the plain, clear, and unambiguous proviso that the proceeds of said lands, whether from sale or direct appropriation in kind, should be applied exclusively, as far as necessary, to the purpose of reclaiming said lands."

"On the 24th of January, 1851, the Governor of the state of Florida approved an act of the Legislature entitled 'An act to secure the swamp and overflowed lands lately granted to the state, and for other purposes,' in which it is provided 'that the Governor is authorized and hereby requested to take such measures as to him may seem expedient and most to the interests of this state, in securing and classifying the lands lately granted to this state,

designated as "swamp or overflowed lands," and that the plats of said land, as soon as secured, shall be delivered to the register of this state, and said lands shall be subject to sale under the same rules, regulations and restrictions as are now, or may hereafter be, imposed upon the sale of seminary lands.' Chapter 332, p. 93, Laws of Florida."

The same act created a "board of internal improvement for the state of Florida," to consist of certain officers and one member from each judicial district, to be elected by the General Assembly, to serve for two years, and required that they should hold an annual meeting on the first Monday in December in each year. Section 3.

"On January 10, 1853, the Governor of the state of Florida approved an act of the Legislature entitled 'An act to amend "An act to secure the swamp and overflowed lands lately granted to the state, and for other purposes,"' in which it was provided that the third section of the act of January 24, 1851, be repealed, and there was created a board of internal improvement for the state of Florida, to consist of the State Engineer, as president, and eight commissioners, to be elected by the General Assembly, to hold their office for four years; that they shall determine upon and recommend plans for the reclamation of swamp lands, and appraise the value of said lands, to be laid before the General Assembly for its action; that the commissioners should receive from the swamp land fund the same per diem and mileage as members of the General Assembly; that the Governor, with the consent of the board of internal improvement, may authorize the State Engineer to contract to reclaim swamp lands for a portion thereof, not exceeding one-half of said lands so reclaimed. Chapter 496, p. 75, Laws of Florida."

"On January 8, 1853, the Governor approved an act of the Legislature entitled 'An act to establish the office of State Engineer and Geologist,' in which it is provided 'that it shall be the duty of the State Engineer to examine and survey the said lands of the state, for the purpose of their reclamation, and make the necessary maps, plats and estimates for said work, to be laid before the General Assembly for their action'; that the State Engineer shall receive, from the proceeds of the sale of the swamp lands, an annual salary not exceeding two thousand dollars, and all necessary expenses. Chapter 497, p. 77, Laws of Florida."

"On December 31, 1852, the Governor approved an act of the Legislature in which it was provided 'that those who reclaim and bring into cultivation lands granted to the state by an act of Congress entitled "An act to enable the state of Arkansas and others to reclaim the swamp lands within their limits," shall be entitled to the full privileges of pre-emption rights, without any restriction as to their owning one hundred and sixty acres or having had the benefit of a former pre-emption right.' Chapter 499, p. 78, Laws of Florida."

"On January 14, 1853, the Governor approved a resolution of the Legislature entitled 'Resolution relative to the overflowed lands of St. Lucie county,' in which it was provided that it shall be the duty of the State Engineer forthwith to examine and report to the Governor upon the practicability of draining the submerged lands in the rear of St. Lucie Sound; that the sum of three thousand dollars, to be paid from the sale of swamp and overflowed lands, are appropriated for the object contemplated. Resolution No. 3."

"In accordance with the requirements of the act of January 10, 1853, the board of internal improvement, on December 22, 1854, reported to the Legislature, through the Governor, that they recommended the granting of alternate sections to aid in the construction of railroads where the roads pass through the lands, to the extent usually granted by Congress, and with such limitations as would prevent any title passing until the roads would well justify the contribution proposed; and it may be well to reserve to the state the power to do the same in the case of future charters (page 142); that they recommended that the lands be vested in trustees consisting of the Governor, Comptroller, Treasurer, and Attorney General, and that they adopt suitable plans for drainage (page 144); that the board have prepared a bill that will carry out the views they present, and which was submitted as a part of their report. They 'recommend that the board, being no longer necessary if the

proposed plan is adopted, be abolished as a board.' House Journ. 1854, p. 134 et seq. The bill proposed by the board of internal improvement was enacted into law, approved January 6, 1855, and became chapter 610, p. 9, of the Laws of Florida."

"The state of Florida possessed no lands except such as might be granted to it by the United States government. The United States government had a right to make such grants for specific purposes, and we find that grants of land were so made as follows: September 4, 1841, 500,000 acres for internal improvements, roads, railways, bridges, canals; March 3, 1845, for the seat of government, public schools, seminaries, and education; September 28, 1850, for the purposes of draining and reclaiming; May 17, 1856, for the construction of railroads."

"Desiring to accept the grant of these lands upon the conditions stated in the act of September 28, 1850, and for the purpose of carrying out those conditions, the Legislature of the state of Florida, after full and thorough consideration, shown by the journal of the proceedings of that Legislature, the messages of the then Governor of the state upon the subject, and the reports of committees, submitted to that Legislature on this subject, the act approved January 6, 1855, was adopted. That act consists of 32 sections. Section 1 provides that so much of the 500,000 acres of land granted for internal improvement purposes by the act of Congress of March 3, 1845 (5 Stat. 788, c. 75), as remain unsold, and the proceeds of such lands as were theretofore sold and on hand, and all proceeds that may thereafter accrue from the sales of said lands; also all the swamp lands granted by the act of September 28, 1850, and the proceeds that have accrued or may hereafter accrue from the sale of said lands—are set apart and declared a distinct and separate fund to be called the 'Internal Improvement Fund of the State of Florida,' and are to be strictly applied according to the provisions of this act. Section 2 (page 10) provides that 'said lands and all the funds arising from the sale thereof are hereby irrevocably vested in five trustees, to-wit: the Governor, the Comptroller, the State Treasurer, the Attorney General and the Register of State Lands, and their successors in office, to hold the same in trust for the uses and purposes hereinafter provided, with the power to sell and transfer said lands to the purchasers and receive payment for the same.' The other sections of the act relate to a system of railroads recommended to the trustees as proper improvements to be aided from the internal improvement fund in the manner therein provided, except section 17 (page 15), in reference to constructing a canal, and except sections 16 and 29 (pages 15, 19), which are as follows:

"Sec. 16. Be it further enacted, that the trustees of the internal improvement fund shall hereafter fix the price of the public lands included in the trust, having due regard to their location, value for agricultural purposes, or on account of timber or naval stores, and make such arrangements for the drainage of the swamp or overflowed lands, as in their judgment may be most advantageous to the internal improvement fund and the settlement and cultivation of the land, and the said trustees shall encourage actual settlement and cultivation of said lands by allowing pre-emptions under such rules and regulations as they may deem advisable: provided, that in no case shall a pre-emption for more than one section of land be granted to any one settler."

"Sec. 29. Be it further enacted, that the alternate sections of the swamp and overflowed lands for six miles on each side may be granted by the General Assembly to such railroad companies, to be hereafter chartered, as they may deem proper, on their compliance with the provisions of this act, as to the manner of constructing the road and drainage, and the sale and transfer of the alternate sections thus granted shall be in accordance with the provisions of this act."

The defendants demurred to the bill of complaint upon 15 different grounds. Their contentions, however, may be grouped into three propositions, as follows:

"(1) The act of Congress of September 28, 1850, was not an act which vested the title in the state of Florida to the swamp and overflowed lands of the class therein described in present, but that title thereto did not vest in the state of Florida until actual selection, approval, and the issue of a

patent by the United States government, acting through the Interior Department, to the state of Florida.

"(2) That, inasmuch as the state of Florida had not the title at the time of the creation of the board of internal improvement fund commission, that such title was not vested in said board of internal improvement fund commission, and for which reason certificate No. 13,909 was invalid, and of no force and binding effect upon the present board of trustees. And

"(3) That, in view of the contentions (1 and 2) herein stated, the present board of trustees has full and complete discretion with respect to any prior certificates made by the board of trustees of any of these lands to exercise its own judgment in the premises, and refuse or grant the request of petitioner."

In the argument on this demurrer, the complainant has met those three propositions by three counter propositions, as follows:

"First. That the act of September 28, 1850, was an act vesting in the state of Florida the title to the swamp and overflowed lands within the description of said act in present; and

"Second. That so far as the selection, approval, and the patenting by the general government through the Department of the Interior is concerned, the effect thereof was merely to identify by boundaries and descriptions, and determine the question of what lands were within the description of the act, and did not effect the vesting of the title; and

"Third. That whether the title under the act of September 28, 1850, was in present thereunder or not, this board is estopped from denying that complainant is entitled to the land in question by virtue of the facts herein and hereinafter to be stated, because by the act of the Legislature of Florida of January 6, 1855, creating this board, the legal title passed to the board of trustees to every acre of land that was swamp and overflowed land in point of fact, and by virtue of the attitude of such board in the case of Kittel against the Augusta, Tallahassee & Gulf Railroad Company and such board itself it is concluded, as a matter of record, from questioning complainant's right to the conveyance sought."

In addition to these three main propositions urged, the defendants, in their demurrer and brief, have submitted the following propositions:

"(4) The act of the Legislature of the state of Florida of February 7, 1883, making a grant of certain lands to the complainant's predecessor in title, is void and ineffectual so far as it relates to swamp and overflowed lands, in that it does not provide for their drainage and reclamation, and because at the time mentioned and ever since the title to said lands was and has been in the trustees, charged with duties in reference to said lands, and such title was not then in the state, and the Legislature of 1883 had no power or authority to direct the trustees to make deeds purporting to convey title to the swamp and overflowed lands in said trust.

"(5) That the act of 1883 is subject to the rights of creditors of the trustees to the trusts of said fund, viz., draining and reclaiming the swamp and overflowed lands; to control, management, and sale, and application of said fund and the lands by the trustees."

These two propositions are met by complainant as follows:

"(a) The trustees of the internal improvement fund, being the creatures of the Legislature of the state of Florida, and having their duties and powers defined by the act creating them, cannot set up the defense that the Legislature has no power to deal with the swamp and overflowed lands because such dealing contravenes the act of Congress; that it was not for them to say that the state has violated the obligations imposed upon it by the act of Congress; that it is a question between the United States and the state, and not a question between the state and a creature of its legislation.

"(b) The vesting of the lands in the trustees by the internal improvement act is not irrevocable, though in express language stated to be. The act of one Legislature cannot bind a subsequent one, unless some constitutional limitation and restriction arising under the former legislation is violated by the latter act. That the internal improvement act is not organic law. That the trustees were merely agents of the state, invested with the legal

title of the lands for their more convenient administration. That the state remained in every respect the beneficiary proprietor, subject to the guaranties which had been made to the holders of railroad bonds secured thereby."

Straley & Hasbrouck and Fred T. Myers, for complainant.
R. W. Williams and W. B. Farley, for defendants.

SWAYNE, District Judge (after stating the case). Considering the first proposition, relating to the act of Congress of September 28, 1850 (9 Stat. 519, c. 134), and reviewing the long line of authorities presented, there seems to be absolute harmony upon two questions involved in the first proposition.

In *French v. Fyan et al.*, 93 U. S. 169, 23 L. Ed. 812, the court say:

"This court has decided more than once that the swamp land act was a grant in presenti by which the title to those lands passed at once to the state in which they lay, except as to states admitted to the Union after its passage. The patent therefor, which is the evidence that the lands contained in it had been identified as swamp lands under that act, relates back and gives certainty to the title of the date of the grant."

And in *Rice v. Sioux City & St. Paul Railroad Company*, 110 U. S. 695, 4 Sup. Ct. 177, 28 L. Ed. 289:

"That the swamp land act of 1850 operated as a grant in presenti to the states then in existence of all the swamp lands in their respective jurisdictions is well settled."

And in *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039:

"The grant by the United States of land to aid in the construction of railroads, in relation to which we have had many cases before us, is in many particulars analogous to the grant by the swamp land act. They are usually of a specific number of sections of land on each side of the proposed route of the road, with a reservation of certain sales or of other disposition made before the road became definitely fixed. The usual words of grant in such cases are similar to those in the swamp land act: 'There is hereby granted.' Though it is impossible to locate the land granted until the road is fixed, yet when that is fixed the grant takes effect as of the date of the act. * * * It is plain that the difficulty of identifying the swamp and overflowed lands could not be defeated through error of the granting clause on whomsoever such identification was required to be made. When identified, the title would perfect as of the date of the act. The patent would be evidence of such identification, and declaratory of title conveyed. * * * The result of these decisions is that the grant of 1850 is one in presenti, passing the title to the land as of its date, but requiring identification of the lands to render the title perfect. * * * For the error in holding that the certificate of the commissioner was necessary to pass the title of the demanded premises to the state, the case must go back for a new trial, when the parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed at the date that the swamp land act of 1850 took effect. If they are proved to have been such lands at that date, they were not afterwards subject to pre-emption by settlers. They were not afterwards public lands at the disposal of the United States. Parties settling upon such lands must be deemed to have done so with notice of the title of the state, and after the segregation map was deposited with the Surveyor General of the state, with notice also that they were actually segregated and claimed by the state as such."

In *Tubbs v. Wilhoit*, 138 U. S. 134, 11 Sup. Ct. 279, 34 L. Ed. 887:

"The swamp land granted on September 28, 1850, to the several states was in presenti, and upon identification of the lands therein in lawful mode title thereto related back to the date of the grant."

In the *Rogers Locomotive Machine Works v. American Emigrant Company*, 164 U. S. 559, 17 Sup. Ct. 188, 41 L. Ed. 552:

"That where the lands in controversy were swamp and overflowed lands within the meaning of the act of 1850 was to be determined in the first instance by the Secretary of the Interior, and that when he identified lands as embraced by that act, and not before, the state was entitled to the patent, and on said patent the fee-simple title vested in the state, and what was before inchoate title then became perfect as of the date of the act."

Michigan Land & Lumber Company v. Rust, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. Ed. 591:

"The act of September 28, 1850, granting certain lands to the several states, was a grant in presenti, passing title to all lands which at that date were swamp lands, but leaving to the Secretary of the Interior to determine and identify what lands were and what lands were not swamp lands."

Brown v. Hitchcock, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772:

"Under the act of September 28, 1850, known as the 'Swamp Land Act,' the legal title to land passed only on the delivery of a patent, and as the record in this case discloses no patent there was no passing of the legal title from the United States, whatever equitable rights may have vested. Until the legal title to land passed from the government, inquiry as to equitable rights comes within the cognizance of the Land Department."

A careful inquiry into the status of these lands is necessary in view of the complainant's demand for a decree that the defendants, the trustees, execute a deed conveying the title to the lands described, and also for unpatented lands when they shall be patented by the United States. The complainant admits that at the time of the alleged grant by the Legislature of the state of Florida and at the time of the alleged certificate the state and the trustees had no title to said lands other than that contained in the act of September 28, 1850; that the United States, through its constituted authorities, had not then identified and patented the said lands. If the state had no title, either legal or equitable, it could not make such grant by legislative act, and would not be bound at a subsequent date, having acquired the legal title in the interim, to make good a prior grant of something it had not. From an analysis of the above decisions these propositions are apparently well defined, viz.: (1) The act of September 28, 1850, known as the "Swamp Land Grant Act," is a grant in presenti of the equitable title to all the swamp and overflowed lands within the boundary of any state then in existence. (2) That to perfect the legal title thereto it was necessary that the Secretary of the Interior, at the request of the Governor, should cause a patent to be issued to the state therefor, and on that patent the fee simple to said lands was vested in the said state. (3) That upon the vesting of the legal title it should relate back and have effect as of September 28, 1850. These three conclusions seem to effectually dispose of the first and second contentions of the defendants, as it is alleged and stated that the state now has the actual legal title to a large portion of the lands claimed in the bill. For all intents and purposes that title has existed since

September 28, 1850, and the state, in dealing with its equitable title, clearly conveyed under the act of September 28, 1850, could not be heard to say that it had no title to grant to the complainant's predecessors in title under the act to aid the construction of the Thomasville, Tallahassee & Gulf Railroad Company, or at the time of the passage of the act creating the board of internal improvement fund commission.

The legal and political status of the board of trustees of the internal improvement fund of the state of Florida is necessary to further consideration of the questions involved on demurrer. Under the act of January 6, 1855 (Laws 1854-55, p. 9, c. 610), above referred to, it is contended by the trustees that the General Assembly had no power to withdraw any portion of the fund after enacting the above act; that the state is as capable of making a contract as an individual, and, when made, is bound by it; that the legislative department can constitutionally pass no law impairing the obligations of its contracts, and when it attempts to do so it is the solemn duty of the judicial department to declare such law null and void. And it is also further contended: That when the General Assembly of 1855 conveyed the internal improvement fund to trustees for the benefit of purchasers and holders of bonds to be issued under it, and for other purposes therein named, they made a law in the nature of a contract. The act of 1861 is an attempt to repeal the act of 1855, and in so far as it seeks to divest the internal improvement fund from the purposes therein indicated could not be done. That when the right to property is vested by grant for particular purposes by legislative authority, or otherwise, the Legislature could not vest it for another purpose. The Legislature having declared the purposes to which the subject-matter of the grant applied, the legislative power over it was exhausted, and it cannot by legislative grant be appropriated for other and different purposes. That the lands granted to the state of Florida by the act of September 28, 1850, came to the state as a sacred trust, to be applied exclusively as far as necessary, for the reclamation and drainage of those lands, and that the state had no power to sell or donate these lands other than discharging the sacred trust imposed by the grant from the federal government, nor had the state the power to divert them to its use in payment of ordinary expenses or otherwise. That the act of the Legislature creating the internal improvement fund then became an executed contract, and extinguished the right of the state. The act of 1883, so far as it attempts to grant the swamp land to the Florida, Tallahassee & Gulf Railroad Company, was an attempt to impair the estate of the grantees in the act of 1855.

These several questions may be well answered by an examination of the case of the Trustees of the Internal Improvement Fund v. the St. Johns Railway Company, 16 Fla 531, which contains an exhaustive and able interpretation of this act by the Supreme Court of the state construing an act of the Legislature of Florida, which in that respect is binding upon this court, as many of the questions

therein involved are along parallel lines with those above enumerated; and in view of the fact that this is the third time these propositions have been argued to this court liberal excerpts from that opinion would seem to be justified here.

"There are two questions involved in this case:

"First. Whether the thirteenth section of the St. Johns Railway charter (Laws 1858-59, p. 95, c. 936) granting swamp and overflowed lands to this company is unconstitutional, as impairing the obligation of contracts arising under the internal improvement act of January 6, 1855 (Laws 1854-55, p. 9, c. 610).

"Second. Whether the St. Johns Railway was constituted in accordance with the provisions and specifications of the internal improvement act; and if not, whether the doing of this was a condition precedent upon which the grant to it should take effect.

"From this case we see that it was the opinion of the Supreme Court of the United States that any disposition of the lands for objects and purposes other than those of the grant, and in such manner as to defeat these, would be a violation of this contract. This leads to the inquiry whether the act of the Legislature consolidating them with the lands granted to the state for internal improvement purposes, and vesting them in trust under the second section, was enacted with a view and intention of carrying into effect the contract entered into under the act of Congress. It cannot be supposed that the Legislature by this act intended to violate this contract, but it must be assumed that the contrary was their intention.

"By referring to the act of Congress, we find that the object of the grant was to enable the states to reclaim these lands for settlement and cultivation and the means of doing this, as pointed out in the act, was by the use of the proceeds of these lands or the appropriation of the lands in kind. The only condition annexed to the grant was that they should be applied exclusively, so far as necessary, to the purpose of reclaiming said lands by levees and drains. Wherever these means were not necessary, a full discretion was left to the states in the choice of other means, not inconsistent with the grant, which they might deem most appropriate to carry into effect its object. Some of them might be best reclaimed by means of drains, some by levees, and some by both combined. But the states in which they were situated were necessarily to be the judges and to have the power of determining the necessity of either or both modes, or whether the object could be better accomplished to any extent by other methods.

"It is true that the leading object of the Legislature in passing this act seems to have been to provide for and encourage a liberal system of internal improvements in this state, and for this purpose they set apart all of the internal improvement and swamp and overflowed lands acquired by the grant, and declared them to be a separate and distinct fund, to be strictly applied according to the provisions of the act. (Section 1.) For the purpose of assuring a proper application of this fund for the purposes therein declared, they vested these lands in five trustees by the second section, to be held by them in trust for the uses and purposes thereafter provided. The leading and primary use and purpose thereafter provided to which the fund was made applicable was to aid in the construction of those lines of road and canal mentioned in the fourth section (page 11), and which have been held by this court in all of its adjudications of this act to be a state system. The terms, conditions, and manner in which this aid should be extended to roads which might accept its provisions were prescribed in the act. Another use and purpose for which this fund was set apart and to which it was made applicable was that provided in the sixteenth section (page 15). Finally, these lands were to be applied in such manner as might be directed by the Legislature upon the contingencies mentioned in the twenty-seventh section (page 18). But all of these uses were intended to be subject to the power reserved to the General Assembly in the twenty-ninth section (page 19) of the act to grant alternate sections of the swamp and overflowed lands, for six miles on each side, to such railroads to be thereafter chartered, as they might deem proper.

"We have now the grant by Congress, its objects, and the legislative action and power over the subject, and we are of opinion that in passing this act the Legislature intended as one of its main objects to carry into effect the purposes of this grant. If this intention can be collected from the act, it must control its construction. That such was the intention is evident from the sixteenth section, which provides that 'the trustees shall make such arrangements for drainage of swamp and overflowed lands as in their judgment may be most advantageous to the internal improvement fund and the settlement and cultivation of the land.' This is one of the modes of reclaiming these lands pointed out in the act of Congress. This intention is further evident from the twenty-ninth section, in which the power to grant alternate sections is reserved to the General Assembly, which is limited to this class of lands granted by Congress, and must be construed in reference to this grant, and as one of the means of reclaiming it.

"It is clear from these provisions that the Legislature intended that the trust created by the second section of this act should be subject to, and to some extent controlled by, its subsequent provisions. * * *

"If correct in the position that the Legislature intended by this act to execute to some extent the contracts arising under the act of Congress, and that they intended that the trust created by the second section of the internal improvement act should be subject to, and to some extent controlled by, its subsequent provisions, then the importance of the reservation of the power over this subject in the twenty-ninth section becomes more striking and apparent as a necessary means of more carefully carrying into effect the purposes of the grant by Congress.

"It must be borne in mind that a very small portion of the lands vested in the trustees were donated for general improvement purposes, not exceeding five hundred thousand acres. Much the larger portion—probably nineteen-twentieths of them—was donated under the grant of the swamp and overflowed lands. When this vast domain is considered, much, if not most, of it lying out of the reach and beyond the influence for development of the great and leading works indicated in the fourth section, it would have been singular if some such power had not been reserved. No more efficient mode of reclaiming them could have been devised than that of constructing lines of railroad and canals through them, thus rendering them accessible to settlers, furnishing transportation for their productions, enhancing the value of the adjacent lands, and making these available for the fund and leading purposes of the trust, which would otherwise be valueless to it; and as such works producing such results are ordinarily beyond the capacity of individual capital and enterprise, it was a wise provision of the act to reserve the power and authorize the use of these lands for such purposes by granting portions of them to corporations, which, by combination of capital, could more successfully accomplish those objects. Railroads, more than any other modern institution, are considered the great developers of new countries by hastening their settlement and rapid improvement, and in a state situated as a large portion of ours, with its greatly diversified climate and varied productions, but much of it inaccessible for want of transportation, no one can estimate the value which such works would add to these lands and the resulting advantages to the fund, to say nothing of their influence in sustaining the roads which were the primary object of the trust. This view of the law is sustained by sound reasoning, and no doubt influenced and controlled the body which devised and adopted the internal improvement act.

"The present is the first case in which the reserved power of the Legislature over this fund under the twenty-ninth section of the act has been brought in question.

"It is contended that the Legislature had no power to make the grant to the St. Johns Railway Company under the thirteenth section of its charter, because a previous Legislature had vested the lands so granted in the trustees of the internal improvement fund, and that they have become bound to the creditors of this fund by the terms of this contract, and that the thirteenth section is a diversion of a part of this fund from the purposes of the trust, and is therefore inoperative and void, because it impairs the obligation of said contract. * * *

"All of the lands vested in the trustees were pledged to the purposes of the trust, except such as the Legislature authorized to be otherwise applied; and these exceptions apply exclusively to the swamp and overflowed lands. These are the lands granted to the St. Johns Railway Company under the thirteenth section of its charter, and the grant is strictly within the limits and only of the lands named in the twenty-ninth section, which reserved the power to the Legislature to make the grant. If they vested in the trustees, they did so subject to this reserved power of the Legislature to dispose of them in the manner and for the purposes mentioned in the thirteenth section of this charter.

"This section is a contract between the state and the company, based upon a valuable consideration which the company has performed on its part, and the trust fund has derived its benefits in the enhanced value of the even sections which remain to the fund within the limits of the grant, which was a part of the consideration stipulated in the act. * * *

"So we think that the grant to the St. Johns Railway Company was but carrying out the true spirit and policy of the law on this subject, which we have seen was twofold—to reclaim these lands by granting the alternate sections as authorized by the twenty-ninth section, and by the use of this as one means to improve the trust estate in aid of the internal improvement system inaugurated by the act. * * * But the act incorporating this company did not bring it within the system provided by the internal improvement act. It was not required to accept its provisions, and, had it accepted them, it would not have made it a part of the system without some clause in its charter or special act authorizing it. It is outside of and independent of the system, and the internal improvement act is no part of its organic law, nor is it bound by any of its provisions. Its rights and powers are derived solely from its charter.

"The power of the Legislature reserved in the twenty-ninth section being an original power, not parted with, is not and could not be limited by the sixth section so as to prevent any future Legislature from exercising its coequal power over the same subject, unless rights had become vested arising under contract which brought into operation some constitutional limitation upon the exercise of such power by a future Legislature. This is a principle well established by all the authorities on the subject. See Cooley's Con. 123-127, note 1, 126.

"In the case of *Gonzalez v. Sullivan* [16 Fla. 819] this court used this language: 'The court here simply say that the Legislature had the right to designate some objects of improvement to be constructed first, and to postpone others. While this may be true of this Legislature, it is also true of a subsequent Legislature that its powers were not limited by the power of the first, unless the act of the first was of such character as called into operation a constitutional limitation, and something more than a simple antecedent exercise of the powers of the subsequent one. The internal improvement act is not organic law, and the power of one Legislature is no greater than another. Where the power of the subsequent one is limited, it results from the fact that the act of the first is of such character that the organic law renders it inviolable through constitutional limitations covering the subject.' * * *

"So far, then, as these creditors are concerned, their rights are not affected, nor is the obligation of the contract between the state or trustees and them impaired, by the grant in the thirteenth section of the charter of this company; and, this being so, it was competent for the Legislature to make the grant therein without requiring on their part a compliance with the sixth section of the internal improvement act."

It was held by this court, in a cause recently decided (no written opinion filed) involving some of the same questions, that the Legislature of the state of Florida had retained the right to control this fund by subsequent grants in aid of railroads, not only under section 29 of the act creating the fund, but in analogous ways, subject, of course, to any vested rights acquired in the trust fund. This view may be de-

rived in some measure from the above decision of the Supreme Court of Florida and from *Rogers Locomotive Works v. Emigrant Co.*, supra, in which Mr. Justice Harlan in the opinion of the court says (164 U. S. 576, 577, 17 Sup. Ct. 193, 41 L. Ed. 552):

"Are those in this action who claim under the state and under the act of 1850 in any better condition than the state? Can they be heard to question the action of the Land Department in 1858, if the state is estopped from so doing? We have seen that the county of Calhoun made a written agreement in 1861 with the American Emigrant Company relating to swamp and overflowed lands. But, if no such agreement had been made, would the county be heard to say that the Land Department erred, as a matter of fact, when, in 1858, it decided that these lands passed to the state under the railroad act? Would the creature of the state be permitted to say what its creator was estopped from saying? The county of Calhoun is a mere political subdivision of the state, created for the state's convenience, and to aid in carrying out, within a limited territory, the policy of the state. Its local government can have no will contrary to the will of the state, and it is subject to the paramount authority of the state in respect as well of its acts as of its property and revenue held for public purposes. The state made it, and could, in its discretion, unmake it, and administer such property and revenue through other instrumentalities. *Jefferson County v. Ford*, 4 G. Greene (Iowa) 367, 370; *Soper v. Henry County*, 26 Iowa, 264, 267; *Maryland v. Baltimore & Ohio Railroad*, 3 How. 534, 550, 11 L. Ed. 714; *United States v. Railroad*, 17 Wall. 322, 329, 21 L. Ed. 597; *Hamilton County Commissioners v. Mighels*, 7 Ohio St. 109, 113; *Askew v. Hale County*, 54 Ala. 639, 640, 25 Am. Rep. 730; *Dillon's Mun. Corp.* §§ 22, 23, 54-71, inclusive, and authorities there cited; *Angell Ames on Corp.* § 31. It would seem to be clear that the relations of the county and the state are such that the action of the latter in accepting the lands in controversy under the railroad act was binding upon the county of Calhoun as one of the governmental agencies of the state; and that the county could not, after such acceptance, claim these lands as swamp and overflowed lands, or by assuming to dispose of them as lands of that character pass to the purchaser the right to raise a question which, in view of its subordination to the state, it was estopped from raising. We are of opinion that the plaintiff could not, by any agreement made with the county in 1861 or afterwards, acquire any greater rights or better position in respect of these lands than the county itself had after the certification of them in 1858 as lands inuring to the state under the railroad act of 1856 (Act May 15, 1856, c. 28, 11 Stat. 9)."

But, irrespective of the right of the Legislature to make subsequent grants, the complainant has set up in the bill the action of the trustees in granting a certificate setting apart and agreeing to deed certain lands, the object of this litigation, to complainant's predecessor in title, when patent thereto had been received from the United States. This agreement was a practical recognition by the trustees of the power of the Legislature over the fund, and an acceptance of this further limitation upon the trust. This recognition was made a matter of record in a suit instituted some years since, as set forth in the bill, in which the predecessor in title of complainant instituted proceedings in this court to get decree of foreclosure on this property on mortgage made by the railroad company to him. The trustees were joined as defendants, and in their answer they say:

"That the lands described in the bill of complaint were selected as swamp and overflowed land under the act of Congress approved September 28, 1850: but these defendants are not personally aware of their real character, such a question being determined by the Secretary of the Interior at Washington,

D. C., in whom is vested by law the authority to decide as to the character of swamp and overflowed lands. * * * The State Engineer having reported favorably upon the construction of ten miles of road by the said Augusta, Tallahassee & Gulf Railroad Company, the trustees aforesaid, on the 16th day of March, A. D. 1889, issued to the said railroad company a certificate numbered 13,909, a copy of which was attached, * * * setting forth that the lands had been earned by the said railroad company, and that conveyance by deed to the said lands would be made to the said company as soon as they were patented to the state of Florida by the United States government; that subsequently to that date, to wit, on the 5th day of July, 1890, and on the 2d day of December, 1890, deeds were made by the said trustees to the said Augusta, Tallahassee & Gulf Railroad Company for a portion of the lands described in said certificate, as shown by the exhibits hereto attached, marked 'B' and 'C,' which exhibits, it is prayed, may be taken as a part hereof, the land so conveyed having been patented to the state of Florida by the United States Government subsequently to the issue of the certificate above referred to."

Said trustees, further answering, said:

"They will convey by deed to the said Augusta, Tallahassee & Gulf Railroad Company the remaining lands embraced in said certificates above mentioned as soon as patents for the same are issued by the United States government to the state of Florida, save and excepting the rights of actual settlers and the rights of Sidney I. Wallis and John A. Henderson for selecting lands and procuring patents for swamp and overflowed lands."

On this answer the cause was set down for hearing without replication, and thereafter the cause was brought on for hearing before the United States Circuit Court on such answer and the testimony of the defendants other than the board of trustees, and a decree was made in favor of complainant, which was in the usual form of a decree as to the other defendants, but provided, among other things, as follows:

"Ordered, adjudged, and decreed that the defendants, and all persons claiming by, through, or under them since the commencement of this suit, be forever barred and foreclosed from all equity of redemption of, in, and to the said mortgaged premises, or any part thereof. 'And it is further ordered, adjudged, and decreed that upon the execution and delivery of the conveyance or conveyances as aforesaid the purchaser or purchasers, his, her or their representatives or assigns, be let into possession of the portion of said mortgaged premises conveyed to him, her, or them, and that any of the parties to this suit who may be in possession of said premises or any portion thereof, and any person or persons who since the commencement of this suit has come into possession under them or any of them, on the production of the special master's deed of conveyance shall surrender possession thereof to such purchaser or purchasers, his, her, or their representatives or assigns, and on refusal so to do will be considered in contempt of this court.'"

The Augusta, Tallahassee & Gulf Railroad Company appealed from this judgment, and the assignment of error that the title to the lands was in the United States was considered by the court. While the Circuit Court of Appeals did not pass directly upon this question, it held that the company had a full equitable title to the lands in controversy, and sufficient to mortgage said lands by virtue of such title; but the point was expressly made on this appeal on behalf of complainant, and clearly acquiesced in by the Circuit Court of Appeals, that by the act of the Legislature of Florida, January 6, 1855, this legal title passed to the board of trustees, defendants, who have not appealed from the decree; and the trustees say in

their answer they will convey to appellant the remainder of the lands as soon as they receive the patent. They could not convey before. The equitable title passed by the grant to every acre of land that is swamp and overflowed land in point of fact. The appellant admits by its mortgage it is all swamp and overflowed land. The trustees admit by their answer and exhibit thereto that it is swamped and overflowed lands, and stopped from and do not seek to controvert it. With the appellant were joined as defendants in the court below the trustees of the internal improvement fund of the state of Florida and William Clark. As these last-named defendants were not substantially affected by the decree of the court below, they did not join in the appeal. The appeal to the Circuit Court of Appeals was not successful, and the decree below was affirmed, and carried out by the sale of the mortgaged premises by the special master appointed for that purpose. On such sale the property was acquired by Joseph J. Kittel, from whom complainant, as above stated, has derived right.

The trustees are a continuing body, although the individual membership is ever fluctuating, and they are as much bound in this action as though the present members had joined in this answer.

These facts, in my opinion, under the authorities establish an estoppel of record as against the trustees, the defendants in this action. The trustees in that suit were under the obligation to bring forward their whole case, and this court will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as a part of the subject in controversy, but which they did not, through inadvertence, negligence, or because the policy of the trustees or of the state as respects the administration of the fund had changed. The trustees in this prior litigation not only had the right to set up any existing defenses that would defeat the foreclosure, but they went further, and by express admissions of record conceded its validity, and saw fit to take no part upon the question directly raised and considered by the court of whether the title in the lands in controversy was in the United States or in the trustees, except to concede it. The questions here raised as to the authority of the State Legislature to deal with the fund, and of the trustees to divert the same, by recognition of this grant, were not presented for determination. The trustees acquiesced in the action of the Legislature, and gave it validity in so far as they could by making a certificate in which they agree to transfer those lands in accordance with the legislative grant, and when a foreclosure of the equities of the railroad company is sought they solemnly make known to the court their intention to conform to the declarations made by them in this certificate, which fulfills every requirement of the law of estoppel of record. *Cromwell v. Sac Co.*, 94 U. S. 351, 24 L. Ed. 195; *Outram v. Morewood*, 3 East, 346; *Mitchell v. First National Bank*, 180 U. S. 471, 21 Sup. Ct. 418, 45 L. Ed. 627; *Bryan v. Kennett*, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. Ed. 908; *Stout v. Lye*, 103 U. S. 66, 26 L. Ed. 428; *Davis v. Brown*, 94 U. S. 428, 24 L. Ed.

204; *So. Pac. Ry. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; *Hopkins v. Lee*, 19 U. S. 109, 5 L. Ed. 218; *Smith v. Kernochan*, 48 U. S. 198, 12 L. Ed. 666.

It would be a labor of supererogation to cite further authorities upon the question invoked. In *Augusta, Tallahassee & Gulf Railroad Company v. Kittel*, 52 Fed. 63, 2 C. C. A. 615, it was essential for complainant to show that the mortgagor had a title, legal or equitable, and which could be mortgaged, to support his claim. Whether such interest was based upon the theory of a vested title in *præsenti* under the act of September 28, 1850, or an equitable interest, is not material now; for it was necessarily decided in the prior action that the interest of the railroad was one capable of being mortgaged, and the court did hold that the certificate was sufficient to convey an interest "mortgageable" by the *Augusta, Tallahassee & Gulf Railroad Company*. Indeed, this question of the title was determined as a matter of law on the demurrers of certain defendants, and was conceded by the answer of the trustees. Suppose; for the sake of argument, that the board of trustees of the internal improvement fund had in such action sought to raise the question of the validity of the title held by itself, and to deny the validity of the certificate, because the title to the lands was still vested in the United States, not in the state of Florida, or in the board of trustees. It would have been perfectly competent for such board to have raised the question as a matter of pleading, and to have had it determined in the prior action. Indeed, petitioner's right in this proceeding, except so far as based on estoppel alone, depends upon the original validity of the title and right to agree to convey the same in the board of trustees at the time of the execution of the certificate, as the validity of the mortgage did in the prior action. Then came the board of trustees, and specifically interrogated whether or not the lands described in the bill in the prior action were swamp and overflowed lands within the sense and meaning of the act of Congress of September 28, 1850, whether it entered into a contract with the *Augusta, Tallahassee & Gulf Railroad Company* to convey said lands, and whether or not the board of trustees claimed or asserted any interest in the lands adverse to the interest and ownership of said company; and to which said board answered that such lands were selected as swamp and overflowed lands, that the railroad grant had been earned, that the certificate had been executed and delivered, and that the board stood ready and willing to convey by deed the remaining lands embraced in such certificate when patented by the United States government to the state of Florida; and on this pleading and the testimony adduced on behalf of the other defendants a decree was made in favor of the complainant adjudging the foreclosure and the sale of this property, and foreclosing all the defendants, or any person claiming by, through, or under them, forever from all equity of redemption in the mortgaged premises, or any part thereof, and requiring the board of trustees, among others, to surrender possession to the purchaser or purchasers under penalty of contempt of court. It would seem, therefore, that not only was the question of title strictly so

speaking before the court in the prior action, but every essential fact and legal conclusion upon which complainant therein could prevail was thrown open to controversy by the board of trustees, might have been presented, and now stands *res judicata* as to such board, and would estop it in any proceedings from holding otherwise than as therein determined. If these admissions and acts of the trustees had been clearly without the scope of their trusts, it would follow that they were not binding on its present membership; but as I have concluded that at the time of these transactions the trustees held the equitable title to all the swamp and overflowed land in the state not patented by the United States or otherwise disposed of, and that it was competent for them to recognize the act of the Legislature, whose creature they were, in giving effect to the grant of land to the Thomasville, Tallahassee & Gulf Railroad Company, it follows that the above facts work an estoppel of record.

I have therefore concluded: That the act of Congress of September 28, 1850, is a grant in *præsentis* of the equitable title to all the swamp and overflowed lands within the boundaries of a state then in existence, and that it was only necessary that the Secretary of the Interior cause a patent to be issued to the state therefor, when the fee simple became vested in the state as of the date of the passage of the act of September 28, 1850. That the state was competent to deal with its inchoate or equitable right to said lands before obtaining patent, and to make grants thereof, subject to the right of the United States in locating and identifying same. That the act of the Legislature of Florida of January 6, 1855, creating the internal improvement fund, does not have a direct tendency to divert the lands from their original purpose, nor has the subsequent railroad land grants, made in accordance with or in analogy to section 29 of said act, such direct tendency. That the trustees of the internal improvement fund, being the creatures of the Legislature of the state of Florida, and having their duties and powers defined by the act of January 6, 1855, which created them, cannot set up the defense that the Legislature had no power to deal with the swamp and overflowed lands because such dealing contravenes the act of Congress. It is not for them to say that the state is violating the obligations imposed upon it by the act of Congress. That is a question between the United States and the state, and not a question between the state and a creature of its Legislature, the trustees of the internal improvement fund. That the issuance of the certificate by the trustees, its mortgage, and the foreclosure proceedings, constitute an estoppel of record as against the present trustees, and that the trustees were competent to undertake and give effect to these acts; and for these reasons the demurrer will be overruled.

In re HEMSTREET.

(District Court, N. D. Iowa, C. D. September 3, 1903.)

1. BANKRUPTCY—LIENS FRAUDULENT UNDER STATE LAW.

A bill of sale from a bankrupt to his wife, and notes and a chattel mortgage executed by him to his brother, both bill of sale and mortgage covering all his personal property and crops, and all he should acquire or raise during a certain number of years, *held* fraudulent, as attempts to cover his property, and void as to creditors under the law of Iowa.

2. SAME—CLAIM OF WIFE TO PROPERTY.

Under the law of Iowa which precludes a wife from asserting ownership of personal property against creditors of her husband where she has permitted such property to pass under his control, and to be used and dealt with by him as his own, such claim cannot be asserted against his trustee in bankruptcy.

3. SAME—CLAIM BASED ON FRAUDULENT SECURITY—ESTOPPEL.

Where the only claim filed by the brother of a bankrupt against his estate was based on notes and a mortgage which are clearly fraudulent, he will be held bound by such action, and will not be permitted to prove the claim as one for wages for labor and entitled to priority.

4. SAME—EXEMPTIONS—TOOLS OF FARMER.

A cream separator is a tool or instrument of a farmer within the meaning of Iowa Code, § 4008, and is exempt as such thereunder on his bankruptcy.

In Bankruptcy. On exceptions to ruling of referee on claims of Robert C. Hemstreet and Millie F. Hemstreet and on claim of bankrupt on matter of exemptions.

See 117 Fed. 568.

E. A. Morling, for trustee and creditors.

J. M. Whitaker and John Menzies, for claimants and bankrupt.

SHIRAS, District Judge. In this case the wife of the bankrupt, Millie F. Hemstreet, asserts a claim, as a creditor of her husband, for some \$200, based upon a bill of sale dated February 23, 1901, which purported to convey to the wife all the horses, cattle, grain, farming implements, and all other personal property of every kind owned by the husband, and also "all crops of every name, nature, and description raised during the years 1901, 1902, and 1903 on the farm rented by me of 265 acres. * * * This bill of sale is intended to cover all and singular all property of every nature I now own, and all property that I may acquire for the next five years, subject, however, to valid liens of record against said property." The referee held that this bill of sale was fraudulent, in that its purpose evidently was to cover up the property of the husband, and protect it against his creditors, he being in debt at the time of its execution, and no other conclusion could possibly be reached with respect thereto. The ruling of the referee rejecting the claim is therefore affirmed.

The wife of the bankrupt also asserted a claim against the trustee for a mare and colt, which she claimed belonged to her, but which were taken possession of by the trustee. She testifies that her brother-in-law about the time of her marriage had made her a

gift of a horse, which was afterwards exchanged for a mare, and she asserts ownership in the mare and her offspring. The evidence shows that these animals passed into the control of the husband, and were dealt with as the other property on the farm, and the facts, under the ruling of the Supreme Court in *Porter v. Goble*, 88 Iowa, 565, 55 N. W. 530, justified the holding of the referee that, as against creditors, the wife could not assert an ownership of the property.

The claim of Robert C. Hemstreet is to the effect that he had worked as a laborer upon the farm rented by the bankrupt under an agreement whereby he was to be paid \$18 per month, in addition to his board, the sum claimed being \$205, for the period extending from February 20, 1901, to March 1, 1902; it being also averred that on August 29, 1901, the bankrupt executed to him four promissory notes for \$122 each, payable on the 1st days of December 1902, 1903, 1904, and 1905, and also executed a chattel mortgage to secure payment of these notes upon all the personal property owned by the bankrupt, including the crops raised by the bankrupt, and even including the watch owned by the bankrupt. It passes all belief that the bankrupt, in executing these notes and mortgage, only intended to secure the wages that might be earned by his hired hand in the four years succeeding the date of the mortgage. The notes and mortgage are clearly void as against creditors. The doubtful question is whether the claim should be recognized as a debt due for wages earned. The claim, as originally filed, was based solely on the notes and mortgages. Subsequently a petition was filed by the claimant setting forth the fact that he had filed a claim for \$205, based upon the four notes and mortgage; that the trustee had taken possession of the mortgaged property, and, without recognizing the lien of petitioner, had sold the property; that the notes and mortgage were given in evidence of the amount due the claimant for labor done and to be performed under the contract in the future; that the chattel mortgage had been duly recorded, and therefore the petitioner prayed that his claim be allowed in the sum of \$205, with interest; that the same be declared a debt due for labor, and be given priority; that the amount due be declared a special lien on the property included in the chattel mortgage and on the proceeds thereof in the hands of the trustee, and that claimant be paid in full therefrom. The only claim filed before the referee on behalf of Robert Hemstreet is that based upon the notes and mortgage. The petition subsequently filed relies on the mortgage, and asks its enforcement, and then recites that there is a sum of \$205 due as wages. The notes and mortgage are void as against creditors, and strictly there is no claim pending for wages due. The petition subsequently filed seeks to enforce the fraudulent mortgage as well as to set up a claim for wages due, but the attitude of the claimant does not appeal to the favor of the court. It is so evident that the bankrupt sought to cover his property by giving mortgages to his wife and brother, to secure claims of doubtful merit, that suspicion is cast upon these claims in whatever form they are presented. The equity of the situation is not such as to require the court to

place the claimant in any other position than that he assumed in filing his claim, and that is as the payee of the notes secured by the fraudulent mortgage. In that position the claimant is not entitled to the relief prayed for. It is possible that there is due some amount, as wages, from the bankrupt; but as the claimant has rested his claim upon the notes and mortgage he must abide the conclusion thereon, and, they being invalid, he is not entitled to other relief against the creditors.

The bankrupt asks to be allowed the value of a cream separator and of a calf, which he claims were exempt to him under the laws of Iowa, and which were taken possession of by the trustee, and by him sold and disposed of. I see no good reason for holding that a cream separator may not be a tool or instrument of a farmer within the meaning of section 4008 of the Code of Iowa. The selling of cream from milk given by the cows owned by farmers has become one of the recognized methods of carrying on ordinary farming in this state, and the tools or instruments used in connection therewith are therefore exempt under the section just cited. Under the terms of section 4017 of the Code, as construed by the state Supreme Court in *Grover v. Younie*, 110 Iowa, 446, 81 N. W. 684, the failure to insist upon the exemption at the time the separator was taken by the trustee does not defeat his right thereto. The trustee testifies that he realized \$65 from sale of the separator, and this sum he must pay out of the proceeds of the estate to the bankrupt. Under section 4008 of the Code the bankrupt was entitled to hold as exempt two cows and two calves. As I understand the evidence, the cows were set apart to the bankrupt, but the trustee took away a calf, over the protest of the wife of the bankrupt, he being absent at the time, without leaving two calves to meet the exemption. The bankrupt is entitled to \$8 as the value of this calf, and this sum will also be paid him by the trustee out of the estate in his hands. A claim is also made for \$50 for crops alleged to have been taken by the trustee from the 40 acres of the farm which the bankrupt claims was his homestead. The creditors show that their debts were incurred before the homestead right, if any, accrued, and it is also claimed by the trustee that the bankrupt used more of the grain, hay, and products of the farm than he was justly entitled to. Under these circumstances it is not made to appear that this claim is a just one, and the same cannot be allowed.

UNITED STATES v. NINETY-NINE DIAMONDS et al.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1905.)

No. 2,139.

1. STATUTORY CONSTRUCTION—RULES.

All the words of a statute should have effect. The intention of the enacting body is not expressed by a part, but by all the statute; and, as the purpose of construction is to ascertain that intention, "all the words of a law must have effect rather than that part should perish by construction."

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 282, 283.]

2. SAME—PLAIN TERMS OF STATUTE MAY NOT BE CONSTRUED AWAY.

Construction and interpretation have no place or office where the language of a statute is unambiguous and its meaning is evident.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 266.]

3. SAME—CONSTRUCTION MUST BE SENSIBLE—OBJECT SOUGHT MAY BE CONSIDERED.

Statutes should have a rational, sensible interpretation. The object which the legislative body sought to attain and the evil which it endeavored to remedy may always be considered to ascertain its intention and to interpret its act.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 262.]

4. CUSTOMS DUTIES—FALSE STATEMENT—LOSS OF DUTIES ESSENTIAL TO OFFENSE.

None of the acts denounced by Act June 10, 1890, c. 407, § 9, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], constitute an offense thereunder, unless they deprive the United States of some of its lawful duties.

5. SAME.

The word "false" in this section, which prescribes punishment by forfeiture, fine, and imprisonment for the use of a false statement in making an entry of imported goods, means more than incorrect or erroneous. It implies wrong or culpable negligence, and signifies knowingly or negligently untrue.

6. PENALTIES—FORFEITURES—"FALSE" AND "FALSELY" MEAN KNOWINGLY OR NEGLIGENTLY UNTRUE.

The words "false" and "falsely," in statutes and contracts which impose forfeitures or penalties for false acts or acts falsely done, generally imply culpable negligence or wrong. They signify more than incorrect or incorrectly, and mean knowingly or intentionally or negligently false or falsely, in the absence of express provisions in the statutes or contracts or reasonable implications from them, their subject, and the circumstances to the contrary.

7. CUSTOMS DUTIES—FALSE STATEMENTS—EVIDENCE.

One who had the right of possession of and a lien upon imported merchandise for the duties and for transportation expenses which he had paid, together with the option to purchase any of it at fixed prices, or to return it to the tentative vendors, declared in good faith in making an entry of the goods, which were invoiced to him, that he was the owner. His statement did not deprive the government of any lawful duties. *Held*, the use of this statement to make the entry did not constitute an offense, under Act June 10, 1890, c. 407, § 9, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895].

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Minnesota.

For opinion below, see 132 Fed. 579.

Charles C. Houpt, for the United States.

W. Wickham Smith (Edward C. Stringer and McNeil V. Seymour, on the brief), for defendants in error.

Before SANBORN and HOOK, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge. This is an action by the United States to confiscate 99 diamonds, under Act June 10, 1890, c. 407, § 9, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], for the administration of the customs, upon the ground that the claimant, Henry Bockstruck, in making his entry, declared that he was the owner and that Simon Fink was the seller of the merchandise, when the truth was that he was the consignee and Fink was the consignor. These were the facts: The diamonds had been sent and invoiced to Bockstruck from Antwerp by Simon Fink, under an agreement that he should pay the duties and the expenses of the transportation from New York and should have the option to keep and pay for, at the invoice price, or to return to Fink, Bodenheimer & Co. in New York, any or all of the diamonds. He paid the duties and the transportation charges from New York, and had a lien on the diamonds for those amounts. He had the right to the possession of the merchandise. The invoice billed the goods to him at the prices specified as the purchaser, and the deputy collector told him to use the declaration of an owner prescribed by Act June 10, 1890, c. 407, § 5, 26 Stat. 132 [U. S. Comp. St. 1901, p. 1889]. There was no claim or evidence in the court below that Bockstruck intended to make any statement that was not true, or to deceive the officers of the government, or that the statement he made in any way deprived or was intended to deprive the United States of any of the lawful duties upon the merchandise referred to therein. The court below held that Bockstruck was the owner of the diamonds and dismissed the action.

In the briefs and arguments of counsel these three questions have been discussed: Was the claimant the owner of the merchandise? Is one, who in making an entry of imported merchandise innocently makes an untrue statement by mistake, accident, or honestly, after the exercise of reasonable care, subject to the forfeiture and penalties imposed by section 9? Is one who makes an entry of imported merchandise by means of a false statement, which does not deprive the United States of any lawful duties, liable to this forfeiture and these penalties? These questions will be considered in their reverse order.

Section 9 reads in this way:

"That if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchan-

dise to which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

The contention of counsel for the government is that the clause "by means whereof the United States shall be deprived of the lawful duties or any portion thereof" is limited in its effect to the crime of using any "willful act or omission," and that all the other offenses denounced by this section are complete, although they have no effect upon the collection of the duties and are not intended to, and do not deprive the government of any portion of them. In this position he is sustained by two decisions of the Circuit Court of the Southern District of New York. *U. S. v. Cutajar* (C. C.) 60 Fed. 744; *U. S. v. Rosenthal* (C. C.) 126 Fed. 766, 776. The respect and deference which the opinions of the learned judges who rendered these decisions always command have invoked a careful and deliberate consideration of the reasons they suggest for their views and of the argument of counsel: but they have not proved convincing. If we eliminate from section 9 the words that are not material to the question under discussion, it reads:

"If any owner shall make any entry by means of any false invoice, affidavit, letter, paper or statement, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties accruing upon the merchandise embraced or referred to in such invoice, affidavit, letter, paper or statement, or affected by such act or omission, such merchandise shall be forfeited."

If the deprivation clause is limited in its effect to the willful act or omission, the words "embraced or referred to in such invoice, affidavit, letter, paper or statement" have neither function nor effect. If these words were omitted and the section read:

"If any owner shall make any entry by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement the merchandise shall be forfeited, and if in making any entry any owner shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties accruing upon the merchandise affected by such act or omission such merchandise shall be forfeited."

it would have the exact effect which the construction of counsel for the government gives it. This fact is a demonstration of the proposition that the Congress intended, and by the words it used expressly declared, that the deprivation clause should have broader scope, and that it should qualify the entry by means of any fraudulent or false affidavit, letter, paper, or statement, as well as the guilt of any willful act or omission. Cardinal rules for the interpretation of the law are that the intention of the legislative body should be ascertained and given effect, and that this intention must be deduced, not from a part, but from the entire statute which expresses it, because the Legislature did not express its intention by a portion, but by all of the law upon the subject. An interpretation which restricts this deprivation clause to the guilt of "any willful act or omission" flies in the teeth of the maxim that "all the words of a law must have effect, rather than that part should perish by construction." *City of St. Louis v. Lane*, 110 Mo. 254, 258, 19 S. W. 533; *Knox Co. v. Morton*, 15 C. C. A. 671, 675,

68 Fed. 787, 790; *Wrightman v. Boone Co.*, 31 C. C. A. 570, 572, 88 Fed. 435, 437; *Paving Co. v. Ward*, 28 C. C. A. 667, 674, 85 Fed. 27, 34.

The section expresses the intention to create and punish several offenses. If all its language is carefully analyzed and separated into its component parts applicable to the various offenses, it clearly reads that, if any owner makes an entry (1) "by means of any fraudulent or false invoice" whereby the government is deprived of the lawful duties "accruing upon the merchandise embraced or referred to in such invoice," or (2) "by means of any fraudulent or false affidavit" whereby the government is deprived of the lawful duties "accruing upon the merchandise embraced or referred to in such affidavit," or (3) "by means of any fraudulent or false report" whereby the government is deprived of the lawful duties "accruing upon the merchandise embraced or referred to in such report," or (4) "by means of any fraudulent or false letter" whereby the government is deprived of the lawful duties "accruing upon the merchandise embraced or referred to in such letter," or (5) "by means of any fraudulent or false paper" whereby the government is deprived of the lawful duties "accruing upon the merchandise embraced or referred to in such paper," or (6) "by means of any false statement" whereby the government is deprived of the lawful duties "accruing upon the merchandise embraced or referred to in such statement," or (7) if any owner shall be guilty of "any willful act or omission" whereby the government shall be deprived of the lawful duties "accruing upon the merchandise affected by such act or omission," such merchandise shall be forfeited. The section is the consolidation of these component parts and their expression in a single sentence. Its language is plain and its meaning evident. It is only by expunging or disregarding a portion of the section that an act which does not deprive the government of lawful duties can be made an offense under it. But a penal statute which creates and denounces a new offense should be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified by such a statute. An act, which is not clearly an offense by the express will of the legislative department of the government, must not be made so after its commission by the interpolation of expressions or by the expunging of some of its terms by the judiciary. The definition of offenses and the classification of the offenders are legislative, and not judicial, functions; and where, as in the case at bar, a penal statute is plain and unambiguous in its terms, the courts may not lawfully extend it to a class of persons who are excluded from its effect by its words, because, in their opinion, the acts of the latter are as mischievous as those of the class whose deeds the statute denounces. It is the intention expressed in the statute, and that alone, to which the courts may give effect. They may not assume or presume purposes and intentions that the terms of the statute do not indicate, and then enact or expunge provisions to accomplish these supposed intentions. Construction and interpretation have no place or office where the language of a statute is unambiguous and its meaning evident. It must be held to mean what it plainly expresses, and no room is left for construction.

In *U. S. v. Wiltberger*, 5 Wheat. 76, 96, 5 L. Ed. 37, 42, Chief Justice Marshall said:

"The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially, in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case, which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

See *Field v. U. S.* (C. C. A.) 137 Fed. 6, 8; *Maxwell v. State*, 40 Md. 293; *Alexander v. Worthington*, 5 Md. 472; *Smith v. State*, 66 Md. 215, 7 Atl. 49; *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152; *U. S. v. Clayton*, Fed. Cas. No. 14,814; *In re McDonough* (D. C.) 49 Fed. 360; *U. S. v. Lake* (D. C.) 129 Fed. 499; *Lake County v. Rollins*, 130 U. S. 662, 670, 9 Sup. Ct. 651, 32 L. Ed. 1060; *Swarts v. Siegel*, 54 C. C. A. 399, 117 Fed. 13.

The plain language and evident meaning of section 9 creates and prescribes a punishment for no act which does not deprive the United States of some of its lawful duties. Moreover, if there is error in the view that the language of this statute is plain and its meaning certain, and it is open to construction, the application to it of the settled rules for the interpretation of statutes leads to no different conclusion. One of the established rules for the construction of statutes is that they should have a rational, sensible construction. *U. S. v. Kirby*, 7 Wall. 482, 486, 19 L. Ed. 278; *Holy Trinity Church v. U. S.*, 143 U. S. 457, 460, 472, 12 Sup. Ct. 511, 36 L. Ed. 226; *Tsoi Sim v. U. S.*, 54 C. C. A. 154, 160, 116 Fed. 920, 926. The act of June 10, 1890, is an act to facilitate the collection of the revenues of the United States. Section 9 is a highly penal statute. It prescribes the punishment of the forfeiture of the merchandise, a fine of a sum not exceeding \$5,000, or imprisonment for a time not exceeding two years, or both, for every offense under it. It seems to be unreasonable and absurd to suppose that the Congress intended to prescribe this severe punishment for acts which were not intended to, and did not deprive the government of its duties or have any effect upon the subject or object of this legislation.

It is conceded by counsel for the government that the deprivation clause of the statute qualifies the offense by "any willful act or omission." It does not seem to be a sensible interpretation of the statute to hold that one who is guilty of a willful act or omission in the entry of his goods is exempt from the forfeiture, fines, and penalties prescribed by the section unless his act or omission deprives the government of its duties, while one who uses a false letter or statement in making his entry is liable to them although his act has no effect upon the revenue. The object which the legislative body sought to attain and the evil which it was endeavoring to remedy may always be considered for the purpose of ascertaining its intention. *Brown v. Duchesne County*, 60 U. S. 183, 194, 15 L. Ed. 595; *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 59, 25 L. Ed. 424; *Durland v. U. S.*, 161 U. S. 306, 313, 16 Sup. Ct. 508, 40 L. Ed. 709. The act of Congress in which this section is found is not a code of moral laws enacted to command truth and punish falsehood. It is an act to aid in the collection of the revenues of the United States. The purpose which the Congress sought to accom-

plish was neither moral nor ethical, but economic and mercenary. The evil which it endeavored to remedy was not the commission of falsehood or perjury, but the deprivation of the United States of its lawful revenues. It is inconceivable that Congress could have intended in such an act to impose the drastic forfeitures, fines, and penalties which it prescribes for acts which deprived it of no revenue and did not affect the subject of the legislation, while it left willful acts or omissions free from punishment unless they had such an effect. The clear words of the statute, their certain meaning, the legal requirement that all the terms of the section which are consistent with each other shall be given effect, a consideration of the subject of the legislation, of the object which the Congress was seeking to attain and of the evil which it was endeavoring to remedy, point unerringly to the same result. And our conclusion is that none of the acts denounced by the section constitute an offense thereunder, unless they cause the United States to be deprived of some of the lawful duties upon imported merchandise.

The word "false" has two distinct and well-recognized meanings. It signifies (1) intentionally or knowingly or negligently untrue, and (2) untrue by mistake, accident, or honestly after the exercise of reasonable care. A statement that is false in the former sense is undoubtedly denounced by section 9. Is the use of a statement which is false in the latter sense equally a violation of the statute? The proposition argued by counsel for the government that evil intent is not always an indispensable element of statutory offenses is undoubtedly sound. Crimes may be created by statutes to the commission of which knowledge and intent are not, and to the commission of which knowledge and intent are, essential. The question here, however, is not whether an intention to defraud the United States of some of its duties is indispensable to the commission of the offense of using the false statement in making the entry of the goods. It is whether the word "false" in the statute means knowingly or negligently untrue or only innocently or erroneously untrue. Hence the facts that the corresponding section of the act of June 22, 1874, read that "any owner, importer, consignee, agent or other person who shall (with intent to defraud the revenue) make or attempt to make any entry," etc. (18 Stat. 188, c. 391, § 12), and that the words in parenthesis were omitted from the act of 1890, and the further fact that section 16 of the act of 1874 (18 Stat. 189), which required the court to submit to the jury as a distinct and separate proposition the question whether the alleged acts were done with an actual intention to defraud the United States, is not found in the act of 1890, upon which counsel for the government found a persuasive argument, are not controlling. They neither determine, nor point with any degree of certainty to the proper determination of the issue, whether the intention of Congress was to punish with forfeiture, fine, and imprisonment untrue statements innocently made through mistake or accident, after the exercise of reasonable care to learn and to tell the truth, or only those statements which are knowingly untrue or untrue through recklessness or the lack of ordinary care to ascertain and to state the truth. Let us turn our attention to this question.

In the case of *U. S. v. 84 Boxes of Sugar*, 7 Pet. 453, 461, 8 L. Ed. 745, 748, which was a proceeding to forfeit the sugars because they were entered as "brown" when they should have been denominated "white," the Supreme Court said:

"The statute under which these sugars were seized and condemned is a highly penal law, and should in conformity with the rule on the subject be construed strictly. If either through accident or mistake the sugars were entered by a different denomination from what their quality required, a forfeiture is not incurred."

Section 5209, Rev. St. [U. S. Comp. St. 1901, p. 3497], declares that:

"Every president, director, cashier, teller, clerk or agent of any such banking association who * * * makes any false entries in any book, report or statement to the association with the intent in either case to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of any such association * * * shall be deemed guilty of a misdemeanor and punished accordingly."

But it is the unquestioned rule that a false entry by a president or other officer, with the intent to injure or defraud specified in the statute, does not constitute an offense under it, unless the entry was knowingly and intentionally made. A false entry, which the officer believed to be true when he made it, although it was in fact untrue, is not the false entry denounced by the law. *Cochran & Sayre v. U. S.*, 157 U. S. 286, 293, 298, 15 Sup. Ct. 628, 39 L. Ed. 704; *U. S. v. Allis (C. C.)* 73 Fed. 165, 170; *U. S. v. Graves (D. C.)* 53 Fed. 634, 644; *U. S. v. Allen (D. C.)* 47 Fed. 696, 697; *Dorsey v. U. S.*, 101 Fed. 746, 757, 41 C. C. A. 652, 663.

A statute of the state of New Hampshire provided that an attaching creditor might demand of a mortgagee, in certain cases, an account of the amount due on the debt secured by the mortgage, and that, if the mortgagee gave a false account, the mortgage should be discharged. The Supreme Court of that state held that an account which was untrue by mistake or accident and without culpable negligence of the mortgagee was not such a false account as would discharge the security under this statute. *Putnam v. Osgood*, 51 N. H. 192, 208.

A law of the state of Ohio imposed a penalty of 50 per cent. of the just tax upon the owner of property who made a "false return or statement." The Supreme Court of Ohio held that a return was not false within the true meaning of this statute, unless it was made with knowledge that it was untrue or through culpable negligence in ascertaining whether it was true or false. *Ratterman, Treasurer, v. Ingalls*, 48 Ohio St. 468, 489, 28 N. E. 168.

In *Wood v. State*, 48 Ga. 192, 297, 15 Am. Rep. 664, the highest judicial tribunal of that state in the discussion of the proper interpretation of this word in a penal statute said:

"'False' means that which is not true, coupled with a lying intent."

Knowledge, intent, or a negligent disregard of the rights of others is indispensable even to that false representation which ordinarily avoids a contract. A mistaken representation that is not true, made after the use of reasonable care to ascertain whether it is true or false and in the belief that it is true, has no such effect. *Union Pac. R. Co.*

v. Barnes, 64 Fed. 80, 83, 12 C. C. A. 48, 50, 51; McDonald v. Trafton, 15 Me. 225, 227.

Many insurance policies contain a stipulation to the effect that any fraud or false swearing in the proofs of loss shall forfeit the claims under the policies. But the law is settled practically without dispute that it is only an untrue statement under oath which is knowingly or recklessly made that will constitute the false swearing which will forfeit the claim, and that a mistaken or an unintentional error in the sworn statement made without culpable negligence does not affect it. Wiede v. Ins. Co., Fed. Cas. No. 17,617; Ins. Cos. v. Weides, 81 U. S. 375, 383, 20 L. Ed. 894; Marion v. Great Republic Ins. Cos., 35 Mo. 148, 151; Franklin Ins. Co. v. Culver, 6 Ind. 136, 139, 140; Maher v. Hibernian Ins. Co., 67 N. Y. 283, 292.

It is conceded that there are many statutes and contracts in which the significance of the words "false" and "falsely" includes no element of knowledge, intent, or negligence, and that legislative bodies have adequate power to inflict penalties and forfeitures for acts that are false in this sense only. Commonwealth v. Weiss, 139 Pa. 247, 21 Atl. 10, 11 L. R. A. 530, 23 Am. St. Rep. 182; Commonwealth v. Raymond, 97 Mass. 567; 3 Greenleaf's Ev. § 21; Wharton's Criminal Law, § 88; Huntington v. Attrill, 118 N. Y. 365, 376, 377, 23 N. E. 544; Torbett v. Eaton, 49 Hun, 209, 212, 213, 1 N. Y. Supp. 614, 616. But before courts enforce penalties or forfeitures for such comparatively innocent acts the intention of the law makers to impose them should appear either by the express terms of the statutes or by reasonable implication. The reason of the case, the general rule that penal statutes should be strictly construed, that the judiciary should not interpret into them the creation of offenses which the enacting body did not clearly denounce, and the general current of decisions upon this subject, to some of which reference has been made, indicate that the true rule is this: The words "false" and "falsely," in statutes and contracts which impose forfeitures or penalties for false acts or acts falsely done, generally imply culpable negligence or wrong. They signify more than incorrect or incorrectly, and mean knowingly or intentionally or negligently false or falsely, in the absence of express provisions in the statutes or contracts themselves, or reasonable implications from them, their subjects, and the circumstances to the contrary. U. S. v. 84 Boxes of Sugar, 7 Pet. 453, 461, 8 L. Ed. 745; Cochran and Sayre v. U. S., 157 U. S. 286, 293, 298, 15 Sup. Ct. 628, 39 L. Ed. 704; U. S. v. Allis (C. C.) 73 Fed. 165, 170; U. S. v. Graves (D. C.) 53 Fed. 634, 644; U. S. v. Allen (D. C.) 47 Fed. 696, 697; Dorsey v. U. S., 101 Fed. 746, 757, 41 C. C. A. 652, 663; Putnam v. Osgood, 51 N. H. 192, 208; Ratterman v. Ingalls, 48 Ohio St. 468, 469, 28 N. E. 168; Wood v. State, 48 Ga. 192, 297, 15 Am. Rep. 664; Union Pac. R. Co. v. Barnes, 64 Fed. 80, 83, 12 C. C. A. 48, 50, 51; McDonald v. Trafton, 15 Me. 225, 227; Wiede v. Ins. Co., Fed. Cas. No. 17,617; Ins. Cos. v. Weides, 81 U. S. 375, 383, 20 L. Ed. 894; Marion v. Great Republic Ins. Co., 35 Mo. 148, 151; Franklin Ins. Co. v. Culver, 6 Ind. 136, 139, 140; Maher v. Hibernian Ins. Co., 67 N. Y. 283, 292; Hatcher v. Dunn, 102 Iowa, 411, 415, 71 N. W. 343, 344, 36

L. R. A. 689; State v. Smith, 63 Vt. 201, 22 Atl. 604; Masson v. Association, 18 U. C. C. P. 19.

Thus Abbott in his Law Dictionary (page 478) says:

"In the more important uses, in jurisprudence, of 'false' and 'falsely,' they usually import somewhat more than the vernacular sense of erroneous or untrue. They are oftenest used to characterize a wrongful or criminal act, such as involves an error or untruth intentionally and knowingly put forward. A thing is called false, when it is made or done with knowledge, actual or constructive, that it is untrue or illegal; or is said to be done falsely, when the meaning is that the party is in fault for its error."

A statute of Iowa made an inspector of illuminating oil civilly and criminally liable for falsely branding it. In a civil action under this law for damages, the Supreme Court of that state said:

"It is important to determine the meaning which should be attached to the word 'falsely' as used in the statute. Does it mean inaccurate, erroneous, or faulty merely, or does it include the thought of intentional wrong? It is true that a false branding may be said to be inaccurate, erroneous, faulty; but the word 'false' usually includes, not only the element of error, but also of intentional wrong. It is said in 7 Am. & Eng. Enc. Law, 661, that 'this word means something more than untrue. It means something designedly untrue, deceitful, and implies an intention to perpetrate some treachery or fraud.' * * * The statute under consideration makes the officer who violates its provisions liable both civilly and criminally upon precisely the same state of facts, and is therefore a penal statute to be strictly construed. Hanks v. Brown, 79 Iowa, 563, 44 N. W. 811, and cases therein cited; Sutherland, St. Const. §§ 208, 371. Statutes are sometimes enacted which prohibit acts, not because of any moral wrong involved in them, nor of any criminal intent with which they are committed, but from considerations of public policy: and persons are required to know the facts and obey the law, at the peril of punishment for disobedience, without regard to actual knowledge or wrongful intent. That is true of many fiscal, police, and other regulations. * * * But it is the general rule that a guilty intent is essential to the commission of a crime, and we are of the opinion that there is nothing in the language of the statute under consideration, even when construed with reference to the demands of public policy, which makes necessary the conclusion that an officer may, without intentional wrong or culpable negligence on his part, subject himself to penalties for which it provides."

Section 9 of the act of 1890 is a penal statute. It prescribes grave forfeitures and penalties, and it falls fairly within the rule which has been announced, and which is sustained by the above authorities. A rational construction of the statute and a consideration of the relation of the offense of the use of a false statement denounced in it to the other offenses created by it strengthen this conclusion. It is neither probable, nor reasonable, to suppose that Congress intended to inflict the forfeiture of the merchandise involved, a possible fine of \$5,000, and possible imprisonment for two years for the use of an innocent or mistaken statement that was made with reasonable care and without knowledge that it was not true. The use of a false statement invokes the same punishment and is enumerated in the same section with the use of a "fraudulent or false invoice, affidavit, letter, paper," and the guilt of a "willful act or omission." As the willful act or omission and the offense of the fraudulent invoice, affidavit, letter, or paper could not be committed without knowledge or a reckless disregard of the means of knowledge, the reasonable inference is that Congress intended that knowledge of its falsity, or culpable negligence in ascertaining the

answer to the question, whether it was true or false, should be an indispensable element of the offense of using the false statement, under the familiar rule, "*Noscitur a sociis*."

Finally, section 5 of this act prescribes the forms of declarations for the entry of merchandise, and requires the owner, consignee, or agent to sign and file a statement in one of these forms according to the nature of the case. It is for a false statement in one of these declarations that this action is prosecuted. Section 6 of the act provides "that any person who shall knowingly make any false statement" in one of these declarations shall be punished by the same fine and imprisonment prescribed by section 9, and that nothing in that section shall relieve the goods of forfeiture. It is inconceivable that Congress intended to punish a knowingly false statement in the declaration by a possible fine of \$5,000 and a possible imprisonment of two years by section 6, and to punish the same false statement when it was not knowingly, but innocently or ignorantly, made through mistake or accident by the same fine, the same imprisonment, and the additional penalty of a forfeiture of the merchandise involved under section 9. The conclusion is that the word "false" in section 9 of the act of June 10, 1890, means more than incorrect or erroneous. It implies wrong or culpable negligence, and signifies knowingly or negligently untrue.

Was the claimant the owner of the diamonds when he made his statement? He had the right to their possession, a lien upon them for the duties and the expenses of their transportation, which he had paid, and an option to keep them and pay the invoice price for them or to return them to the vendors; but he had not agreed to keep or to pay for them. He had not, therefore, completed his tentative purchase, and the general ownership of the property was in Fink, Bodenheimer & Co., and not in him. *Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co.*, 52 C. C. A. 25, 29, 114 Fed. 77, 81, 57 L. R. A. 696. But the act of June 10, 1890, opens with the enactment "that all merchandise imported into the United States shall for the purpose of this act be deemed and held to be the property of the person to whom the merchandise may be consigned," and this declaration has been followed by an adjudication that the consignee of imported goods is deemed the owner for the purpose of the collection of the customs, whatever his relation may be to other parties interested in them. *U. S. v. Bishop*, 125 Fed. 181, 185, 60 C. C. A. 123, 127.

Conceding, without deciding, that notwithstanding this statutory and judicial determination the entryman is required by section 5 to state who the owner of the imported merchandise is (*U. S. v. Fawcett* [C. C.] 86 Fed. 900), the fact that the term "owner" is not limited in its significance to one who holds a perfect title to property must not be overlooked. The word has other meanings, and must have its appropriate significance in each case in view of the subject, object, and terms of the legislation in which it is found. Thus, there may be many joint owners of the same property, yet each would undoubtedly be an owner. A bailor may have a general, and a bailee a special, ownership in the subject of the bailment. 2 *Hale on Bailments*, 56. In *Camp v. Rogers*, 44 Conn. 291, 298, a person who hired a carriage for a limited time was held to have

a special property in it, and to be the owner within the meaning of a statute which provided a remedy against one who "shall drive against another vehicle and injure its owner." In *Baltimore & Ohio R. Co. v. Walker*, 45 Ohio St. 577, 585, 16 N. E. 475, 480, it is said that:

"'To own' is defined 'to hold as property; to have a legal or rightful title to; to have; to possess'—and an 'owner' is 'one who owns; a rightful proprietor.' An owner is not necessarily one owning the fee simple or one having in the property the highest estate it will admit of. One having a lesser estate may be an owner, and, indeed, there may be different estates in the same property vested in different persons, and each be an owner thereof."

And the court held that under a statute which gave a remedy against the owner of a railroad for injuries resulting from a defect in the railroad locomotive or car the operating lessee was the owner for the time being.

In *Choteau v. Thompson*, 2 Ohio St. 114, and *Dutro v. Wilson*, 4 Ohio St. 101, the Supreme Court of that state decided, under a law which gave a mechanic's lien upon a building, and land upon which it was placed, to any one who furnished material or labor therefor under a contract with the owner, that the holder of the leasehold estate was such an owner. In *Gilligan v. Board of Aldermen*, 11 R. I. 258, it was held that a tenant for life, or from year to year, was an owner within the meaning of a law which gave compensation to abutting owners for damages caused by a change of grade in highways.

One of the accepted definitions of the term "owner" which has received the sanction of judicial tribunals is:

"He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right."

Bouvier's Law Dictionary, tit. "Owner"; *Johnson v. Crookshanks*, 21 Or. 239, 28 Pac. 78.

This definition comes very near to a description of the situation of the claimant when he made his declaration. He had the right of possession, and thus the dominion over the property. He had a lien upon it, the right to hold it until the amount of his lien was paid, and the ultimate right to appropriate it in due time to the payment of that lien. He had the right to purchase it at a fixed price, and hence, by exercising that right and paying the price, a right to destroy it. Conceding, however, that *Fink, Bodenheimer & Co.* still held the general ownership of the property, he had the special ownership and title of a bailee, and, in view of these facts and of the declaration of the statute that a consignee shall be deemed an owner, his statement that he was such was clearly free from any element of wrong or of culpable negligence; and, as there is no evidence that it deprived or was intended to deprive the government of any of its revenues, the use of it did not constitute an offense under the law. A construction of the act of June 10, 1890, that would subject a merchant who made an innocent error in the statement in his declaration of the title to imported merchandise to forfeiture, fine, and imprisonment, when his act neither deprived nor was calculated nor intended to deprive the United States of any of its customs or revenues,

would deflect the statute from its true purpose, create a new offense by judicial legislation after the fact, and be a reproach to the administration of justice.

The judgment below was right, and it is affirmed.

BROWN v. CHICAGO, R. I. & P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. August 5, 1905.)

No. 2,213.

CARRIERS—ASSAULT ON PASSENGERS—LIABILITY.

The liability or nonliability of the carrier of passengers for hire for an injury inflicted upon a passenger carried, by reason of a third person making an unprovoked assault upon him, depends upon the presence or absence of evidence showing the employes of the carrier either knew, or by the exercise of due care should have known, from all the attendant facts and circumstances of the particular case, that injury to the passenger carried was threatened or impending, and which injury, by the exercise of that high degree of care which the law requires of a carrier of passengers for their safety and protection, thus being foreseen, might have been guarded against.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1125.]

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

J. A. Giantvalley (Walter L. Chapin, on the brief), for plaintiff in error.

McNeil V. Seymour (Edward C. Stringer, on the brief), for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and POLLOCK, District Judge.

POLLOCK, District Judge. This is an action brought to recover damages for a personal injury sustained by plaintiff while riding as a passenger on one of defendant's regular passenger trains. The controlling facts are practically undisputed, and, stated in that light most favorable to the contention made by plaintiff, are: On the morning of August 10, 1902, plaintiff was a passenger on one of the regular passenger trains on defendant's line of railway en route from Enid, in the territory of Oklahoma, via Kansas City, Mo., to his home in Brookfield, Mo. When the train arrived at the breakfast station of Caldwell, in the southern part of the state of Kansas, a cowboy in a state of partial intoxication boarded the train with a ticket for Corbin, a small station about seven miles north of Caldwell, and entered the same car in which plaintiff and many other passengers were riding. At the time he entered the coach he was using and continued to use profane and abusive language. The train conductor, while engaged in the performance of his duties in another car, was informed of the conduct of this passenger, came into the car in which he was riding, and informed him he must stop

the use of such language or get off the train. The schedule time of the train from the station of Caldwell to that of Corbin was about 12 minutes. After the conductor had taken up the ticket of the intoxicated passenger, and as the train neared the station of Corbin, he took hold of the passenger and forcibly proceeded with him to the platform of the car, where a scuffle ensued between them. At this time the passenger said to the conductor, prefacing the same with an oath, "I will get even with you." When the train stopped at Corbin, the intoxicated passenger was ejected therefrom. At this time plaintiff was sitting in the front seat of the day coach on the right-hand side of the car, by the window, playing with a little child. As the drunken passenger alighted on the platform at the station, he at once stooped down and picked up a piece of burned gumbo, used at that place on the road as ballast, weighing about two pounds, and hurled it through the window at which plaintiff was sitting, intending thereby to strike the conductor who had removed him from the train, but instead thereof hitting plaintiff in the back of the head, rendering him unconscious, and injuring him to such an extent as to require his removal from the train at the station of Wellington. This act of violence was suddenly entered upon and committed, and was apprehended neither by plaintiff nor the conductor of the train. At the time plaintiff was a married man about 50 years of age, earning \$3 per day. As a result of the blow he was seriously injured, and brought this action against the railway company to recover his damages incident thereto, alleging his injury to have been received through the negligence of the defendant company, in that it failed to accord him that high degree of protection which the law requires of a carrier of passengers toward one carried, and that his injury occurred through the concurrent acts of the drunken passenger and the conductor of the train. At the conclusion of the evidence the trial court directed a verdict for defendant. The sole assignment of error is based on this ruling.

From a consideration of the facts as above stated, giving the plaintiff the benefit of every reasonable inference that may be drawn therefrom, and viewed in the light of that high degree of care which the law requires of the carrier of passengers for hire for the safety and protection of the passenger, we are of the opinion the ruling of the trial court is right, and must be affirmed. The precise nature of the negligence charged against defendant is alleged in the petition as follows:

"That the plaintiff was injured by reason of the concurrent acts of defendant's conductor and the drunken man he expelled from the train in a very careless and negligent manner. That the man ejected from the train, as above stated, was very mad, angry, drunken, unsafe, dangerous, violently desperate, and insane with rage, and it was the duty of the defendant to exercise the highest degree of care in protecting its passengers from the danger and injury which might result from the act of removing such man from its train. That defendant failed to use proper care and precaution for the protection of this plaintiff against injury, in that the defendant's conductor did not, as is customary in cases of this kind, to protect the passengers, call a brakeman or any one else to assist him in removing the man from the coach and to the rear of the train."

It is thus seen the specific act of negligence charged against defendant is that the conductor of the train did not call to his aid the brakeman on the train, or other assistance, in removing the drunken, angry, and dangerous person from the train; whereas the violent act which resulted in injury to plaintiff arose after the removal of the intoxicated passenger from the train. It is, however, contended by counsel for plaintiff in argument that the conductor of the train should have apprehended the probability of danger to plaintiff, and was negligent in not guarding plaintiff against the same. *Spangler v. Railway Co.*, 68 Kan. 47, 74 Pac. 607, 63 L. R. A. 634; *Penny v. Atlantic Coast Line R. Co.*, 133 N. C. 221, 45 S. E. 563, 63 L. R. A. 497; *West Memphis Packet Co. v. White*, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427; *Snow v. Fitchburg R. Co.*, 136 Mass. 552, 49 Am. Rep. 40; *Indianapolis St. Ry. Co. v. Dawson* (Ind. App.) 68 N. E. 909, and other cases are cited in support of this contention. An examination of these cases, however, will show their inapplicability to the facts in the case at bar. They all rest for their support upon antecedent facts leading up to the injury, of such character as to inform the conductor, or others in charge of the conveyance, that injury to the passenger would be attempted, of such nature as ordinary prudence might and should have guarded against, and by a failure to so act the carrier was negligent. Thus, in *Spangler v. Railway Co.*, a case much relied upon by counsel for plaintiff, and in which the manner of inflicting the injury of which complaint was made was very similar to that in the case at bar, the court, after quoting with approval the rule laid down by Mr. Fetter in his work on *Carriers of Passengers* (volume 1, § 96) as follows: "Knowledge of the existence of the danger, or of facts and circumstances from which the danger may be reasonably anticipated, is necessary to fix a liability upon the carrier for damages sustained in consequence of failure to guard against it"—made application of the rule to the facts in that case in the following language:

"From the evidence relating to the character, condition, and conduct of the young men, it is reasonable to conclude that some depredation was to be committed upon the St. Joe passengers at Gower. It is fairly inferable that the conductor knew, or should have known, of this danger, and hence that he should have exercised the highest vigilance and diligence to subvert it; that he failed to employ to that end any of the means at his command; and that the plaintiff's injury was the result of his negligence."

In *Penny v. Atlantic Coast Line R. Co.*, it is said:

"According to the uniform tendency of these adjudications (decisions of other courts), which we admit as authorities, the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servant's neglect in this particular, when by the exercise of proper care the acts of violence might have been foreseen and prevented."

In *West Memphis Packet Co. v. White*, which was an accidental injury by one passenger inflicted upon another, it is held:

"The owner of a steamboat is required to exercise the utmost vigilance and diligence in protecting its passengers from injuries from another passenger by the negligent and careless use of a loaded gun exhibited by him, where, under all the circumstances, such owner or his officers and agents might reasonably have expected or anticipated the injury."

In *Snow v. Fitchburg R. Co.*, in which a passenger standing on a depot platform awaiting the arrival of his train was injured by being struck by a mail bag thrown from the train in accordance with the custom known to the corporation, it is said:

"There was evidence in the case tending to show that mail bags had not infrequently been thrown from this car in such a way as to strike upon the platform where the plaintiff stood; and, if this evidence was believed, the court was justified in inferring that the defendant knew, or in the exercise of proper care ought to have known, this. It was within the power of the defendant to prevent this practice of throwing out mail bags, if in no other way, by withholding the use of the car, or by stopping the train at the station. The case presented is unlike that of the act of a passenger, which the defendant had no reason to anticipate or power to prevent."

In the case of *Indianapolis St. Ry. Co. v. Dawson* it is held:

"Where a street railway, owning a park reached by its lines and maintaining attractions for the public there, has knowledge that there is a conspiracy on the part of certain persons to assault any colored persons visiting the park, and knows of acts of violence committed pursuant to such design, and transports colored persons there without warning them of the danger, and they are assaulted pursuant to the conspiracy, the company's employes making no attempt to interfere, the railway company is liable for the injuries."

In *Meyer v. St. Louis, I. M. & S. Ry. Co.*, 54 Fed. 116, 4 C. C. A. 221, in which case one passenger was shot and killed by an insane passenger, and in which there was evidence tending to show the employes of the defendant company in charge of the train knew before the act happened of the insanity of the passenger committing the deed, this court ruled:

"The railroad would not be negligent by reason of nonaction, if its employes, exercising the high degree of care demanded of them, could not have reasonably anticipated the effect of failure to restrain or eject such insane passenger."

"To charge the defendant company with the duty of restraint, it need not necessarily have been foreseen that the killing would take place, unless for such restraint. If a reasonable possibility of injury to any one of the passengers could have been foreseen, the obligation arose to take proper action for their protection, although it could not be anticipated which one of the passengers might be injured by such insane person, nor whether his violence would cause death or not."

In the light of authority, and in the very reason of things, the liability or nonliability of the carrier of passengers, in cases of this nature, must be held to depend upon the presence or absence of evidence tending to show the employes of the defendant carrier either knew, or by the exercise of due care should have known, from the circumstances of the particular case, injury to the passenger was threatened or impending, which injury, by the exercise of that high degree of care which the law requires of a carrier of passengers for the safety and protection of the passenger, might not only have been foreseen, but guarded against, thus averting the injury. The foregoing cases and others relied upon by counsel for plaintiff were ruled in favor of the liability of the carrier, but, as has been seen, in recognition of this principle. *Felton, Adm'r v. Chicago, Rock Island & Pacific Ry. Co.*, 69 Iowa, 577 29 N. W. 618; *Fewings v. Mendenhall*, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. Rep. 519; *Putnam v. Broadway & Seventh Ave. R. R. Co.*, 55 N. Y.

108, 14 Am. Rep. 190. And in the many other cases cited by counsel for the defendant the nonliability of the defendant was adjudged upon this ground.

Applying this principle to the facts in the case at bar, as stated, the nonliability of the defendant follows, and follows for the reason that the act of violence resulting in injury to the plaintiff was suddenly entered upon and committed, entirely unapprehended and unforeseen by any one, and was in its nature and manner of execution of such character, in the light of attending circumstances, as to be clearly unexpected.

The judgment of the Circuit Court must be affirmed.

DODGE COAL STORAGE CO. v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court, N. D. New York. July 27, 1905.)

No. 6,920.

PATENTS—PATENTABLE INVENTION—AGGREGATION OF OLD ELEMENTS IN STORAGE APPARATUS.

The Piez & Beaumont patents, No. 668,960 and No. 688,111, granted on a division of the same application, both being for improvements in storage apparatus consisting of mechanism for piling coal or analogous material and for removing material from a pile, are void for lack of novelty and patentable invention in view of the prior art, and because each is for a mere aggregation of old elements, each of which performs separately its old function.

In Equity. Suit in equity to restrain the alleged infringement of two United States letters patent, viz: No. 668,960, dated February 26, 1901, for improvements in storage apparatus, to Charles Piez and Robert H. Beaumont, assignors to the Dodge Coal Storage Company, and No. 688,111, dated December 3, 1901, for improvements in storage apparatus, to same parties.

Howson & Howson (Charles Howson, of counsel), for complainant.

Geo. C. Wing, R. S. Taylor, and E. M. Hulse, for defendant.

RAY, District Judge. The application for letters patent No. 668,960, dated February 26, 1901, was filed October 18, 1899. A division was allowed and application for letters patent No. 688,111, dated December 3, 1901, on such division, was filed December 31, 1900. Both inventions are for improvements in storage apparatus. No. 668,960 says, "Our invention relates to certain improvements in mechanism for piling coal and analogous material and for removing material from a pile," and as to the object, "The object of our invention is to provide a comparatively cheap structure which will pile material in a semicircular or circular pile from a fixed point, and remove material from the pile to a fixed point," and as to how this is done, "This object we accomplish by so constructing the apparatus that the conveyer, mounted on a pivoted structure, can pass through the pivot of said structure and receive material at a

fixed point, the elevating and conveying mechanism being carried solely by the movable section." This patent has six claims. The main or central or controlling idea of each is a fixed structure having an open center with a movable structure pivoted thereto and supported thereby, the pivot having an open center, through which open fixed structure and open pivot the coal or other material is hoisted or elevated to the movable structure along which it is transported by certain carrying apparatus to the desired point. By merely reversing the process—that is, by taking the coal from the pile and bringing it back and letting it down through the open pivot and tower to the pit or a hopper, or into the car, or both direct, we have a coal loader. It works either way with equal facility. The six claims read as follows:

"(1) The combination of a fixed structure, a pivoted structure arranged to swing thereon, the said pivot having an open center, and elevating and conveying mechanism on said pivoted structure, said mechanism arranged to elevate material through the open center of the pivot, substantially as described.

"(2) The combination of a fixed structure having an open center, a movable structure pivoted to the fixed structure, and elevating and conveying mechanism on said movable structure, the elevating mechanism arranged to elevate material through the fixed structure and through the pivot of the movable structure, substantially as described.

"(3) The combination of a fixed structure, a pivoted structure arranged to swing thereon, said pivot having an open center, and an endless conveyer passing along said pivoted structure through the pivot of the same and down through the fixed structure, substantially as described.

"(4) The combination of a fixed structure having an open center, a movable structure arranged to swing thereon and having an open pivot, and elevating and conveying mechanism for carrying material continuously forward through the fixed structure, through the open pivot and along the movable structure, substantially as described.

"(5) The combination of a fixed structure having an open center, a movable structure arranged to swing on the fixed structure and having an open pivot and having two troughs, an endless conveyer mounted on the movable structure and arranged to travel on said troughs, said conveyer passing through the open pivot and the fixed structure, and means for loading the buckets of the conveyer at the fixed structure, substantially as described.

"(6) The combination in storage apparatus of a fixed structure having an open center, a movable structure pivoted thereto, said pivot having an open center, two conveyer-troughs carried by the movable structure, a bucket elevator and conveyer mounted on the movable structure and its horizontal runs arranged to travel on the said troughs, the elevating-section of the conveyer extending through the open pivot and through the fixed structure to a receiving-point, with means carried by the movable structure for charging the return run of the conveyer with material from the pile, substantially as described."

As shown in the drawings, the fixed structure with open center is of iron or wood framework, and the movable structure pivoted thereon, which may be of any reasonable or practicable length, is in the form of a truss, which is supported at its outer end by a leg or legs or a tower-like structure supported by a small wheeled carriage which travels on a circular track. This permits the shifting of the location of the pivoted movable structure, always moving on its fixed pivoted end, however, to any desired position within the area circumscribed by the circular track, and permits coal to be lifted and carried by the hoisting and carrying mechanism from the bottom of the open fixed structure up through the interior of the

fixed structure and pivot to the movable pivoted structure and along it to the point where the coal or other material is to be deposited, or from such pivot back over the same route to the bottom of the fixed structure. The great object is to lift and carry the coal above the surface of the earth, as much above as the surface of the completed pile of coal or other material, when stored, demands; to take it from a given point, avoiding the necessity for an extensive and expensive pit or hopper, or of moving the hoisting and carrying apparatus from point to point. If this was not done, the entire area could not be covered to the depth desired.

In the first claim of the first patent we have in combination, three elements: (1) A fixed structure; (2) a pivoted structure arranged to swing thereon, the pivot having an open center; and (3) elevating and conveying mechanism on the pivoted structure so arranged as to elevate the material through the open center of the pivot. Here we have no extended "pivoted structure," no support for the outer end (or ends of it, if it be pivoted in the center), no open center for the fixed structure. In claim 2 thereof we have in combination (1) a fixed structure with open center; (2) a movable structure pivoted to the fixed structure; and (3) elevating and conveying mechanism on the movable structure, such mechanism so arranged as to elevate material through the open centered fixed structure and the pivot of the movable structure. Here we differ from claim 1 in having an open centered fixed structure, but not an open centered pivot, except by implication. In claim 3 thereof we have (1) a fixed structure; (2) a pivoted structure arranged to swing thereon, said pivot having an open center; (3) an endless conveyer passing along said pivoted structure and down through the fixed structure. Here the endless conveyer takes the place of conveying mechanism. In claim 4 thereof we have (1) fixed structure with open center; (2) movable structure arranged to swing thereon and having an open pivot; and (3) elevating and carrying mechanism for carrying material continuously forward through the fixed structure, through the open pivot, and along the movable structure. In claim 5 thereof we find (1) fixed structure with open center; (2) movable structure arranged to swing on the fixed structure, and having an open pivot and having two troughs; and (3) an endless conveyer mounted on the movable structure, and arranged to travel on said troughs, the conveyance also passing through the open pivot and the fixed structure; and (4) means for loading the buckets of the conveyer at the fixed structure. Here are added two troughs on which the conveyer travels, but they are a part of the movable structure, and probably are permissible in the other claims. "Means for loading the buckets of the conveyer at the fixed structure," top or bottom thereof, might include many things. In claim 6 we have (1) fixed structure with open center; (2) movable structure pivoted thereto, said pivot having an open center; (3) two conveyor troughs carried by the movable structure; (4) a bucket, elevator, and conveyer, etc.; and (5) with means carried by the movable structure for loading the return run of the con-

veyer. If any novel element, or element of novelty, enters into this patent and any claim thereof, it enters into all of such claims, and consists of the open pivot. There must be novelty in an invention of this kind, and in every valid claim must be found one novel element.

As the contention is made that the second patent, No. 688,111, is void because for the same invention described and claimed in No. 668,960, and because a patentee can have but one patent for the same invention, we will now consider the elements of the second patent—that of December 3, 1901. As to the matter to which it relates and the object the specifications say:

"Our invention relates to certain improvements in mechanism for piling coal or analogous material and for removing material from a pile.

"The object of our invention is to make a comparatively cheap structure of this type in which the material can be piled in two semicircular piles, and in which the conveying and elevating mechanism is carried entirely by a horizontally-swinging support."

The claims of the patent are as follows:

"(1) In combination, a track, a pit located in position to receive coal dumped from a car on said track, a tower above said pit and having a clear hoisting-opening above the pit, a horizontally-swinging support extending laterally from said tower, a trackway upon said support, a bucket-carriage upon said trackway, a bucket, and means whereby said bucket may be hoisted and lowered both within said tower and from said trackway, and means whereby said carriage may be propelled, substantially as described.

"(2) The combination of a tower having an axial hoisting-opening extending through its base, a horizontally-swinging support connected with said tower, a trackway extending from substantially the pivotal axis of said tower out onto said support, a carriage on said trackway, a coal-bucket, and means whereby said coal-bucket may be hoisted and lowered from said carriage, substantially in the pivotal axis of said tower and also at other points on said trackway, substantially as described.

"(3) In a device for handling and storing coal and similar materials, the combination with a tower mounted to turn upon a pivot and having a central hoisting and lowering opening, a receiving-bin beneath said opening and a carrier-support extending from said tower and movable with said tower as a pivot, of a hoisting and conveying apparatus mounted upon said tower and carrier-support, and adapted to take material from and to deposit it within either the bin or the space covered by said support at will.

"(4) In a device for handling and storing coal and similar materials, the combination with a pivoted tower having an axial hoisting-opening, a radial track connected with said tower and movable upon a common pivot therewith, of a receiving-bin beneath said tower, and a hoisting and conveying apparatus comprising a carrier movable on said track, and a coal receiver and conveyor carried thereby and adapted to be lowered within the tower into said bin.

"(5) In a device for handling and storing coal and similar materials, the combination with a tower mounted to turn upon a pivot and having a clear central hoisting-opening therein, extending through its base, and a radial support for a carrier adapted to swing with the tower, of a hoisting apparatus mounted upon said tower and radial support, and adapted to take or deliver material at will either through the axis of the tower or from beneath said support.

"(6) In a device for handling and storing coal and similar materials, the combination with a tower mounted to turn upon a pivot and having a clear central hoisting-opening therein, a radial arm adapted to swing with the tower and a traveling support for the outer end of said arm, of a hoisting and conveying apparatus mounted upon said tower and radial arm and adapted to take or deliver material at will, either through the axis of the tower or from beneath said arm.

"(7) In a device for handling and storing coal and similar materials, the combination with a tower mounted to turn upon a pivot and having a clear central hoisting opening therein, a radial arm adapted to swing with the tower, hoisting and conveying apparatus mounted upon said tower and arm, and an engine for operating said mechanism also mounted upon and swinging with the tower, substantially as described."

We are impressed at once on the mere reading that the central and controlling idea of the patent and of each and every element is a tower on a pivot, such tower and pivot being open in the center so as to permit the coal or other material hoisted and carried to be raised (or lowered as the case may be) through the interior of this pivoted structure. This is plainly expressed in the following paragraph of the specifications:

"The essential feature of the above-described apparatus is the open fixed structure or tower, a horizontally-swinging support pivoted to the tower and arranged to swing over a certain area, the pivot having an open center through which the material can be elevated from a hopper or pit to the swinging support and carried along the said support and discharged at any point desired. The structure is also so constructed that the clam-shell bucket can remove material from the pile, and the bucket can be carried along the swinging support and its contents deposited at any point desired, either directly into cars or boats or into the hopper."

This patent, in its claims, adds some elements not found among the elements expressly mentioned in the claim of the first patent; as, for instance, two railroad tracks and a pit or hopper. But the first patent and its claims presupposes a means for bringing coal to the storage apparatus, including a road and vehicles, and this would include cars and railroad tracks. It also presupposes a place beneath the fixed structure, where the coal may be deposited before being taken up for storage. It might be taken from a car, a wagon, the ground, or a hole in the ground, viz., a pit or hopper. The railroad tracks are no more a part of the patent or invention described and claimed than are the cars running thereon, or the coal in the mine. So far as the construction or the working and operation of the invention is concerned, or so far as the operation and working of the hoisting and transporting apparatus used for storing the coal—in short, so far as the entire storage apparatus is concerned, including its supports and motive power, the tracks and cars and coal, or other material, and even the pit or hopper under the tower, are entirely disconnected therefrom. We might as well add a reaping machine as an element to a patented threshing machine, when the one is entirely disconnected from the other, as to add these railroad tracks to claim 1 as an element thereof, and then say the second patent is not for the same invention as the first. These tracks, presumably, are used to carry the cars that bring the coal from the mines to the hopper or pit into which it is "dumped" before being hoisted and carried by the storage apparatus to the points of storage. Why not include a coal mine and apparatus for crushing the coal and cars running on the railroad tracks leading to and connecting with those which reach the pit or hopper? Coal cannot be stored until it is mined, elevated from the mine, and transported to the place of storage.

Still the fact remains that the claims of the later or second patent are somewhat restricted in describing some of the elements thereof—that is, narrower—and in other cases we find an added element as stated. This raises the question whether the second patent for an invention is for the same invention described in the prior or first patent, where the invention in both resides in the introduction into the combination of a single novel element found in each claim of such prior patent and each claim of the subsequent patent, and not in a new or novel arrangement of old and well-known elements working in a new way to produce an old result or in the old way to produce a new result, but in the subsequent patent, elements, not novel, but old and well known, are added, and such added elements were necessary adjuncts of the first, as much so as they are of the second. In the storage apparatus of the first patent we have the fixed structure, the movable structure pivoted thereon, the pivot and fixed structure being open in the center to admit the passage of the bucket or buckets carrying the material to be stored, and the extension of the movable structure and the elevating and conveying mechanism, and means for loading the buckets of the conveyer. This is all there is of the storage apparatus of the second patent. The terms of the claims differ. The necessary elements of each claim exist in both, and are mentioned in both, but are described differently. If the first operates at all, it must be placed where coal is already placed so as to be under the pivot and open fixed structure, or where it can be brought and placed there, or where coal is already stored in the storage area, and is to be taken to the space under the fixed structure. It is true that when a person taking a patent for a combination puts into the combination certain elements, all are made material so far as he is concerned. But does it follow that a few years later he may take another patent for the same thing on adding to the old combination of the claim another element not novel, and one that does not change the operation, or the result of the operation, of the combination? But a combination and its elements are distinct inventions, and a patent for the combination is not the same as a patent for the elements, nor does it cover them. *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906; *Corn Planter Patent*, 23 Wall. 181, 23 L. Ed. 161.

In *Walker on Patents* we find this statement (section 180, p. 166) :

"On the other hand, two or more related patents may lawfully be granted for different parts of one extensive machine. In such cases it is proper to describe the whole machine in each of the specifications, and to picture the whole machine in each set of drawings, thus causing the separate letters patent to differ from each other only in their claims."

And in section 180a, pp. 167, 168, 169, we read :

"Sec. 180a. Only one valid original patent can be granted to an inventor on one invention; and, if a plurality of such patents are thus granted, all except the first are void. * * * And no monopoly of any invention is secured to any patentee by any patent otherwise than by a claim in that patent which is coextensive with that invention. Therefore the rule for ascertaining the identity or the nonidentity of the invention or inventions of a plurality of resembling original patents granted to one inventor is the same

as the rule for ascertaining the identity or nonidentity of the invention or inventions of a plurality of resembling original patents granted to a plurality of inventors. And that rule consists in comparing the claims of the patents in question, and finding identity or nonidentity of invention, according as those claims are found to be coextensive or not coextensive. Claims are coextensive which cover the same combination, of the same number, of the same parts, with the same features, though the functions which are mentioned in the claims are not coextensive. That was held to be the character of the respective claims of two patents to the same inventor in the case of *Miller v. Eagle Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121; and therefore the second of those patents was held to have been granted for the same invention as the first, and to be void. But two claims are not coextensive which specify different combinations of parts of a process, machine, or manufacture, even where some of those parts are in each of the combinations, because the claim which specifies fewest of those parts may be infringed by what will not infringe any claim specifying more of those parts. That was held to be the character of the respective claims of two patents to the same inventor in the case of *Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76, and therefore the second of those patents was held to have been granted for another invention than the first, and to be valid. And two claims are not coextensive where one of them specifies all the features of any or all of the parts of its subject, while the other omits one of those features, because the latter may be infringed by processes or mechanisms which lack that feature, while the former cannot."

In 2 Robinson on Patents, § 462, we find this rule:

"Subject-matter must not include inventions already patented in the United States by the same inventor. An application which, together with new matter, includes matter already patented in the United States by the same inventor, is within this rule, as well as one whose scope corresponds exactly with that of the preceding patent."

Still the second patent is for a combination, as is the first, and the second includes elements not found in the first. The claims are not, therefore, coextensive.

In *Miller v. Eagle Manufacturing Company*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121, it is held: "No patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ." But the terms may differ, and mean and describe the same thing, while, if the elements of the claims differ, we have, perhaps, a different patent.

But, passing this, we come to the other questions in the case. The defendant insists that in view of the prior art there is no patentable invention disclosed, and that the complainant's structure is but an aggregation of old devices. The patentees of the complainant's patent are in no sense pioneers in this invention. Theirs, if an invention, is in no sense a pioneer. The complainant's counsel says:

"The fundamental conception—the keynote—of the patents in suit is the making of a large area tributary to a single central point in storage apparatus. The apparatus of the patents embody the novel idea of concentration of the delivery of the material at a fixed point to which every square foot of the storage area is tributary."

This idea as to bringing the coal in from the area is found in the patent, but it is not a novel idea. The idea as to the storage of coal on the area of limited storage territory is to deliver it from, not at, a given central point to any and every point of the storage area. This is not a novel idea. It is not patentable in any event.

The man in the hayfield cocking hay, or in early spring picking and piling stone or scattering fertilizer from the pile dumped from the wagon, well understands the economy, etc., of moving to and from and of carrying to or of distributing from a given central point if it is desired to cover a given circumscribed area. The pivoted and swinging well curb for raising water from the well or the pivoted and swinging crane for stone and other heavy material recognized all this long before the apparatus of this patent was devised. The prior art shows the idea to be old. The hollow tower or fixed or revolving structure, or structure with the lower part fixed and the upper part revolving on a pivot (pivoted to the lower part), is clearly old. Turntables on the surface of the earth for turning engines or loaded cars are old. The one part is on a fixed structure—the masonry on the earth; the other part, which revolves, is above on the underside of a frame with tracks to receive the engine. Otherwise it is open. If not intending to run something onto the revolving part, take away the rails and leave it open. This is a mere matter of construction. If it is desired to use this turntable or turning structure above the earth, raise the foundation above the earth and it is done. If it is desirable to have an open turntable or structure when so elevated, construct it with an open center. Any suitable structure may be constructed on and as a part of the upper portion of this turntable. The pivotal portion and turning arrangement may be at the bottom or at the top of the tower or at any intermediate part. This is mere matter of location, and requires no inventive skill to determine whether it shall be at the one point or the other, any more than does it require inventive skill to determine that, if it is desirable to carry buckets of coal up through the interior of a turntable or pivoted device, the way to do it is to construct the turntable or pivot with an open center. The structure turning on the fixed structure, and supported thereby, must be so constructed as to balance, or else be supported at the end or ends. This structure may support and carry the lifting and transporting apparatus and the engine that furnishes the motive power. All these things we have in the patents in suit. The rails on the ground support the cars that bring the coal. Their work and mission ends. The car dumps the coal and goes away. The pit receives and holds the coal, and does nothing else. Now we have coal stored in a pit. It is desired to store this coal, and more, as it may be brought, on the given area about the pit. It must be lifted and carried above the surface of the earth, as before stated. An elevated fixed structure. What for? To support another structure and a lifting device. Why this other structure mentioned, the turning or pivoted structure? To support the carrying device. The second structure must be made to turn. Why? So as to permit the device carrying the coal to be placed in different positions above the earth covering the entire area on which the storage is to be made. How is this to be accomplished? By pivoting the second structure on the first. By an open pivot if the coal is to be elevated on the interior of such structures and pivot. The

fixed structure holds up the other, the movable, structure. It does no more than this. The movable structure pivoted on the other carries or supports the lifting and carrying device and does no more. It is turned to right or left occasionally, as an independent proceeding or operation, on the pivot and leg at the end. The lifting and carrying device, operated by an engine or other power, picks up the coal, and carries it to the point of destination. Each element does its work, and no more. And everything is done in succession. We have, in short, a revolving supporting device for a lifting and carrying device. The tower above the turntable makes a complete revolution on its pivot, because it is desirable to deposit material on nearly every part of the area of the circle. Had the purpose been to take coal from a car or a pit to a boat, it would not have been made completely revoluble because desirable to deposit on one side of the tower only. The prior art had not failed. All that was required was to make the tower, with its arm, completely revoluble. Engineering skill was adequate to the work. There is not a new idea in the whole combination, not even in the putting together. It is a mere assemblage of old elements, each doing its work in the old way. I will not take time to refer to all the structures in the prior art, but refer to the following:

In patent to E. L. Clark, October 15, 1889, No. 413,031, we find a pit directly under a revoluble tower (a tower mounted on an open turntable or pivot open in the center, with a hoisting apparatus inside taking coal from the pit up through the interior or open center of the tower and discharging it into a chute which carries it into a pile outside. A car on a track at the surface of the ground is discharging coal into the pit. The elevating machinery is operated by an engine mounted on the turntable. Now, attach to this tower at proper elevation the truss or bridge structure to support the elevating and carrying apparatus, and support that structure at its outer end by a leg, if required, and we have in principle and in substance, and in every substantial detail, the complainant's devices. In the prior art, patent to one G. H. Hulett, December 13, 1892, No. 487,865, we have a car of coal immediately under a hollow tower discharging coal into a bucket just outside the tower, which bucket, by means of a hoisting and carrying apparatus, is carried up to and along a horizontal truss structure or arm, and may be dumped at any point desired. This horizontal truss or arm, which supports the hoisting and carrying apparatus, is pivoted on the open tower, which supports it at the end where the load is lifted, and is supported again towards its outer end by another tower, which is movable, and carried by wheels upon a circular track. This differs from complainant's, so far as principle and idea of means are concerned, mainly, if not entirely, in taking the load up outside the tower. But combine this with the Clark open revoluble tower and pit—and this is what complainant did—and we have the patents in suit. There is no evidence of invention in making the combination. In fact, ordinary engineering and mechanical skill, operating with the well-known devices of the prior art to produce

a storage apparatus for covering all available space within the interior of a defined circle, had no difficulty in constructing the devices of the complainant's patents, and alleged to be infringed by defendant. In determining whether or not inventive skill, as contrasted with mere mechanical or engineering skill, has been displayed, we are to consider the art in which the work in question was done, the state of that art, and the results attained. Here we have no new result. Coal had been stored before, and just as well, and from a central point; but, it is said, not over so great an area. Possibly true. But all that was required was to make the elevated and pivotal part of the tower carrying the swinging arm describe a complete circle or make a complete revolution and the work was done—the end attained.

In *Atlantic Works v. Brady*, 107 U. S. 192, at pages 199, 200, 2 Sup. Ct. 225, at page 231, 27 L. Ed. 438, Mr. Justice Bradley said:

"The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle, and injurious in its consequences."

In *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749, it was held:

"A combination of old elements is **not** patentable unless they all so enter into it as that each qualifies every other. It must either form a new machine of distinct character and function, or produce a result which is not the mere aggregate of separate contributions, but is due to the joint and co-operating action of all the elements."

In the patents in suit we do not have a new machine of distinct character and functions. A pit under an open centered tower receives and holds coal. A fixed structure holds up a movable structure turning thereon. This, in its turn, supports an elevating and carrying device set in motion by a steam engine or some other power. The result is, coal or some other material is taken by the lifting and carrying device from one point to another. The two structures hold up the device that carries the coal. How is the element of the railroad track qualified in any degree by either of the other elements, saying nothing of all of them? How is the element of the track qualified by the revolving truss structure? How is the element of the pit qualified by the leg supporting the outer end of the swinging arm or truss? How do these coact?

In *Pickering v. McCullough*, *supra*, the court (pages 317, 318, of 104 U. S. [26 L. Ed. 749]) said:

"We are clearly of opinion that this is not patentable. It comes plainly within the rule, as stated by Mr. Justice Strong in *Hailes v. Van Wormer*, 20 Wall. 353, 368, 22 L. Ed. 241, where he said: 'All the devices of which the alleged combination is made are confessedly old. No claim is made for any one of them singly, as an independent invention. It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in com-

mon use before the combination was made. But the result must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not invention.' 'The combination, to be patentable,' said Mr. Justice Hunt, in *Reckendorfer v. Faber*, 92 U. S. 347, 357, 23 L. Ed. 719, 'must produce a different force or effect or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union. If not so, it is only an aggregation of separate elements.'

In *Hailes v. Van Wormer*, 20 Wall. 353, the court, at page 368 (22 L. Ed. 241), said:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one, by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination, and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination."

In the lead pencil case of *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719, there was a combination of ordinary lead pencil for writing or figuring and of rubber for erasing the marks or letters made by the pencil. The writer desires to write and have his writing and figures correct when completed. As a part of this whole process he uses this pencil; lead at one end, erasing rubber at the other, the wood attached to and supporting the rubber. Held no invention in putting the lead and rubber into the wood in this combination. The wood held both the other elements in position, and all formed one instrument, but the pencil performed its old function of making marks on the paper, and the rubber its old function of erasing the marks. They did not coact, perform any joint function; the one element in no way qualified the other.

In *Brinkerhoff v. Aloe*, 146 U. S. 515, at page 516, 13 Sup. Ct. 221, at page 224, 36 L. Ed. 1068, the rule is clearly and concisely stated thus:

"To sustain a patent on a combination of old devices it is well settled that a new result must be obtained which is due to the joint and co-operating action of all the old elements. Either this must be accomplished, or a new machine of distinct character and function must be constructed. *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Tack Co. v. Manufacturing Co. (C. C.)* 3 Fed. 26, 9 Bissell, 258; *Wringing Machine Co. v. Young*, 14 Blatchf. 46, Fed. Cas. No. 9,508. If several old devices are so put together as to produce even a better machine or instrument than was formerly in use, but each of the old devices does what it had formerly done in the instrument or machine from which it was borrowed and in the old way, without uniting with other old devices to perform any joint function, it seems that the combination is not patentable."

In *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991, the patent was for a device for taking grain from one car to another and weighing it during the process of transfer. There was a building with a grain elevator, two railroad tracks entering this building, and such arrangements that the grain within a car on one track was discharged into the foot of an elevator, and taken thence to a hopper, where it was weighed, and then forwarded through a discharge pipe into a car on the other track. The elements of this combination were all old. The court, at page 302 of 158 U. S., page 833 of 15 Sup. Ct. (39 L. Ed. 991), said:

"It is not claimed that there is any novelty in any one of the elements of the above combination. They are all perfectly well known, and, if not known in the combination described, they are known in combinations so analogous that the court is at liberty to judge for itself whether there be any invention in using them in the exact combination claimed. We do not feel compelled to shut our eyes to a fact so well known as that elevators have for many years been used for transferring grain from railway cars to vessels lying alongside, and that this method involves the use of a railway track entering a fixed or stationary building, an elevator apparatus, elevator hopper scales for weighing the grain, and a discharge spout for discharging the grain into the vessel. There is certainly no novelty in using two railway tracks instead of one, or in discharging the grain into a second car instead of a storage bin or a vessel. Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements. Indeed, the multiplicity of elements may go on indefinitely without creating a patentable combination, unless by their collocation a new result be produced. Thus nothing would have been added to the legal aspect of the combination in question by introducing as new elements the car from which the transfer was made, the engine that drew such car, the steam shovel, the engine that operated the shovel and the elevator, as well as the locomotive which drew the loaded car from the building, though these are all indispensable features; since each of them is an old and well-known device, and performs a well-understood duty."

This quotation, just given, is quite pertinent as applied to the claims of the second patent adding as elements the railroad tracks and pit. Many other cases might be cited and quoted from, all to the same effect, but it would add nothing to what has been said. In *Palmer v. Corning*, 156 U. S. 342, at pages 345, 346, 15 Sup. Ct. 381, at page 382, 39 L. Ed. 445, the court cites and quotes with approval from *Hailes v. Van Wormer*, 20 Wall. 353, 368, 22 L. Ed. 241; *Reckendorfer v. Faber*, 92 U. S. 347, 357, 23 L. Ed. 719; *Pickering v. McCullough*, 104 U. S. 310, 318, 26 L. Ed. 749; and *Thatcher Heating Co. v. Burtis*, 121 U. S. 286, 294, 7 Sup. Ct. 1034, 30 L. Ed. 942. Those cases remain unshaken.

If the letters patent in suit last granted are not void because they are for the same invention described and claimed in those in suit first granted—of which I have little doubt—they are void for want of novelty and patentable invention in view of the prior art and because for a mere aggregation of old elements. For the same reasons letters patent in suit first granted are also void.

The defendant is entitled to a decree dismissing the complaint, with costs.

YORK COUNTY SAV. BANK v. ABBOT.

(Circuit Court, D. Maine. July 31, 1905.)

No. 542.

1. JURISDICTION OF FEDERAL COURTS—LOCAL SUITS—APPEARANCE OF DEFENDANT.

Where, in a suit in a Circuit Court of the United States against a non-resident defendant, in which jurisdiction is sought to be maintained under section 8 of Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], providing for local suits, no service is obtained on the defendant within the jurisdiction, it is settled that the entry of an appearance by such defendant "specially and solely for the purpose of objecting to the jurisdiction of the court," and the filing of a motion to dismiss, and, on its being overruled, of a demurrer, do not amount to a general appearance to give the court jurisdiction over the person of the defendant.

2. SAME—NATURE OF RELIEF SOUGHT—INABILITY TO ENFORCE POSSIBLE DECREE.

A suit in equity by a lessee against a nonresident lessor to enforce alleged rights under the terms of the lease by requiring the defendant to elect either to sell the land to, or to buy the building thereon from, complainant at an appraised value, or to have the court make such election and carry the same into effect through a master or trustee appointed for the purpose, is not within the jurisdiction of the Circuit Court of the United States for the district in which the property is situated, by virtue of section 8 of Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], where the defendant has not appeared.

In Equity. On demurrer to bill.

See 131 Fed. 980.

Eben Winthrop Freeman and Enoch W. Foster, for complainant.
Brandeis, Dunbar & Nutter, and Bird & Bradley, for respondent.

PUTNAM, Circuit Judge. This bill in equity was brought by a corporation organized under the laws of Maine, now holding the title and possession of the original lessee under the lease hereinafter set out. Martha T. Abbot is a citizen of Massachusetts, domiciled in that state, and is the sole person named in the bill against whom either relief or process is prayed. No personal service has ever been made on her within the jurisdiction of this court, and jurisdiction is sought to be maintained solely under section 738 of the Revised Statutes, as re-enacted by section 8 of the act of March 3, 1875, c. 137, 18 Stat. 472, 473 [U. S. Comp. St. 1901, p. 513]. The essential portions of section 8 are as follows:

"When in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time

so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

This same cause was before us on a motion to dismiss the bill, which motion was disposed of in accordance with the opinion passed down on August 18, 1904. York County Sav. Bank v. Abbot (C. C.) 131 Fed. 980. The basis of that motion as shown in the opinion related mainly, if not entirely, to the merits of the case. The points made were that there was no obligation binding on Martha T. Abbot; that this court had no jurisdiction unless there was an obligation enforceable against the land; that, if there was an obligation, it was not one enforceable against the land; and that, if there was an obligation in any respect enforceable against the land, it was not enforceable in this court. In disposing of that motion we observed that, whatever disposition might then be apprehended, we were confident some form of relief would be found, although it was not then prudent to forecast its particular character, nor could we then do so with certainty. It is important to understand and explain the position thus assumed on the previous hearing.

After the motion to dismiss was disposed of, Martha T. Abbot filed a general demurrer. On that demurrer new propositions bearing on the question of jurisdiction have been specifically brought to our attention and urged upon us. Among the rest is that we have no jurisdiction to enforce a personal contract, so that, if Martha T. Abbot should see fit to declare an election to purchase when the complainant calls upon her to act, we would be powerless to enforce any obligation in that direction. It is to be regretted that in this way the order of this case has been in a certain sense reversed, and that, on the motion to dismiss, propositions relating to the merits were called to our attention, while this proposition, which bears directly and solely on the question of jurisdiction, was delayed until brought here on demurrer. We must add, however, that in one way there may be an advantage arising from this fact, because the proposition now urged upon us might not have been fairly understood by us until we were forced to give attention to the merits of the controversy and to the actual detailed relations of the parties with reference to the terms of the lease.

The complainant has relied on the fact that we have heretofore refused to dismiss the bill for want of jurisdiction, and especially on some observations made in our former opinion in reference thereto; but it is the duty of this court always to take under consideration questions of jurisdiction, and to dismiss a suit at any stage of the proceeding when it is apparent that it is *coram non jure*. In addition to that, we may well observe that it would be a misfortune if we take jurisdiction, involving apparently protracted and costly litigation, all to prove of no avail in the end for want of authority

on our part to proceed; while, on the other hand, on a question of the character which we must now investigate, the parties have a summary relief by proceeding directly to the Supreme Court under the judiciary act of July 3, 1891, as shown by a résumé of the cases in *Remington v. Central Pacific Railroad Company*, 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959, and *Board of Trade v. Hammond Elevator Company*, 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1111.

Although the issue of jurisdiction is open at any stage, yet, inasmuch as some questions of jurisdiction may be waived, and the respondent has demurred, it becomes necessary for us to examine whether or not Martha T. Abbot is still an "absent defendant without appearance" within the meaning of those words in the extract which we have made from the act of March 3, 1875.

Subsequent to the return date of the order against an absent defendant which was made in accordance with that legislation, Martha T. Abbot, by her attorneys, entered an appearance, as follows:

"The clerk will enter our appearance for the defendant, Martha T. Abbot, specially and solely for the purpose of objecting to the jurisdiction of the court."

As to this, we may observe that the settled rule in the federal courts is not that which to some extent formerly existed in England, by force of which a party named as a defendant, by appointing an attorney of a particular court, submits himself to the jurisdiction of that court for all purposes whatever which are susceptible of being reached by waiver, and this to the extent that appearances of this character and motions consequent thereon must be signed by the party in person. Under the practice of the federal courts, there can be no question that this appearance was not such an appearance as was referred to in the concluding paragraph of section 8. *Radford v. Folsom*, 123 U. S. 725, 727, 8 Sup. Ct. 334, 31 L. Ed. 292.

After the motion to dismiss was refused, Martha T. Abbot demurred, as we have said; but in the demurrer she stated that she appeared specially for the purpose, did not submit to the jurisdiction of the court, and did not waive her objection to the jurisdiction theretofore taken by her motion to dismiss; and she added that she expressly insisted on that objection. Inasmuch as she first appeared to move to dismiss, and her motion to dismiss was refused, a subsequent appearance by her on demurrer cannot be regarded as voluntary, and must be held to have been forced by the refusal to dismiss; so that thereby her motion to dismiss was not waived. Her appearance was not an appearance within the meaning of the eighth section of the act of March 3, 1875, and all questions of jurisdiction which might have been raised under the motion to dismiss are now available as of the time of that motion. All this was fully settled in *Southern Pacific Company v. Denton*, 146 U. S. 202, 204, 206, 13 Sup. Ct. 44, 36 L. Ed. 942, where a series of proceedings occurred precisely like those at bar. It may as well be observed that the headnote in that case is not in all respects correct, because there did not exist any want of diversity of citizenship necessary to give jurisdiction to a Circuit Court of the United States.

The question was one of residence, or domicile, which would have been waived by a general appearance without any protest as to jurisdiction, precisely the same as in the case at bar. Therefore our jurisdiction, as we have said, still rests entirely on the eighth section of the act of March 3, 1875, and must be supported by it if at all. Our powers, therefore, do not go beyond what is provided for by that act, so that we have none except to dispose of what may well be called the res, and therefore none to issue a personal decree against Martha T. Abbot which would be effectual in law. Consequently, notwithstanding the views which we have heretofore expressed, if the case before us is of such a character that the lien which may be ultimately decreed cannot be made effectual except by some personal act of the respondent which we have not the power to compel, it is too plain to need discussion that the matter of our jurisdiction must be determined by an examination of the underlying question whether we are able to give an effectual remedy in every view of the form which the ultimate determination of the merits may take. In order to make clear the result of this determination, it is necessary to restate the facts, which are in part stated in our previous opinion. The lease is as follows:

"U. S. I. R. \$1.00 E. S. Oct. 3, '67.	This Indenture made the first day of October in the year of our Lord one thousand eight hundred and sixty-seven, Witnesseth: That Eben Steele of Portland doth hereby lease, demise, and let unto Thaddeus C. Lewis, of said Portland, a store lot on the northerly side of Middle Street, in said Portland, between the lot now owned by the heirs of the late Martha F. Trask, and the lot now owned by David Keazer, and which was conveyed to me by the Ocean Insurance Company, by deed dated May 6, 1847, and recorded in the Cumberland Registry, Book 203, Page 71, a division of the whole lot having afterwards been made, between said Steele and said Trask heirs, owners, of the other moiety, and the Eastern half conveyed to said Steele, in severalty, which is now hereby leased to said Lewis, subject to the agreement of April 20, 1831, between William McLellan and others, and recorded Book 126, Page 158.
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To hold, for the term of twenty-five (25) years from the first day of October 1867, yielding and paying therefor, the rent of four hundred and fifty dollars per year. And the said Lessee doth covenant to pay the said rent in quarterly payments, as follows, viz. One hundred and twelve $\frac{60}{100}$ dollars, on the first day of January, April, July and October annually; and also within one year, to erect on said premises a store of three stories of brick, iron and stone, of good style, and to continue to maintain on said premises, such building, or one of equal value during the term, and to pay all taxes duly assessed thereon, during the term, and for such further time as the Lessee may hold the same. At the end of said term of twenty-five years, the Lessor, or his representatives, shall have the privilege of extending this lease, by a perpetual lease forever, to the Lessee, or his assigns, at the above described rent and taxes; or, if the Lessor, or his assigns or representatives prefer, they may have an appraisal, of the lot, and building thereon, with the option on their part, of purchasing such buildings at such appraised value or of selling to the Lessee or his representatives, the lot at such appraised value, whichever the Lessor, his assigns, or representatives may then elect. Each party, on request, to choose an appraiser, and the two selected, to choose a third; and if either party neglects to choose an appraiser, such appraiser is to be selected for such party, by the Judge of Probate of Cumberland County: and the appraisal of a majority of such appraisers to be conclusive in case of disagreement.

And the said Lessee doth hereby covenant, for himself, his heirs and representatives, to purchase said lot at such appraisal, or to convey said building to the Lessor, or his representatives, according to the decision and election

of said Lessor, or his representatives or to execute and complete a perpetual lease of said lot, as before stipulated, at the end of said term, if the Lessor, or his representatives shall demand such lease. The building erected on said lot is hereby pledged and conveyed to the Lessor, his heirs, executors, and assigns, as security for the faithful performance of this agreement, and every covenant therein by the Lessee, his heirs, executors or assigns. And the Lessor may enter, to expel the Lessee, and his assigns, if he or they shall fail to pay the rent aforesaid, whether said rent be demanded or not, or if they shall violate any of the covenants of this lease, by them to be performed.

In witness whereof the parties have hereunto set their hands and seals, the day and year first above written.

Eben Steele [Seal.]

In presence of

Thaddeus C. Lewis [Seal.]

Thomas R. Hayes.

Woodbury Robinson."

The lessee's interest under the lease of October 1, 1867, is vested in the complainant. The lessor, Eben Steele, died in 1871, and devised his interest in the leased premises to Abby A. Steele and Martha T. Abbot. Mrs. Abbot, in 1876, released all interest to Miss Steele, and on the death of the latter, in 1898, by inheritance became sole owner. Abby A. Steele, it is alleged in the bill, did not, after the expiration of the lease, exercise her right to elect to extend the lease as a perpetual lease, and neither she nor Mrs. Abbot at any time prior to June 1, 1899, or thereafter, requested the complainant to appoint an appraiser. On June 1, 1899, the complainant in writing requested Mrs. Abbot to choose an appraiser, but she refused to do so. Thereafter, and prior to November 10, 1899, the complainant selected an appraiser, and on November 10, 1899, applied to the judge of probate for Cumberland county to appoint an appraiser; and the judge, after giving notice to Mrs. Abbot of such application, did appoint an appraiser, and these two selected a third. The appraisers subsequently notified both parties of their intention to appraise the premises at a time and place specified, and at such time and place did appraise the building at \$3,500 and the land at \$2,887.50, and notified the parties thereof. On August 24, 1900, the complainant requested Mrs. Abbot to exercise her option to purchase the building from, or sell the land to, the complainant, each at the appraised price, and notified her of its willingness to abide by and carry out such election by her; but she did not do either. On October 30, 1900, the complainant tendered to her for execution a quitclaim deed of the land and \$2,887.50 in payment therefor, and tendered a bill of sale of the building for delivery on payment of \$3,500, but she refused to accept either offer.

The bill prays that Mrs. Abbot be ordered to elect whether to buy the building from, or sell the land to, the complainant, each at the appraised price; that the court appoint a master to exercise this right of election; that the court itself exercise this right of election; that the court order Mrs. Abbot, pursuant to the election thus made, either to pay to the complainant \$3,500 for a bill of sale of the building, or execute and deliver a deed of the land for \$2,887.50; that the court appoint a master or some suitable person to execute the order made under the preceding prayer; that the court restrain

Mrs. Abbot pending the suit from incumbering or transferring the property; and for general relief.

Of course, if we proceed to final or interlocutory decree, we would be compelled by that decree to determine according to just and legal consideration whether Martha T. Abbot should convey the land and accept the appraised value thereof, or should accept the building and pay the appraised value of it. If the court should determine that the land should be conveyed by her, there would be no difficulty, under the act of March 3, 1875, in appointing a master to make the conveyance in the event Mrs. Abbot refused to execute a deed, permitting the price therefor to be deposited in the registry of the court, where further disposition might be made of it. This would fully accomplish in that direction the purpose of the bill, and would all be justified under the act named, and would therefore be within the power of the court. On the other hand, if on just and legal considerations we should conclude that the building should be conveyed to Mrs. Abbot, we would have no power to accomplish the decree, and our jurisdiction would thus ultimately fail. Such a determination—that is, that Martha T. Abbot should receive the building and pay therefor—in order to be effectual, would involve a personal decree against her for the price of the same. We have carefully examined all the decisions of the Supreme Court relative to section 738 of the Revised Statutes and the act of March 3, 1875, revising the same, and are unable to find any authorization from that court to proceed to such a decree. While in some of the cases determined by that court the rights of an absent defendant who has not appeared have been effectually disposed of, in none of them has any mere personal act on the part of the absent defendant been a necessary element. In *Robertson v. Carson*, 19 Wall. 94, 22 L. Ed. 178, and *McBurney v. Carson*, 99 U. S. 567, 25 L. Ed. 378, the co-operation of the absent defendant, who was a mortgagor in a mortgage which had been unlawfully discharged, was necessary to protect his own rights; but such co-operation was not necessary to secure such an effectual disposition of the property as would restore the rights of other parties to the litigation. Therefore the cases are not in point. In *Jellenik v. Huron Company*, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647, where there was in dispute the title to shares of corporate stock issued by a corporation whose domicile was in the district where the litigation occurred, it is apparent from what appears at pages 11 and 12 of 177 U. S., page 563 of 20 Sup. Ct. (44 L. Ed. 647), that the corporation could, by the laws of the state where it was created, make an effectual transfer of the stock without the personal act of the absent apparent holder of the certificates. Therefore that case is not in point. No decisions of the Supreme Court can be found approaching so near the case at bar as the three we have cited. On the other hand, in view of the fact that the statute of the United States on which this bill rests was built up from analogous legislation of various states which had been several times before the Supreme Court, *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, is in point, although it relates to local, and not congressional, action. There it was declared that the statute in controversy had

no application to suits in personam; although sufficient authority for the institution of suits in rem. So the eighth section of the act of March 3, 1875, expressly declares, in accordance with the extracts which we have made from it, that our adjudication shall, as regards an "absent defendant without appearance," "affect only the property which shall have been the subject of the suit," which shall be under the jurisdiction of the court and within the district. We have shown that, so far as Mrs. Abbot is concerned, there is no such appearance; so that therefore this provision of statute is especially obligatory on us, and, consequently, we cannot give complete relief according to the terms of the bill. It necessarily follows that we have no jurisdiction whatever.

We have given the case very careful consideration, with a very strong desire to furnish the complainant relief if we could do so. Inasmuch as the lease provided that the lessee should not only construct on the leased premises a building of peculiar character—that is, a store of three stories of brick, iron, and steel, and of good style—and also required the lessee to continue to maintain such building, or one of equal value, during the whole of the term, the relations of the parties on this account are substantially different from what they were in any case cited to us on either side. Had the lessee been permitted by the lease to occupy the premises as he saw fit, to construct a building or not, as he found for his interest, and thus to construct it, if at all, in such manner that it might be easily removed as a building, instead of, as required, of such a character that it could only be taken down and removed as mere material, it might well have been said that the parties were content that he should take his chances to make himself whole out of the leased property during the term; but, with the requirements which we have stated, the presumption is almost inevitable that the parties to the lease did not contemplate leaving the various interests in the unfortunate condition in which they would be if the position of Mrs. Abbot is correct. Therefore it might well be understood that, if it were possible to so construe the lease as to dispose of all the interests of all the parties to it so as to secure their intrinsic value, such a construction would be given it. However, as we have no jurisdiction over the case, it is not within our province to express any decisive views with reference to the merits of the question which the complainant has sought to present.

On the other hand, we cannot overlook the fact, as we have said, it would be unfortunate if we should proceed to a determination of this case on its merits, with the result that it should finally be determined by the appellate tribunals that the whole was fruitless for lack of jurisdiction over the bill before us. As we have said, we understand the question involved to be within that class of questions of jurisdiction which may be immediately certified to the Supreme Court. If the parties are of the opinion that, in order to take the case to that tribunal, a certificate is necessary in accordance with the judiciary act of March 3, 1891, they may seasonably prepare and submit the same to the court. Meanwhile, we will make such an

order as will reserve all rights of the complainant in the event it desires hereafter to proceed against the respondent in some court having jurisdiction in the state or district of her domicile.

Let there be a decree, under rule 21 (31 C. C. A. clxiii, 90 Fed. Id.) dismissing the bill for want of jurisdiction, the same to be without prejudice, and without costs.

ERIE CITY IRON WORKS v. THOMAS et al.

(Circuit Court, S. D. New York. July 3, 1905.)

1. CONTRACT—ACTION FOR BREACH—PLEADING.

A complaint in an action to recover the price of certain bonds of a corporation, which alleges that plaintiff was induced to sell machinery to the corporation and to accept such bonds in part payment on the promise of defendants, who were officers of the corporation, to purchase the bonds at par at any time within six months, sets up a valid contract, not unilateral nor lacking in consideration; the agreement of the plaintiff to sell the bonds being presumed from the facts pleaded.

2. SAME.

Where defendants contracted to purchase certain bonds from plaintiff at a stated price, plaintiff, on their refusal to accept and pay for the bonds when tendered, was entitled at his election to treat the bonds as the property of defendants, and maintain an action at law for the purchase price; and the fact that the prayer of the complaint was that defendants be compelled to accept and pay for the bonds does not make the suit one in equity for specific performance, nor render the complaint demurrable.

3. COMPLAINT—DEMURRER—INAPPROPRIATE PRAYER.

A complaint which states facts constituting a cause of action is not demurrable because the prayer is for relief which does not conform to the case made.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 143, 439, 440.]

At Law. On demurrer to complaint.

Gilbert E. Roe, for plaintiff.

Richard A. Irving, for defendants.

HAZEL, District Judge. This is an action at law to recover the sum of \$5,000, the par value of certain 6 per cent. gold bonds of the Empire State Sugar Company, a New York corporation. The defendants demurred to the complaint on the ground that a cause of action is not stated. The complaint alleges that the plaintiff entered into a contract with the Empire State Sugar Company, by which, in consideration of the payment of \$18,000, it furnished said corporation with boilers, machinery, etc., and as a part of the purchase price therefor, being induced so to do by the promise of the defendants, as hereinafter stated, accepted five bonds of the corporation, secured by a mortgage. Upon this point the complaint alleges:

"That as a part consideration for entering into said contract, and as an inducement to the complainant to enter therein, and for other valuable consideration, as plaintiff is informed and verily believes, the said defendants jointly and severally promised and agreed with this plaintiff at said time that if this

plaintiff would accept the above-mentioned bonds in part payment on said contract, as above stated, the said defendants would forthwith buy for cash the said bonds of plaintiff at their face or par value at any time within six months after the delivery thereof."

The bonds were not delivered on January 1, 1901, as agreed, but an interim certificate was issued at that time to the plaintiff. Subsequently, on March 28, 1901, the bonds were delivered to, and accepted by, the plaintiff. After the issuance of the certificate, and also after the delivery of the bonds (within the six-months period), the plaintiff made a tender thereof to the defendants, who, however, refused to accept them. The principal question is whether the promise of the defendants, who were officers and directors of the corporation, to purchase the bonds within the time specified, is void for lack of consideration. Defendants contend that there was no binding obligation upon the plaintiff to sell the bonds, and therefore the agreement is unilateral. This proposition is untenable. The complaint clearly indicates that the plaintiff was induced by the defendants to make the contract with the sugar company and to part with its property in reliance upon the promise of the defendants to afterwards take the bonds off its hands. Under the circumstances, plaintiff's consent to sell the bonds to the defendants may be presumed. A concurrent binding obligation to do so existed. *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190. In the last-mentioned case the plaintiff was induced to furnish a sum of money to the corporation in which he was a stockholder upon the agreement that the defendant, another stockholder, would in a specified time take all of the plaintiff's stock and bonds at the cost price. The defendant being unwilling later to fulfill the contract, another agreement in lieu of the first was made, by which the defendant in writing bound himself to take the plaintiff's capital stock only at a certain price. The defendant failing to keep the agreement, an action was brought against him by the plaintiff to enforce it. It was there contended, as here, that the agreement was not mutual, the plaintiff not having expressly agreed to sell the stock; therefore there was no consideration expressed in the writing. The court held that the prior parol agreement to sell was valid, and plaintiff could treat the stock as belonging to the defendant. That case is thought to be in close analogy to the case at bar.

Defendants also insist that the complaint alleges a cause of action for specific performance, and the point is urged, *inter alia*, that the facts averred have the characteristics of an equitable action to compel the defendants to fulfill their promise to buy the bonds. As already intimated, the agreement to purchase the bonds is sufficiently alleged, and in the circumstances plaintiff had the election of his remedies. *Dustan v. McAndrew*, 44 N. Y. 72. The fact that the prayer demands that the defendants be required to accept the bonds, and that plaintiff have judgment in the sum of \$5,000, is immaterial. There are many cases to be found which hold that the prayer for relief is not demurrable, inasmuch as it does not sustain the nature of the action. *O'Brien v. Fitzgerald*,

143 N. Y. 377, 38 N. E. 371; *Bell v. Merrifield*, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436; *Bateman v. Straus*, 86 App. Div. 540, 83 N. Y. Supp. 785. And in 16 Ency. of Pleading & Practice, 776, it is held that, the prayer being only a matter of form, the cause of action, if properly stated, cannot be reached by demurrer.

Demurrer is overruled, with costs.

HYAMS v. UNITED STATES.

(Circuit Court, D. Massachusetts. July 17, 1905.)

No. 1,441.

1. COURTS—UNITED STATES CIRCUIT COURTS—CLAIMS AGAINST UNITED STATES—TUCKER ACT—ACTIONS—FINDINGS.

Under Tucker Act March 3, 1887, c. 359, § 7, 24 Stat. 506 [U. S. Comp. St. 1901, p. 755], providing that in proceedings on claims against the United States it shall be the duty of the court to cause a written opinion to be filed in the case setting forth the specific findings by the court of the facts therein and the conclusions of law on all questions of law involved in the case, and to render judgment thereon, such opinion is not the usual opinion of the trial judge, but constitutes a part of the record to enable the public and the appellate court to find on the record a formal statement of the Circuit Court's findings both on questions of law and fact and the reasons for such findings.

2. SAME—COMMISSIONER'S DECISION—REVIEW.

In proceedings to recover a tobacco rebate as authorized by Act Cong. April 12, 1902, c. 500, § 4, 32 Stat. 97 [U. S. Comp. St. Supp. 1903, p. 277], the whole claim having accrued since the passage of Tucker Act, Act Cong. March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], as amended by Act June 27, 1898, c. 503, 30 Stat. 494 [U. S. Comp. St. 1901, p. 753], a rejection of the claim by the commissioner of internal revenue is reviewable by the Circuit Court under such act.

3. SAME—EVIDENCE.

Where in a suit for tobacco rebate, as authorized by Act Cong. April 12, 1902, c. 500, § 4, 32 Stat. 97 [U. S. Comp. St. Supp. 1903, p. 277], claimant presented four witnesses, who testified explicitly to the amount of tobacco claimed for, and such testimony was uncontradicted, the mere fact that the government claimed that the space in the stores was obviously inadequate for holding the amount of tobacco testified to was insufficient to show that the claim was fraudulent.

4. SAME—PROOF—COMPLIANCE WITH INSTRUCTIONS.

A strict compliance with a clause in instructions on the back of a blank proof for tobacco rebate, requiring the witnesses at the time of taking the inventory to each count the packages of the several denominations mentioned in the inventory, keep a separate account of the same on separate sheets of paper, make computations, etc., was not a condition precedent to the claimant's right to the rebate, authorized by Act Cong. April 12, 1902, c. 500, § 4, 32 Stat. 97 [U. S. Comp. St. Supp. 1903, p. 277].

Charles W. Bartlett and Wilfred Bolster, for petitioner.

William H. Garland, Asst. U. S. Atty.

HALE, District Judge. This case comes before the court under what is known as the "Tucker Act," approved on March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], as amended June 27, 1898, c. 503, 30 Stat. 494 [U. S. Comp. St. 1901, p. 753]. The

petition recites the section of the statute which it relies upon. It further sets out that on the 1st day of July, 1902, the petitioner was a dealer in tobacco and snuff, and that he had in his possession and owned certain original and unbroken factory packages of smoking and manufactured tobacco, snuff and cigars, upon which the taxes had been paid, to wit, an amount of 45,788 pounds, in a certain store then located at 904 Washington street, in Boston; and that he had at the same date in his possession and owned the further amount of 3,407 pounds located in another store, No. 764 Washington street, in said Boston, and that upon said goods there was, pursuant to the said section of said act, due and allowable to the petitioner the sum of \$1,771.92; that the petitioner's claim for allowance or drawback was duly presented in accordance with law within 60 days after the 1st day of July, 1902; that the petitioner's stock was duly inventoried, and his claim properly verified, taken, and presented in accordance with all legal rules and regulations made by the commissioner of internal revenue, under the provisions of law; but the said drawback, although requested, has not been paid to the petitioner. The answer of the United States denies every material allegation of the petition. A motion to dismiss was duly filed, setting out that the court has not jurisdiction within the second section of the act of March 3, 1887, because the manifest intent of the act of April 12, 1902, was to leave the ascertainment of the fact whether or not claimants for rebate had on hand any tobacco to the officers of the Internal Revenue Department, and did not provide that their decision should be reviewable by this court. The motion to dismiss also takes the ground that the petitioner has not produced evidence showing that his claim is of the clear value of upwards of \$1,000.

After the hearing of the case before this court, the respondent seasonably filed a motion for judgment for the United States for the following reasons:

"(1) That the petitioner, in presenting his claim for rebate, did not comply with the provisions of the act of April 12, 1902, and the regulations established pursuant thereto by the commissioner of internal revenue. (2) Because the petitioner made a willfully false and fraudulent claim for rebate. (3) Because the commissioner of internal revenue, in view of the dubious, uncertain, and conflicting evidence produced by the claimant in support of his claim, was justified in disallowing the same. (4) Because the evidence produced by the petitioner here in support of his action is so dubious, uncertain, and conflicting that this court cannot determine what, if any, portion of petitioner's claim should have been allowed, and must therefore find for the defendant. (5) Because the evidence produced by the petitioner here in support of his action is so manifestly false in essential particulars that this court cannot properly find that any portion of petitioner's claim should have been allowed, and must therefore find for the defendant."

The cause was fully heard before this court in May, 1905. Testimony was offered on both sides. Under section 7 of the Tucker act (24 Stat. 506 [U. S. Comp. St. 1901, p. 755]) it becomes the duty of the court "to cause a written opinion to be filed in the cause setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved

in the case, and to render judgment thereon." In *U. S. v. Swift* the United States Circuit Court of Appeals in this circuit have lately sent down an opinion (139 Fed. 225), Judge Putnam speaking for the court, in which that court comments upon the Tucker act and the proceedings in causes under that act. In discussing the opinion which the court must file under that act, Judge Putnam says: "Under the statute that opinion is not to be regarded as the usual opinion of the trial judge, but must be accepted as a part of the record." It seems clear that the purpose of the opinion is to enable the public and the appellate court to find upon the record a formal statement of the findings of the Circuit Court, both upon questions of law and fact and the reasons for such findings.

As the court has already observed, the right to recover in this claim is based upon the Tucker act, which gives to the Circuit Court jurisdiction of all claims founded upon any law of Congress where the amount of the claim exceeds \$1,000, except war claims and claims rejected by any department authorized to hear and determine the same, before the passage of the act of 1887. The contention of the learned counsel for the United States is that the claim in the case at bar is one upon which the decision of the head of the department is final. The argument of the learned counsel upon this point is complete and exhaustive, but the court cannot take the view of the law which he urges. In *Rand v. U. S.* (D. C.) 36 Fed. 671, Judge Webb held that "in a claim of the United States commissioner for fees for services, his charges having been disallowed by the First Comptroller of the Treasury, the portion of the account rejected by the comptroller prior to March 3, 1887, was not within the jurisdiction of the court, but that as to the portion of the account since that date the court had jurisdiction." Judge Webb based his decision upon *Bliss v. U. S.* (C. C.) 34 Fed. 781. While the question is not by any means beyond doubt, it seems the duty of this court to take the same view of the law that was taken in the cases just cited. There seems to be good reason to hold that the rejection of an account by the commissioner of internal revenue may be reviewed under the provisions of the Tucker act, unless such rejection was previous to the passage of that act. The whole of the claim in the case at bar accrued since March 3, 1887. For the purposes of this case the court finds that it was not the intention of Congress to give final jurisdiction in the premises to the commissioner of internal revenue, but that this court has jurisdiction under the Tucker act.

By the pleadings the question of fact is raised whether or not the petitioner had and owned on July 1, 1902, the amount of tobacco which he claims to have had. The petitioner offers four witnesses, whose testimony is explicit upon this point. The learned counsel for the respondent claims, however, that the evidence produced by the petitioner is manifestly false, that the space in the stores was obviously inadequate for holding the amount of tobacco testified to, and that the whole claim is absolutely fraudulent. But the testimony of the petitioner's witnesses is clear, and is in terms uncon-

tradicted by any other witnesses. While under the whole testimony a suspicion of fraud is raised, it cannot be held that there has been such clear and convincing proof of fraud as is required by law to overthrow direct and affirmative testimony. It is not enough that a case should raise a strong suspicion. There must be some clear, affirmative, and convincing testimony to support an allegation of fraud.

The respondent raises the objection that paragraph 8 of instructions on the back of the blank proof has not been complied with. That provision is as follows:

"(8) The witnesses at time of taking the inventory should each count the packages of the several denominations mentioned in the inventory and keep an accurate account of the same on separate sheets of paper. The computations to be made by the witnesses of the total number of such packages and their aggregate net weight should be compared, and checked with the manufacturers' inventory, and if agreeing therewith should be signed by the witnesses and the claimant, and delivered to him as a memorandum of his inventory, and from which he could make a new claim should his original claim be lost or misplaced."

While there is some question whether there has been a strict compliance with this provision, the court cannot hold that this clause is intended as a condition precedent to the petitioner's right to a rebate. The clause seems to the court to be for the protection of the respondent and of the claimant in case of loss. The court cannot hold that the testimony presents any defense under this clause in the instructions.

The learned counsel for the United States has presented certain requests for findings and rulings. Without reciting those requests or going over the case further in detail, it is sufficient to say that the requests may be regarded as refused, except so far as this opinion shows them to be granted. Those requests may, however, be made distinctly a part of the record, so that the respondent may have full right to exceptions.

A decree may be entered for the petitioner for the amount claimed, namely, \$1,771.92, and for his costs.

ROBERT et al. v. PINELAND CLUB et al.

SANDERS et al. v. SAME.

(Circuit Court, D. South Carolina. August 4, 1905.)

1. REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURT—DISTRICT OF SUIT.

Where the parties to a suit in a state court are citizens of different states, and the other conditions necessary to make the cause one of federal cognizance exist, it is removable by the defendant, although neither party is a citizen or resident of the state in which suit is brought.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 60.

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 O. C. A. 298.]

2. SAME—TIME FOR FILING PETITION.

Where, in a suit in a state court against an unincorporated association to recover lands the title to which was vested in defendant's trustees, the court held that such trustees were necessary parties, and they were thereupon brought in, the cause was removable on a petition filed by them in apt time after the service of process on them, although the time for the filing of an answer by the association had expired.

On Motion to Remand to State Court.

C. J. Colclock and A. McS. Bostick, for plaintiffs Robert and others.
Jas. A. Harley, for plaintiffs Sanders and others.

W. S. Smith, W. B. De Loach, and Smythe, Lee & Frost, for defendants.

BRAWLEY, District Judge. 1. It is contended that, inasmuch as neither plaintiffs nor petitioning defendants are citizens of South Carolina, this court has no jurisdiction. It was so held at one time, but more recent decisions of the federal courts are to the effect that the restrictive language of the first section of the act applies only to suits commenced in the United States courts by original process, and that they have no application to suits removed from the state courts. Judge Dillon, in his work on Removal of Causes, says:

"It is now well settled that where the parties are citizens of different states, and the other conditions of removability are satisfied, the cause may be removed to the federal court, notwithstanding the fact that neither plaintiff nor defendant is a citizen or resident of the state where the suit is brought, or of the district within the territorial jurisdiction of the federal court to which it is to be transferred."

Judge Newman, in *Rome Petroleum, etc., Co. v. Hughes, etc., Co.* (C. C.) 130 Fed. 585, reviews the decisions, quoting Judge Shiras in *Fales v. Chicago, etc., R. R. Co.* (C. C.) 32 Fed. 673:

"It seems to me that the question of federal cognizance is confounded with question of the place of bringing suit by original process. The latter question has nothing to do with the right of removal. The question whether an action might have been brought by original process in any federal court is material in order to determine whether it was a case of federal cognizance; but, that question being decided in favor of federal jurisdiction, the question of the proper place or district in which the suit might have been brought by original process is wholly immaterial on the question of removal." And again:

"If a suit is brought in a case of federal cognizance in a court of a state of which the defendant is not a resident, then the election is given to such non-resident defendant to carry the case by removal into the federal court."

In *Whitworth v. R. R. Co.* (C. C.) 107 Fed. 557, Judge Evans held that a nonresident defendant, although neither plaintiff nor defendant was a citizen of the state in which suit was brought, could remove it to the federal court. Judge Newman therefore held that the case was removable.

The same question was decided by Judge Simonton, of this circuit, in *Virginia-Carolina Chemical Co. v. Sundry Insurance Companies* (C. C.) 108 Fed. 452. The syllabus (No. 3) gives the substance of his decision in these words:

"An action brought by B., a Virginia corporation, under these circumstances, in the state court, against a corporation of another state, is removable into the federal court at the instance of the defendant corporation, notwithstanding that neither the defendant corporation nor the plaintiff corporation is a resident of South Carolina."

Chief Justice Burnam, of the state Court of Appeals of Kentucky, in *Ill. Central R. Co. v. Whitworth* (Ky.) 73 S. W. 766, decides (March 24, 1903):

"That a suit between citizens of different states may be removed to the federal court, though neither party is a resident of the state where the suit is brought."

Judge Keller, in *Foulk v. Gray* (C. C.) 120 Fed. 156, in a carefully prepared opinion, cites the cases on both sides, and, while saying that "the trend of authority is distinctly in favor of the proposition" that such a case is removable, holds, as there is no authority strictly binding upon him, that the court does not have jurisdiction except by consent of both parties; that while the defendant waives objection to removal the plaintiff cannot be held to have waived his right to object by bringing the suit in the state court. Judge Simonton, in the case already cited, says:

"The right of removal is given wholly to the defendant, without any reference in a remote degree to the plaintiff or his wishes; so no waiver on the part of the plaintiff is necessary or proper."

As the great weight of authority is on the side of the right of removal, and as my predecessor in this circuit has so expressly decided, I feel myself bound to overrule the objection on this point.

2. The second ground upon which the motion to remand rests is that the petition for removal was not filed in proper time. These suits were begun in 1902 in the state court to recover a part of the lands alleged to be in the possession of the Pineland Club. The record before me is very imperfect. It appears in the second of the cases above stated that in the original complaint the Pineland Club, John F. Garnett, president, Edward E. Denniston, and Edward W. Clark, Jr., trustees, were named as defendants; but it does not appear that the trustees were served, and by order of the court made October 7, 1903, upon motion of plaintiff's attorneys an amended complaint was substituted, and the Pineland Club was

named as the sole defendant. In the first of the cases stated it appears that the Pineland Club was the only defendant named. Service was made by leaving a copy with the wife of Garnett, who was the president of the club, and a citizen of South Carolina, since deceased. The Pineland Club is an unincorporated association, and the lands in controversy are held as a shooting preserve. After the cases had been pending for some time, the trustees above named filed their petition (Ripley having been meantime substituted as one of the trustees in lieu of Denniston) setting forth the pendency of the suits, and that the petitioners were seised in fee and in actual possession of the lands in controversy, and that, this being an action for the recovery of real property, the petitioners were proper and necessary parties to a complete determination of the controversy; and by order of the court, October 7, 1904, the trustees were made parties. A petition for removal was filed November 7, 1904. There is no doubt that the petition was filed in proper time after service upon them of the amended complaint whereby they were made parties, but it is contended that, inasmuch as the petitioners individually were members of the Pineland Club, they were already parties by service upon the president of the club, and therefore that the petition for removal comes too late. The legal title to the lands in controversy is in the petitioners as trustees. The Pineland Club, as already stated, was an unincorporated association. Whether such an association could hold land was somewhat discussed in the argument before me, but it is unnecessary to go into the learning on that subject, for I need not decide whether it could or could not, the fact being that it did not, for the legal title is indisputably in the trustee, and, the state court having decided that the trustees were necessary and proper parties, that decision is binding, even if I entertained a doubt, which I do not. It is true that these trustees, as individuals, were beneficially interested in the land, and it might be that for some purposes service upon the president of the club might bind them. I express no opinion on that point, because the record does not disclose the precise nature of the Pineland Club, or the authority of its president; but concurring, as I do, in the view of the state court, that the trustees who hold the legal title are proper and necessary parties to a controversy affecting the title to the lands in question, I must hold that the objection that the petition for removal was not filed in the proper time is not well taken.

The motion to remand is therefore refused.

WILMERDING v. UNITED STATES.

(Circuit Court, S. D. New York. December 12, 1904.)

No. 3,721.

CUSTOMS DUTIES—ENTERED VALUE—CORRECTION—CLERICAL ERROR.

Certain importers inadvertently entered a shipment of goods on the basis of an invoice which, through clerical error, failed to specify certain charges as nondutiable. Their inclusion in the entered value indicated a price for the goods which rendered them subject to a higher duty than that which would have been applicable had they been entered at their true value. The error was not brought to the importers' attention until, after liquidation; demand was made for the increased duties that had been assessed on account of the error, whereupon they sought permission to correct the error. *Held*, that this should have been allowed.

On Application for Review of a Decision of the Board of United States General Appraisers.

Note *Gillespie v. U. S.* (C. C.) 124 Fed. 106; *Lawder v. Stone* (C. C.) 125 Fed. 809; and *In re Crooks*, G. A. 5,877, T. D. 25,890.

The decision of the Board of General Appraisers overruled the protest of Wilmerding, Morris & Mitchell against the assessment of duty by the collector of customs at the port of New York. The importers, in their protest, demanded relief from the assessment of increased duties, alleged to be due to a clerical error in making out an invoice covering certain matting. It appeared that the invoice on which entry was made failed to specify various nondutiable charges as being included in the invoice price. As to some of the items on the invoice it made no difference in the rate of duty whether these charges were deducted or not; but on other items the inclusion of the charges was sufficient to bring the value of the merchandise above the dividing line of 10 cents per square yard, established in paragraph 333, Tariff Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 180 [U. S. Comp. St. 1901, p. 1662], under which the matting was dutiable. A duty of 7 cents per square yard and 25 per cent. *ad valorem* was thereby incurred, instead of 3 cents per square yard, the rate on matting valued at less than 10 cents per square yard, which would have been applicable had the invoice been correctly made out, and which was the rate on the basis of which entry was made originally. On incomplete evidence the Board of General Appraisers held that the importers had not made out a case showing them to be entitled to the relief sought, and affirmed the assessment of duty. In the circuit court the importers introduced much additional evidence, showing that it was not intended to include said nondutiable charges in the value of the merchandise; that the failure to specify them separately in the invoice was due to an inadvertence; that the matting was of a standard variety largely imported, on which it was usual to pay a duty of 3 cents per square yard; that its value in this market precluded the idea of a higher duty; that the fact that the terms of the invoice demanded the imposition of the higher rate, instead of the rate of 3 cents per square yard stated in the entry, was not noticed either by the manager of the matting department of the importers' establishment or by the custom house broker, nor by the entry clerk either in the office of the collector or in the naval office, who should have rejected the entry as stating the wrong rate, nor by the appraiser's office, nor by the liquidating clerk of the collector, and was not observed until the entry reached the liquidator of the naval office. The higher duty was thereupon adopted by the liquidating clerk in the custom house, and agreed to by the naval office, and the entry thus was liquidated on the basis of the same figures as had been before all the persons mentioned; and the importers were notified to pay the balance found due, which was the first time the error was brought to their attention. It was shown further that the error was due (1) to an inadvertent omission of the items of charges from the invoice, and (2) to the fact that at the time of entry neither the manager, broker, entry clerks, nor appraiser observed that certain lines of the invoice, without deducting the charges above mentioned, would, on their

face, call for the higher duty; that these people were misled by dividing the total value of the invoice by the total number of yards on the invoice, which gave a result of less than 10 cents per square yard, whereas a division line by line for each item of the invoice would have shown the error of omission. Had this been discovered, the importers could have adjusted the matter by entering on a pro forma invoice and giving a bond for the production of a correct consular invoice, which it was proven was precisely what was done with regard to a later similar invoice, as to which the error was discovered before completion of the entry. It appeared also that the charges in question were in fact nondutiable, and that full market value would be represented by the balance left after their deduction.

Everit Brown, for the importers.
Henry A. Wise, Asst. U. S. Atty.

PLATT, District Judge. The decision of the Board of General Appraisers is reversed.

AUSTIN BALDWIN & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. June 1, 1905.)

No. 3,727.

1. CUSTOMS DUTIES—EVIDENCE—FINDING OF GENERAL APPRAISERS—INFORMAL ACKNOWLEDGMENT.

A finding of the Board of General Appraisers upon legitimate evidence will not be reversed, where the sole substantial statement relied upon for reversal consists of an informal acknowledgment made by a foreign merchant.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 205.]

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Austin Baldwin & Co. Note G. A. 3,697, T. D. 17,649.

Walden & Webster (Henry J. Webster, of counsel), for the importers.

D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question was assessed for duty as "articles composed of iron or steel," under Act 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], and is claimed by the importers to be dutiable under the provision in paragraph 135, 30 Stat. [U. S. Comp. St. 1901, p. 1638], for "steel in all forms and shapes not specially provided for." The sole substantial statement relied on to reverse the decision of the Board of General Appraisers consists of an informal acknowledgment made by a merchant in Scotland. The decision of the board is affirmed on the single ground that such statement is not competent to overthrow the finding of the board upon legitimate evidence.

Decision affirmed.

UNITED STATES v. WEINBERG (two cases).

WEINBERG v. UNITED STATES.

(Circuit Court, S. D. New York. June 1, 1905.)

Nos. 3,674, 3,690, 3,703.

1. CUSTOMS DUTIES—CLASSIFICATION—IMITATION PRECIOUS STONES—IMITATION PEARLS.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for imitations of precious stones, *held* to cover imitation whole and half pearls, including such as have been strung on wire for purposes of manufacture.

2. SAME—PIERCED IMITATION PEARLS—BEADS.

Pierced imitation pearls are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], relating to "beads of all kinds, not threaded or strung," rather than under paragraph 435 (30 Stat. 192 [U. S. Comp. St. 1901, p. 1676]), as imitations of precious stones.

On Application for Review of Decisions of the Board of United States General Appraisers.

For decisions below, see G. A. 5,781, T. D. 25,563, and G. A. 5,784, T. D. 25,566, which related to importations at the port of New York by F. W. Weinberg.

These importations consisted of imitations or whole and half pearls, of which some were mounted on wire for purposes of manufacture, some were pierced and intended to be strung, and others were neither mounted nor pierced. The kind last mentioned were classified as manufactures of paste, not specially provided for, under paragraph 112, Schedule B, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635]; those mounted on wire were classified as parts of jewelry, under paragraph 434, Schedule N, § 1, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676]; and those that were pierced were classified under the provision in paragraph 408 for "beads of all kinds, not threaded or strung." The importer contended that they should have been classified under paragraph 435, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], as imitations of precious stones. This contention was sustained by the board, except as to the pierced goods. The importer's appeal relates to the latter, and the government's appeals to the remainder of the merchandise.

Charles Duane Baker, Asst. U. S. Atty.

Comstock & Washburn (Albert H. Washburn, of counsel), for the importers.

TOWNSEND, Circuit Judge. The decision of the Board of General Appraisers is affirmed, on the authority of *Lorsch v. U. S.* (C. C.) 119 Fed. 476, and *U. S. v. Morrison*, 179 U. S. 456, 21 Sup. Ct. 195, 45 L. Ed. 275.

MEMORANDUM DECISIONS.

FORSYTH MFG. CO. v. PUTNAM, HOOKER & CO. (Circuit Court of Appeals, Fifth Circuit. October 14, 1905.) No. 1,440. In Error to the Circuit Court of the United States for the Southern District of Georgia. R. L. Berner, for plaintiff in error. Isaac Hardeman and Geo. S. Jones, for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The record in this case fails to disclose such diverse citizenship as to confer jurisdiction upon the Circuit Court, and therefore, on authority of *Knight et al. v. Lutcher & Moore Lumber Company* (C. C. A.) 136 Fed. 404, the judgment of the Circuit Court is reversed, with costs against the defendants in error, and the case is remanded to the Circuit Court, with instructions to proceed according to law and in conformity with our views as expressed in *Knight et al. v. Lutcher & Moore Lumber Company*, above referred to.

KINCHELOE et al. v. COMPUTING SCALE CO. (Circuit Court of Appeals, Fourth Circuit. July 7, 1905.) No. 570. Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Alexandria. H. P. Doolittle and Charles Howson, for appellants. Melville Church (Joseph B. Church, on briefs), for appellee. Before GOFF, Circuit Judge, and BOYD and McDOWELL, District Judges.

PER CURIAM. Upon careful consideration of the record and arguments of counsel, we are satisfied that the decree below is without error. An order will be entered affirming the decree of the Circuit Court, with costs, and remanding the cause for the proceedings directed by said decree.

KNIGHT et al. v. LUTCHER & MOORE LUMBER CO. et al. (Circuit Court of Appeals, Fifth Circuit. October 14, 1905.) No. 1,401. In Error to the Circuit Court of the United States for the Western District of Louisiana. For former opinion, see 136 Fed. 404. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. No one of the judges who participated in the decision of this case having asked for a rehearing, and being still satisfied our former decision is correct, the rehearing herein applied for is denied.

DINGELSTEDT & CO. v. UNITED STATES. (Circuit Court, S. D. New York. May 17, 1905.) No. 3,646. On Application for Review of a Decision of the Board of United States General Appraisers. Comstock & Washburn (Albert H. Washburn, of counsel), for importers. Charles Duane Baker, Asst. U. S. Atty.

TOWNSEND, Circuit Judge (orally). The testimony taken in this court conclusively shows that the articles in question fall within the provisions of paragraph 400 of the act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule M. 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672]), which provides for lithographic prints exceeding .008 and not exceeding .020 of an inch in thickness, and not exceeding 35 square inches cutting size in dimensions, as claimed by the importer. The decision of the Board of Appraisers is therefore reversed.

NEW RIVER COAL SALES CO. v. THOMPSON et al. (Circuit Court, E. D. Pennsylvania. October 13, 1905.) No. 37. Exceptions to Answers to Interrogatories. Louis B. Runk and Read & Pettit, for complainant. Wm. M. Montgomery, for respondents.

J. B. McPHERSON, District Judge. For the reasons stated in the plaintiff's exceptions, I am of opinion that the answers of Joseph W. Thompson to the first, second, third, fifth, and eleventh interrogatories are not sufficient. And for similar reasons, the exceptions to the answers of Susan V. Thompson to the first, fourth, fifth, and ninth interrogatories are also sustained. The defendants are hereby ordered to amend their respective answers within 15 days, so as to meet the plaintiff's objections.

SMITH-WARREN CO. v. DAVID LUPTON'S SONS CO. et al. (Circuit Court, E. D. Pennsylvania. October 13, 1905.) No. 31. Demurrer to Bill. W. S. Jackson and A. B. Stickney, for complainant. Fraley & Paul, for respondents.

J. B. McPHERSON, District Judge. The seventh and eighth grounds of demurrer seem to me to be well founded, but it does not follow that the bill must be dismissed. On the contrary, I think that the proper order is to strike out paragraphs 20, 21, 22, and 23, as containing what at present appears to be irrelevant matter, and require the defendants to answer the rest of the bill. If the answer sets up the Watkins patent as a justification for the defendants' acts, it will be time enough then to consider what place in the art that patent is entitled to hold, and how far it may be affected by what was done in the office while the application was pending. The clerk is directed to enter the appropriate order.

UNITED STATES v. SIXTEEN BOLTS OF SILK. (District Court, N. D. California. June 30, 1904.) No. 1,634.

DE HAVEN, District Judge. The facts of this case are fully stated in the opinion this day filed in the case of United States v. Wm. H. Harts, 131 Fed. 886. For the reasons therein stated, and also because, upon consideration of the evidence, I find that the allegations of the libel are true, judgment will be entered in favor of the government for a forfeiture of the goods described in the libel of information as prayed for.